In its recent *Wilderness Society v. Rey* decision, the Ninth Circuit addressed the difficult question of when a statute may establish a right to informational standing. The decision interpreted the Supreme Court's decision in *Summers v. Earth Island Institute*, and concluded that general notice and appeal provisions in a statute that do not establish an explicit public right to information from the government are insufficient to establish informational standing. The *Wilderness Society* decision indirectly raised the broader question of when Congress may modify common law injury requirements or even Article III constitutional standing requirements. Although the *Wilderness Society* decision relied on the implications of *Summers*, the Ninth Circuit would have been better advised to examine Justice Kennedy’s concurring opinions in *Lujan v. Defenders of Wildlife* and *Summers*. His opinions suggest that Congress has significant authority to expand citizen suit standing as long as it carefully defines the statutory injuries it seeks to remedy. *Wilderness Society* is important because it is the first court of appeals decision that attempts to reconcile *Summers* and *FEC v. Akins*, the crucial informational standing case. Although the result in *Wilderness Society* may be correct, the Ninth Circuit failed to grasp the full complexities of the Supreme Court’s standing jurisprudence. This Article argues how to best interpret *Lujan, Summers*, and *Akins* in determining how much authority Congress has to establish informational standing and other standing rights that have divided lower federal courts.
Honey, It’s All the Buzz: Regulating Neighborhood Beehives

Patricia E. Salkin

[pages 55–72]

Abstract: Beekeeping’s popularity has surged in recent years, perhaps culminating in the introduction of the first ever White House bee hive. Local apiaries provide a wide variety of benefits to communities, ranging from pollination services for gardens to producing honey that can be used in a wide array of foods and products. Apiaries are not always welcome in a community, however, perhaps because of their potential to cause a nuisance, or to harm crops or people. Although beekeeping regulation implicates both state and federal concerns, a number of localities have developed unique and practical regulations that promote backyard beekeeping, while maximizing its benefits and minimizing its potential harm. This Article examines those regulations with the hope of aiding land use regulators in developing strategies to promote beekeeping activities.

Private Policing of Environmental Performance: Does It Further Public Goals?

Sarah L. Stafford

[pages 73–98]

Abstract: Over the past two decades the role of private parties in the policing of environmental regulation has grown dramatically. In some cases the Environmental Protection Agency (EPA) has led this effort. In other situations, private parties have provided the impetus for new policing activities that are conducted independently from the EPA. Private policing can be beneficial when the increased involvement of the private sector either decreases the costs of achieving a particular level of environmental performance or increases environmental performance in a cost-effective manner. Private parties, however, could also divert regulated entities away from regulatory objectives. This Article explores the privatization of environmental enforcement by presenting six examples and highlighting their benefits and costs. Although the examples cited are not necessarily representative of all private policing, their mixed results regarding the effectiveness of private sector participation shows a need for careful evaluation of these initiatives. The Article concludes by making a case for a more deliberate approach to evaluating the role of the private sector in the enforcement of environmental regulation, and suggests that before responding to continuing calls to further privatize environmental regulation and enforcement it is first necessary to ensure that existing private participation is helping to achieve regulatory goals.
NOTES

AN EMPIRICAL ANALYSIS OF AGRICULTURAL PRESERVATION STATUTES
IN NEW YORK, NEBRASKA, AND MINNESOTA

Nicholas Clark Buttino

Abstract: States passed agricultural preservation statutes in part to protect their agricultural heritage. Some scholars worry that right-to-farm statutes have not succeeded in achieving this goal. The agricultural preservation statutes of New York, Nebraska, and Minnesota show three different strategies toward agricultural preservation, all of which take different stances on the protections extended to small and large farms. Despite the structural differences among the states’ statutory approach to agricultural preservation, all three experienced similar agricultural demographic shifts since the 1980s—the number of large and small farms has increased while the number of medium-sized farms has decreased. The similarity in demographic trends suggests that none of the statutes are effective. Legislatures may be able to redirect their agricultural preservation statutes by empowering agricultural advisory boards to consider not only the soundness of farming practices but also the cultural and environmental value of individual farms.

BALANCING THE NEED FOR ENERGY AND CLEAN WATER: THE CASE FOR APPLYING STRICT LIABILITY IN HYDRAULIC FRACTURING SUITS

Hannah Coman

Abstract: Hydraulic facturing is a process used to extract natural gas from shale formations. This process has been used commercially since the 1940s, but has recently become prevalent as more shale formations have been discovered, specifically the Marcellus Shale formation in Pennsylvania. Although natural gas is a relatively clean source of domestic energy, there have been numerous allegations of water contamination caused by hydraulic fracturing, and several lawsuits have been filed as a result. Two of these suits (Berish v. Southwestern Energy Production Co. and Fiorentino v. Cabot & Gas) are pending in the U.S. District Court for the Middle District of Pennsylvania. Both complaints seek recovery under a strict liability cause of action—asserting that hydraulic fracturing is an “ultrahazardous and abnormally dangerous” activity. Although it is unlikely that the court will adopt a strict liability framework in deciding these cases, this Note argues that such a framework is both legally appropriate and beneficial to helping
balance our energy needs and the importance of clean water. These pending cases will likely set the standard for future hydraulic fracturing contamination cases in Pennsylvania, and potentially across the United States.

**Scope of Reviewable Evidence in NEPA Predetermination Cases: Why Going Off the Record Puts Courts on Target**

*Jesse Garfinkel*

[pages 161–184]

**Abstract:** Plaintiffs challenging an agency’s environmental impact statement on the grounds of predetermination have been met with different judicially created evidentiary standards. Under the Fourth Circuit’s approach, as applied in *National Audubon Society v. Department of the Navy*, courts should restrict the scope of reviewable evidence to the administrative record. Under the Tenth Circuit’s approach, however, extra-record evidence may also be considered in determining predetermination claims. In *Forest Guardians v. U.S. Fish and Wildlife Service*, the Tenth Circuit considered emails, intra-agency correspondence, and a grant agreement outside the scope of the administrative record, and concluded that the agency had not predetermined the outcome of its impact statement. This Note advocates for the universal adoption of the expansive Tenth Circuit approach because of the importance of extra-record evidence in predetermination cases and its minimal risk to agency independence.

“*Pigs Will Fly*”: Protecting the Los Angeles River by Declaring Navigability

*Susan Harris*

[pages 185–212]

**Abstract:** In 2010, the Environmental Protection Agency (EPA) declared the Los Angeles River “navigable” for purposes of enforcing Clean Water Act (CWA) protections, which could limit destruction of the river’s tributaries and wetlands and expand recreational opportunities for the city. The EPA’s declaration was criticized by some as regulatory overreach—“like declaring that pigs will fly”—because the Los Angeles River does not fit within traditional notions of navigability. Others have attempted to remove navigability language from the CWA, suggesting that it is not the appropriate test for environmental protection. After examining the history of the Los Angeles River and providing a background on CWA jurisprudence, this Note argues that the EPA’s case by case approach to declaring navigability is an effective way to uphold the goals of the CWA.
while expanding CWA protection for the Los Angeles River and other urban and western rivers.

**NECESSARILY HYPOCRITICAL: THE LEGAL VIABILITY OF EPA’S REGULATION OF STATIONARY SOURCE GREENHOUSE GAS EMISSIONS UNDER THE CLEAN AIR ACT**

*Nathan D. Riccardi*

[pages 213–241]

**Abstract:** The Supreme Court’s ruling in *Massachusetts v. EPA* made clear that greenhouse gases fall within the realm of air pollutants the Clean Air Act was designed to regulate. The Court’s decision sparked a chain reaction forcing the EPA to regulate greenhouse gases under different provisions of the Act. The EPA’s decision to regulate drew fierce criticism, especially from industries that would be forced to reduce emissions. Opponents argue that greenhouse gases are not traditional pollutants and therefore the drafters of the Clean Air Act did not intend them to be regulated. Furthermore, they argue that the EPA over-stepped its authority in “tailoring” a new rule to incorporate greenhouse gases more appropriately into the Act’s framework. This Note defends the EPA’s decision to regulate greenhouse gases, as well as its Tailoring Rule. In light of the Clean Air Act’s explicit language and legislative intent, the EPA was not only legally justified in implements its decision, but it had no other choice.
INFORMATIONAL STANDING
AFTER SUMMERS

BRADFORD C. MANK*

Abstract: In its recent Wilderness Society v. Rey decision, the Ninth Circuit addressed the difficult question of when a statute may establish a right to informational standing. The decision interpreted the Supreme Court’s decision in Summers v. Earth Island Institute, and concluded that general notice and appeal provisions in a statute that do not establish an explicit public right to information from the government are insufficient to establish informational standing. The Wilderness Society decision indirectly raised the broader question of when Congress may modify common law injury requirements or even Article III constitutional standing requirements. Although the Wilderness Society decision relied on the implications of Summers, the Ninth Circuit would have been better advised to examine Justice Kennedy’s concurring opinions in Lujan v. Defenders of Wildlife and Summers. His opinions suggest that Congress has significant authority to expand citizen suit standing as long as it carefully defines the statutory injuries it seeks to remedy. Wilderness Society is important because it is the first court of appeals decision that attempts to reconcile Summers and FEC v. Akins, the crucial informational standing case. Although the result in Wilderness Society may be correct, the Ninth Circuit failed to grasp the full complexities of the Supreme Court’s standing jurisprudence. This Article argues how to best interpret Lujan, Summers, and Akins in determining how much authority Congress has to establish informational standing and other standing rights that have divided lower federal courts.


* James B. Helmer, Jr. Professor of Law, University of Cincinnati College of Law. The author presented an early version of this Article at the Environmental Scholarship Symposium at Vermont Law School on October 22, 2010. The author wishes to thank Michael Solimine and Kim Brown for their comments.
Introduction

In its recent decision, Wilderness Society v. Rey, the Ninth Circuit addressed the difficult question of when a statute may establish a right to informational standing. The D.C. Circuit and the Sixth Circuit had previously reached different conclusions about whether environmental statutes promoting public participation or requiring environmental assessments in certain circumstances create a right to informational standing. The Ninth Circuit’s decision interpreted the Supreme Court’s decision in Summers v. Earth Island Institute—which explicitly narrowed procedural rights standing—as implicitly narrowing standing rights in general. The Wilderness Society decision concluded that general notice and appeal provisions in a statute that are designed to promote public participation, but do not establish an explicit public right to information from the government, are insufficient to establish informational standing.

The decision in Wilderness Society indirectly raised the broader question of when Congress may modify common law injury requirements, or even Article III constitutional standing requirements for a concrete injury. That question in turn raises broader separation of powers questions. Although Wilderness Society relied on the implications of Summers to limit informational standing, the Ninth Circuit would have been better advised to examine Justice Kennedy’s concur-
r

9 See infra notes 362–415 and accompanying text.
10 See infra notes 362–415 and accompanying text.
11 See infra notes 36–92 and accompanying text (discussing Article III standing requirements and, in particular, what is a sufficient “injury-in-fact” for standing).
13 See Lujan, 504 U.S. 555, 602 (1992) (Blackmun, J., dissenting) (arguing that the “principal effect” of Justice Scalia’s restrictive approach to standing was “to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates”); Kimberly N. Brown, Justiciable Generalized Grievances, 68 Md. L. Rev. 221, 283 (2008) (“If Justice Scalia is correct, and standing should strictly operate to shield the executive from judicial review notwithstanding congressional intent, laws passed by a democratically elected branch could simply go unenforced.”); Michael E. Solimine, Congress, Separation of Powers, and Standing, 59 Case W. Res. L. Rev. 1023, 1050 (2009) (“With respect to the argument that a broad reading of Article III standing improperly limits executive power under Article II, some scholars contend that it does not give sufficient weight to the balance, as opposed to the separation, of powers.”).
14 504 U.S. at 560 (citations omitted); Mank, Global Warming, supra note 12, at 23–24.
serving that plaintiffs who may suffer a concrete injury resulting from a procedural violation by the government are entitled to a more relaxed application of both the imminent injury and the redressability standing requirements.\textsuperscript{15} Justice Kennedy, who has often been the swing vote in standing cases, wrote a concurring opinion in \textit{Lujan} arguing that Congress may use its legislative authority to go beyond common law principles in defining a concrete injury, although he acknowledged that Congress did not have the authority to eliminate the concrete injury requirement of Article III.\textsuperscript{16}

In \textit{Federal Election Commission v. Akins}, Justice Breyer, joined by five other justices including Justice Kennedy, endorsed informational injuries as potentially sufficient for standing.\textsuperscript{17} The Court held that the plaintiff voters suffered a “concrete and particular” injury in fact sufficient for Article III standing because they were deprived of the statutory right to receive designated “information [which] would help them . . . to evaluate candidates for public office”—despite the fact that many other voters shared the same informational injury.\textsuperscript{18} Justice Scalia wrote a dissenting opinion, joined by two other justices, arguing that the plaintiffs did not have standing because their injury was common to the public at large and did not cause them a particularized injury.\textsuperscript{19}

Both before and after \textit{Akins}, lower court decisions have been divided when plaintiffs in environmental cases seek standing based on an alleged informational injury resulting from the government or a private defendant’s failure to provide information regarding their environmental impacts.\textsuperscript{20} Before \textit{Akins}, in \textit{Foundation on Economic Trends v. Lyng}, the D.C. Circuit questioned, but did not decide, whether informational injury alone can meet the Article III injury in fact requirement.\textsuperscript{21} By contrast, citing \textit{Akins}, a divided panel of the Sixth Circuit in \textit{American Canoe Ass’n v. City of Louisa Water & Sewer Commission} concluded that environmental groups had standing to seek information

\textsuperscript{15} \textit{Lujan}, 504 U.S. at 572 n.7; see \textit{Mank, States Standing, supra} note 1, at 1716–20; \textit{Mank, Global Warming, supra} note 12, at 35–36.
\textsuperscript{16} \textit{Lujan}, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in the judgment); see \textit{Mank, Global Warming, supra} note 12, at 34–35.
\textsuperscript{17} 524 U.S. 11, 20 (1998).
\textsuperscript{18} Id. at 21, 23–25; see \textit{Mank, Global Warming, supra} note 12, at 37–38.
\textsuperscript{19} \textit{Akins}, 524 U.S. at 29, 33–37 (Scalia, J., dissenting); see \textit{Mank, Global Warming, supra} note 12, at 38–40.
\textsuperscript{20} See \textit{infra} notes 196–355 and accompanying text.
\textsuperscript{21} 943 F.2d 79, 84–85 (D.C. Cir. 1991); see also \textit{Akins}, 524 U.S. at 11; \textit{Am. Canoe Ass’n v. City of Louisa Water & Sewer Comm’n}, 389 F.3d 536, 547–48 (6th Cir. 2004) (Kennedy, J., concurring in part and concurring in the judgment in part and dissenting in part) (discussing \textit{Lyng’s} criticism of informational standing).
about water pollution issues pursuant to the citizen suit provision of the
Clean Water Act, if it would assist their members’ understanding of pol-
lution issues and legislative proposals.\footnote{389 F.3d at 544–47.}

In \textit{Summers}, the Supreme Court, in a five-to-four decision written
by Justice Scalia, adopted a restrictive approach to standing that re-
quires plaintiffs to prove how they are concretely injured, or will be
imminently injured, by the government’s allegedly illegal actions.\footnote{See
555 U.S. at 495–97. Justice Scalia’s majority opinion was joined by Chief Justice
Roberts and Justices Kennedy, Thomas, and Alito. \textit{Id.} at 489. Justice Breyer’s dissenting
opinion was joined by Justices Stevens, Souter, and Ginsburg. \textit{Id.} at 501.}
This opinion rejected Justice Breyer’s proposed test for organizational
standing based upon the statistical probability that some of an organi-
zation’s members will likely be harmed in the near future.\footnote{Id.
at 496–500 (majority opinion).} The Court held that the plaintiff organizations failed to establish that they would
suffer an “imminent” injury necessary for standing because they could
not prove the specific places and times when their members would be
harmed by the government’s allegedly illegal policy of selling fire-
damaged timber without public notice and comment.\footnote{Id. at 490–96.}
By emphasizing that plaintiffs must demonstrate an imminent injury even for proce-
dural rights, the \textit{Summers} decision implicitly overruled previous deci-
sions that had relaxed the imminence requirement for standing in pro-
cedural rights cases.\footnote{Compare infra notes 49–57 and accompanying text with infra notes 160–176 and ac-
companying text.} Justice Kennedy, however, wrote a concurring
opinion in \textit{Summers} that echoed his opinion in \textit{Lujan}—while plaintiffs
had failed to prove a concrete injury, Congress could provide a broader
statutory definition of what constitutes a “concrete” injury for similar
plaintiffs in the future.\footnote{See infra notes 178–181 and accompanying text.}

In \textit{Wilderness Society}, the Ninth Circuit interpreted \textit{Summers} and
\textit{Akins} to implicitly restrict the scope of informational standing to stat-
utes that give plaintiffs an explicit right to information from the gov-
ernment.\footnote{Wilderness Soc’y, 622 F.3d at 1259.} The court reasoned that \textit{Akins}’s support for informational
standing was limited to statutes that explicitly give the public the right
to particular information from the government.\footnote{Id.} Conversely, if an en-
vironmental statute only seeks to encourage public participation and
does not provide a right to information about certain types of govern-
ment projects, such a statute should be read narrowly in light of *Summers*.\(^{30}\) Otherwise, a broad doctrine of informational standing would allow plaintiffs to bypass *Summers’s* conclusion that procedural injury alone does not provide standing, unless it is attached to a particular project or if the procedural injury results in informational harm.\(^{31}\)

Although the Supreme Court generally tightened standing requirements in *Lujan* and *Summers*, the *Akins* decision nonetheless left open the possibility of broad informational standing.\(^{32}\) The Ninth Circuit’s decision in *Wilderness Society* is important because it is the first court of appeals decision that attempts to reconcile *Summers* and *Akins*.\(^{33}\) The result in *Wilderness Society*—that Congress must explicitly establish informational standing rights—may be correct, but the Ninth Circuit failed to grasp the full complexities of the Supreme Court’s standing jurisprudence by focusing only on how *Summers* might limit *Akins*.\(^{34}\) Because he was the key swing vote in *Lujan* and *Summers* and was a member of the *Akins* majority, Justice Kennedy’s analysis of standing issues is crucial to understanding the Supreme Court’s standing jurisprudence.\(^{35}\) This Article argues how to best interpret *Lujan*, *Summers*, and *Akins* in determining how much authority Congress has to establish informational standing and other standing rights issues that have divided lower federal courts.

Part I provides an introduction to standing doctrine. Part II discusses the Supreme Court’s informational standing decisions in *Public Citizen v. U.S. Department of Justice* and *Akins*. Part III examines the *Summers* decision. Part IV explicates conflicting decisions on informational standing in the D.C. Circuit, Sixth Circuit, and most recently the Ninth Circuit decision. Part V uses Justice Kennedy’s concurring opinion in *Lujan* to propose a framework for courts to assess Congress’s authority to grant standing rights in general, and informational standing rights in particular.

---

30 See id. at 1259–60.
31 Id. at 1260.
32 See infra notes 119–144, 151–176 and accompanying text.
33 See infra notes 300–354 and accompanying text.
34 See infra notes 362–394 and accompanying text.
I. STANDING DOCTRINE

A. Constitutional and Prudential Standing

Although the Constitution does not explicitly require that a plaintiff have standing to file suit in federal courts, since 1944 the Supreme Court has inferred from the Constitution’s Article III limitation of judicial decisions to “Cases” and to “Controversies” that federal courts must utilize standing requirements to guarantee that the plaintiff has a genuine interest and stake in a case. Federal courts only have jurisdiction over a case if a plaintiff has standing for the relief sought. If the plaintiff fails to meet constitutional standing requirements, a federal court will dismiss the case without deciding the merits.

Standing requirements derive from broad constitutional principles, and prohibit unconstitutional advisory opinions. Furthermore, standing supports separation of powers principles—defining the division of powers between the judiciary and political branches of govern-

36 See U.S. CONST. art. III, § 2. “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and ... to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States ... .” Id. See also DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 340–42 (2006) (explaining why the Supreme Court infers that the Article III case and controversy requirement necessitates standing limitations); Ryan Guilds, A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access, 74 N.C. L. Rev. 1863, 1868–71 (1996) (discussing rationales for standing jurisprudence and citing Stark v. Wickard, 321 U.S. 288, 310 (1944), as the first time the Article III standing requirement was referenced); Mank, States Standing, supra note 1, at 1709–10; Mank, Standing and Statistical Persons, note 1, at 673. But see Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 Mich L. Rev. 163, 168–79 (1992) (arguing that framers of the Constitution did not intend Article III to require standing). See generally Solimine, supra note 13, at 1036–38 (discussing debate on whether the Constitution implicitly requires standing to sue).


38 See DaimlerChrysler, 547 U.S. at 340–46; Friends of the Earth, 528 U.S. at 180 (“[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.”); Mank, States Standing, supra note 1, at 1710; Mank, Standing and Statistical Persons, supra note 1.

39 See DaimlerChrysler, 547 U.S. at 340–42; Mank, Standing and Statistical Persons, supra note 1, at 673.

40 See, e.g., Gaston, supra note 37, at 219.
ment so that the “Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’” 41 There is, however, disagreement as to what extent the principle of separation of powers limits the standing of suits challenging alleged executive branch under or non-enforcement of congressional requirements mandated by statute. 42 In Lujan for example, Justice Scalia reasoned that allowing any person to sue the U.S. government to challenge its alleged failure to enforce the law would improperly interfere with the President’s Article II constitutional authority to “‘take Care that the Laws be faithfully executed . . . .’” 43 Some commentators have argued that Justice Scalia’s approach to standing undermines the role of Congress in using judicial review to guarantee that the executive branch obeys enacted laws. 44

In addition to constitutional Article III standing requirements, federal courts may impose prudential standing requirements to restrict unreasonable demands on limited judicial resources or for other policy reasons. 45 Congress may enact legislation to override prudential limitations but must “expressly negate[]” such limitations. 46 The Supreme Court has been unclear regarding whether its restriction on suits alleg-

---

41 DaimlerChrysler, 547 U.S. at 341 (quoting Warth v. Seldin, 490 U.S. 490, 498 (1975)); Mank, States Standing, supra note 1, at 1709–10; Mank, Standing and Statistical Persons, supra note 1, at 679; see Scalia, infra note 12, at 881, 896.

42 See Scalia, supra note 12, at 881–82 (arguing for restrictive standing, thereby limiting the role of the judiciary). But see Lujan 504 U.S. at 602 (Blackmun, J., dissenting) (The “principal effect” of Justice Scalia’s majority opinion’s restrictive approach to standing was “to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates.”).

43 Lujan, at 504 U.S. at 577 (quoting U.S. Const. art. II, § 3). Justice Scalia acknowledged that Congress may “elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.” Id. at 578.

44 See Heather Elliott, The Functions of Standing, 61 Stan. L. Rev. 459, 496 (2008) (arguing courts should not use standing doctrine “as a backdoor way to limit Congress’s legislative power”); infra notes 365–401 and accompanying text (discussing broad standing rights as means to protect congressional authority to ensure that the executive branch enforces federal laws).

45 See, e.g., Bennett v. Spear, 520 U.S. 514, 154, 162–63 (1997) (describing the “zone of interests” standard as a prudential limitation rather than a mandatory constitutional requirement); Flast v. Cohen, 392 U.S. 83, 97 (1968) (stating that prudential requirements are based “in policy, rather than purely constitutional, considerations”); Yackle, supra note 12, at 318 (stating that prudential limitations are policy-based “and may be relaxed in some circumstances”).

46 Bennett, 520 U.S. at 163. Unlike constitutional standing, prudential limits on standing “can be modified or abrogated by Congress.” Id. at 162. Prudential limitations are judge-made and must be “expressly negated.” Id. at 163. Furthermore, citizen suit provisions abrogate the zone of interest limitation. Id. at 166.
ing “generalized grievances”—a term used to refer to suits involving large segments of the public, or those where a citizen lacking a personal injury seeks to force the government to obey a duly enacted law—is a prudential or constitutional limitation.  

B. The Injury Requirement

In *Lujan*, the Court summarized and refined its three-part standing test. First, a plaintiff must show “an injury-in-fact” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” Next, the plaintiff must also show “a causal connection between the injury and the conduct complained of,” directly linking the injury to the challenged action of the defendant. Finally, the injury must be likely, rather than speculatively, redressable by the court. A plaintiff has the burden of establishing all three parts of the standing test.

This Article will focus primarily on the injury requirement for standing. In *Lujan*, the majority concluded that the plaintiff, Defenders of Wildlife, lacked standing to challenge the failure of certain government agencies to consult with the Secretary of Interior about funding projects that might hurt endangered species in foreign countries. The court found that the plaintiff lacked standing because the two members of the organization who filed affidavits only had intentions to visit the relevant foreign countries—Egypt and Sri Lanka—at some indeterminate future date. The Court concluded, “[s]uch ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of

---

47 Guilds, *supra* note 36, at 1884 (“Beyond the uncertainty about whether generalized grievances are constitutional or prudential limitations, there is also uncertainty about their precise definition.”); see *Yackle*, *supra* note 12, at 342 (“The ‘generalized grievance’ formulation is notoriously ambiguous.”).
48 See *Yackle*, *supra* note 12, at 342–49 (discussing the Supreme Court debate on whether the rule against generalized grievances is a constitutional rule or a non-constitutional policy waivable by Congress); Guilds, *supra* note 36, at 1878; Mank, *States Standing*, *supra* note 1, at 1710–16.
49 See 504 U.S. at 560–61.
50 Id.
51 Id.
52 Id. at 560.
53 Id. at 561 (stating that “[t]he party invoking federal jurisdiction bears the burden of establishing these elements”); see *DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *Yackle*, *supra* note 12, at 336.
54 504 U.S. at 557–59, 578.
55 Id. at 562–64.
an ‘actual or imminent’ injury that our cases require.”56 Similarly, in Summers, Justice Scalia’s majority opinion concluded that the plaintiff organizations failed to demonstrate a concrete injury because they could not specify precise times and locations when their members would visit national parks where the U.S. Forest Service was allegedly engaged in illegal salvage timber sales.57

C. Relaxed Standing in Procedural Cases

In cases involving procedural violations, such as the failure of the government to prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA),58 courts relax the imminence and redressability portions of the standing test.59 The Summers decision, however, may suggest that the Court is retrenching its relaxation of the imminence requirement.60 In footnote seven of Lujan, Justice Scalia stated that plaintiffs who may suffer a concrete injury resulting from the government’s procedural error are entitled to a more relaxed application of these standing requirements because remedying the procedural violation may not change the government’s substantive decision.61 Justice Scalia offered the prototypical example of procedural injury to a plaintiff who lives near a proposed dam who seeks an environmental assessment under NEPA to study its potential impacts.62 He stated:

There is this much truth to the assertion that “procedural rights” are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s

56 Id. at 564.
57 555 U.S. at 493–97.
59 See, e.g., Lujan, 504 U.S. at 572 n.7.
60 See Summers, 555 U.S. at 498–99; Brown, supra note 13, at 257–64 (discussing the Court’s leniency in deciding standing in cases involving procedural violations). A plaintiff must still allege that the proposed government action would have some possibility of causing a concrete harm. See Lujan, 504 U.S. at 572 n.7. The Supreme Court has never clearly explained to what extent the immediacy or redressability portions of the standing test are relaxed in procedural rights cases. Mank, States Standing, supra note 1, at 1719.
61 See 504 U.S. at 572 n.7.
62 Id.; see Mank, States Standing, supra note 1, at 1716; Mank, Global Warming, supra note 12, at 35–36.
failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.\textsuperscript{63}

Justice Scalia limited standing in this example to plaintiffs with concrete injuries resulting from the government’s procedural error.\textsuperscript{64} Furthermore, “persons who live (and propose to live) at the other end of the country from the dam” do not have “concrete interests affected” and thus do not have standing to challenge such a violation.\textsuperscript{65}

A plaintiff normally must establish standing by showing it is likely that they will suffer a concrete injury from actions traceable to the defendant, and that injury could be redressed by a favorable judicial decision.\textsuperscript{66} A plaintiff, however, claiming government procedural error need not prove that the government’s actions will cause imminent harm, or that a judicial remedy will actually prevent the government from taking the proposed action.\textsuperscript{67} For example, a NEPA plaintiff is entitled to a remedy mandating that the government follow NEPA’s procedural requirement of conducting an EIS, even if it is uncertain that it will lead the government to change its substantive decision.\textsuperscript{68}

In \textit{Massachusetts v. EPA}, the Court arguably adopted an even more relaxed approach to redressability for procedural rights plaintiffs than that suggested in footnote seven of \textit{Lujan}.\textsuperscript{69} The decision declared that procedural rights litigants need only demonstrate “some possibility” that their requested remedy would redress a procedural injury.\textsuperscript{70} Illustrating the volatility of the Court’s position on standing, the four dissenting jus-

\begin{footnotes}
\item[63] \textit{Lujan}, 504 U.S. at 572 n.7; see \textit{Mank}, \textit{Global Warming}, supra note 12, at 35–36, 35 n.240 (discussing relaxed standing requirements for procedural injuries); Blake R. Bertagna, Comment, “Standing” Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming, 2006 BYU L. Rev. 415, 457 (discussing relaxed standing requirements for procedural injuries).

\item[64] See \textit{Lujan}, 504 U.S. at 572 n.7.

\item[65] Id.; see id. at 573 n.8 (“We do not hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.”); William W. Buzbee, \textit{Standing and the Statutory Universe}, 11 DUK\textsc{e} Env\textsc{t}l. L. & Pol\textsc{'y} F. 247, 257 (2001); \textit{Mank}, \textit{States Standing}, supra note 1, at 1716.

\item[66] \textit{Lujan}, 504 U.S. at 560–61.

\item[67] See id. at 572 n.7; \textit{Mank}, \textit{Global Warming}, supra note 12, at 35–36, 35 n.240, 36 n.244.

\item[68] See \textit{Lujan}, 504 U.S. at 572 n.7; \textit{Mank}, \textit{Global Warming}, supra note 12, at 35–36.


\item[70] Id. at 518 (“When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”).
\end{footnotes}
tices in Massachusetts v. EPA—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—were in the Summers majority two years later, while four of the justices in the Massachusetts v. EPA majority—Justices Stevens, Souter, Ginsburg, and Breyer—dissented in Summers. Justice Kennedy was the only justice in the majority in both cases, thus demonstrating that he is the key vote in standing cases. In Massachusetts v. EPA, the Court rejected the argument by the Environmental Protection Agency (EPA) that petitioners must prove that federal courts could remedy the global problem of climate change. Instead, the Court determined that petitioners satisfied the redressability portion of the standing test because a court order requiring the EPA to regulate emissions from new vehicles will “slow or reduce” global climate change. The decision’s “some possibility” test appears to be applicable to all procedural rights plaintiffs. The Summers decision did not address Massachusetts v. EPA’s relaxed approach to redressability for procedural rights plaintiffs, but it may have tightened the imminence requirement.

Typical of much of the Supreme Court’s imprecise standing jurisprudence, footnote seven of Lujan does not clearly explain the degree to which the immediacy and redressability requirements are waived or relaxed in procedural rights cases, the plaintiff’s burden of proof to establish standing in procedural rights cases, or how to define procedural rights. As a result, what plaintiffs must show regarding their like-

---

72 Compare Summers, 555 U.S. at 488 (listing majority and dissenting members); with Massachusetts v. EPA, 549 U.S. at 501 (listing majority and dissenting members).
73 See 549 U.S. at 525.
74 Id.; Mank, Standing and Statistical Persons, supra note 1, at 675.
75 See Massachusetts v. EPA, 549 U.S. at 518; Mank, States Standing, supra note 1, at 1727 (arguing the “some possibility” standard in Massachusetts v. EPA applies to all procedural plaintiffs).
76 See infra notes 200–237 and accompanying text.
77 See Brian J. Gatchel, Informational and Procedural Standing After Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 99–105 (1995) (criticizing footnote seven in Lujan for failing to explain to what extent immediacy and redressability standing requirements are relaxed or eliminated); Mank, States Standing, supra note 1, at 1718–20 (criticizing the Court’s lack of guidance on how to apply footnote seven in Lujan); Mank, Global Warming, supra note 12, at 36–37, 36 n.244 (“[F]ootnote seven does not clearly explain the extent to which redressability and immediacy requirements are waived in procedural rights cases.”); Sunstein, supra note 36, at 208 (“The Court acknowledged (without any real expansion) that in some cases involving procedural violations, plaintiffs need not show redressability.”); Christopher T. Burt, Comment, Procedural Injury Standing After Lujan v. Defenders of Wildlife, 62 U. CHI. L. REV. 275, 285 (1995) (“Lujan’s procedural injury dicta is not without its problems, however. At best, it is vague and provides little guidance for prospective plaintiffs and the lower courts . . . .”).
lihood of harm arising from the agency’s action is unclear. For example, the D.C. Circuit employs a strict “substantial probability” test, but the Ninth Circuit utilizes a more lenient “reasonable probability” test. The Supreme Court could have prevented confusion in lower courts by eliminating the immediacy requirement for procedural rights plaintiffs as they have no control over how quickly the government will act, but the *Lujan* decision does not address the issue of timing. Additionally, footnote seven does not provide clear guidance as to what extent courts can relax or eliminate the redressability requirement. Yet, the subsequent *Massachusetts v. EPA* decision appears to adopt a relaxed approach to the redressability requirement in procedural rights cases.

### D. Threatened and Imminent Injuries

In some cases, a threatened injury may be sufficiently concrete and imminent if the harm is likely to occur in the relatively near future, although the Supreme Court has never precisely defined “imminent injury.” In *Babitt v. United Farm Workers National Union*, the Court stated “[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is

---

78 Compare Fla. Audubon Soc’y v. Bentsen, 94 F.3d 658, 665–72 (D.C. Cir. 1996) (applying a strict four-part test for standing in a procedural rights case, including requiring a procedural rights plaintiff to demonstrate a particularized injury, that “a particularized environmental interest of theirs [...] will suffer demonstrably increased risk,” and that it is “substantially probable” that the agency action will cause the demonstrable injury alleged), with Citizens for Better Forestry v. U.S. Dep’t of Agric., 341 F.3d 961, 972 (9th Cir. 2003) (rejecting *Florida Audubon*’s standing test for procedural rights plaintiffs and stating that such plaintiffs must show “the reasonable probability of the challenged action’s threat to [their] concrete interest”) (quoting Churchill Cnty. v. Babbitt, 150 F.3d 1072, 1078 (9th Cir. 1998)), and Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 451–52 (10th Cir. 1996) (disagreeing with *Florida Audubon*’s “substantial probability” test for procedural rights plaintiffs and instead adopting a test requiring plaintiff to establish an “increased risk of adverse environmental consequences” from the alleged failure to follow NEPA). See generally Mank, *Global Warming*, supra note 12, at 45–63.

79 Compare Fla. Audubon, 94 F.3d at 665–72 (applying a substantial probability test), with *Citizens for Better Forestry*, 341 F.3d at 972 (applying a reasonable probability test).


81 See Gatchel, supra note 77, at 100, 108; Mank, *States Standing*, supra note 1, at 1719; Sinor, supra note 80, at 879 (criticizing footnote seven because it “is confusing and raises more questions than it answers”).

82 See 549 U.S. at 518.

enough.”84 *Lujan’s* approach to “imminent injury” is similar to *Babbitt’s* approach to threatened injuries.85 The imminent injury test, however, fails to define a sufficient probability of risk to a plaintiff and how quickly injury must result.86 For instance, the Ninth Circuit has interpreted the imminent standing test to require an increased risk of harm.87 The subsequent *Summers* decision arguably overruled the Ninth Circuit’s approach to the imminence test by requiring plaintiffs to demonstrate when and where they would be injured in the future.88

**E. Oscillating Standing Requirements**

The Court has oscillated between relatively strict and lenient standing requirements. *Lujan* adopted a relatively strict definition of concrete injury, but footnote seven allowed a more lenient standard for plaintiffs in procedural rights cases to meet the imminence and redressability requirements for standing.89 *Massachusetts v. EPA* appeared to relax the redressability standard for procedural rights plaintiffs.90 Yet just two years later, *Summers* arguably narrowed procedural standing in regard to the imminence standard.91 The Court’s confusing standing jurisprudence results from profound philosophical disagreements among the justices on the Court.92

---


85 See *Lujan*, 504 U.S. at 560–64; *Babbitt*, 442 U.S. at 298.


88 See 555 U.S. at 498–99; *infra* notes 160–176 and accompanying text.

89 See supra notes 36–57 and accompanying text.

90 See 549 U.S. at 518; supra notes 49–57 and accompanying text.

91 See 555 U.S. at 498–501; *infra* notes 160–176 and accompanying text.

92 See *infra* notes 119–144, 160–195 and accompanying text.
II. INFORMATIONAL STANDING: PUBLIC CITIZEN AND AKINS

A. Public Citizen v. U.S. Department of Justice: Endorsing Pure Informational Standing

In Public Citizen v. U.S. Department of Justice, the Supreme Court endorsed the concept of pure informational standing but did not discuss the issue at length.\(^93\) Justice Scalia took no part in the consideration of the case, and perhaps his absence is the reason for the lack of such discussion.\(^94\) For many years, the American Bar Association’s Standing Committee on the Federal Judiciary (ABA Committee) provided advice to the President on the nomination of federal judges.\(^95\) The Federal Advisory Committee Act (FACA) imposes a number of requirements\(^96\) on committees or similar groups that advise the President or federal agencies.\(^97\) The plaintiff filed suit requesting both a declaration that the Justice Department’s utilization of the ABA Committee was covered by FACA and an order mandating the Justice Department to comply with FACA’s requirements.\(^98\)

Justice Brennan’s majority opinion concluded that the ABA Committee did not constitute an “advisory committee” for purposes of FACA.\(^99\) FACA’s legislative history indicated that Congress did not intend to apply the term “utilize” in the statute to the advisory relationship between the Justice Department and the ABA Committee.\(^100\) The majority acknowledged that it avoided interpreting FACA to apply to the ABA Committee in part because such an interpretation would raise serious constitutional concerns regarding whether FACA unduly infringed on the President’s constitutional power to nominate federal judges and thus violated the doctrine of separation of powers.\(^101\) In a concurring opinion, Justice Kennedy, joined by Chief Justice Rehnquist and Justice O’Connor, applied a “plain language” construction of the statute in reasoning that FACA included the ABA Committee’s activities

\(^94\) See id. at 442.
\(^95\) Id. at 443–45.
\(^96\) These requirements include the public availability of records consistent with the Freedom of Information Act’s public information requirements and exemptions. See 5 U.S.C. § 552 (2006).
\(^97\) See Public Citizen, 491 U.S. at 445–47.
\(^98\) Id. at 447.
\(^99\) Id. at 463–65.
\(^100\) See id. at 451–65.
\(^101\) See U.S. Const. art. 2, § 2, cl. 2; Public Citizen, 491 U.S. at 465–67.
when advising the Justice Department on such matters. But Justice Kennedy ultimately concluded that the application of FACA to the President’s use of the ABA Committee was unconstitutional because it violated Article II’s appointments clause by interfering with the President’s ability to gather information about potential judicial nominees.

Most relevant for this Article, the ABA argued that the plaintiffs lacked standing because they failed to allege an “injury sufficiently concrete and specific” since they “advanced a general grievance shared in substantially equal measure by all or a large class of citizens . . . .” Following its decisions relating to informational standing under the Freedom of Information Act (FOIA), the Court concluded that the plaintiffs had standing to seek information pursuant to FACA’s statutory mandates. The Court reasoned that prohibiting the appellant from studying the ABA Committee’s activities is comparable to a denial of information under FOIA. The Court’s interpretation of FOIA never required more than a showing that the information requested was denied. Thus, a refusal to grant information under FACA, like a refusal to grant information under FOIA, constitutes a distinct injury and affords standing to sue.

The Court rejected the ABA’s argument that the plaintiffs did not have standing because they alleged a generalized grievance. The Court found that it was not reason enough to deny the appellants their asserted injury solely because other citizens or groups of citizens may also claim the same injury. Similarly, FOIA is not restricted by the fact that many citizens might request the same information under its authority.

The court in Public Citizen did not attempt to reconcile its approval of standing in FACA suits with its recognition of standing in FOIA cases, or with other decisions that questioned standing in circumstances

---

102 See Public Citizen, 491 U.S. at 467–89 (Kennedy, J., concurring in part and concurring in the judgment).
103 See id. at 481–89; see U.S. Const. art. 2, § 2, cl. 2.
104 See Public Citizen, 491 U.S. at 448–49 (majority opinion).
105 See id. at 449.
106 See id.
107 Id.
108 See id.
109 See id. at 449–50.
110 See Public Citizen, 491 U.S. at 449–50.
where a plaintiff asserted a generalized grievance. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, for example, the Supreme Court held that a court could deny standing in a suit involving generalized harms because such a suit would raise “general prudential concerns ‘about the proper—and properly limited—role of the courts in a democratic society.’” *Public Citizen’s* approach to informational standing—allowing any citizen to seek information under FACA—is arguably inconsistent with *Duke Power’s* restrictive approach to generalized grievances, but *Public Citizen* did not discuss that case. One problem typical of standing jurisprudence is that the Court has never precisely defined the term “generalized grievance” and whether its prohibition is a flexible judicial prudential doctrine or a firmer constitutional rule. As a result, it is difficult to decide whether the decisions in *Public Citizen* and *Duke Power* are merely in tension or actually contradict each other. Justice Kennedy’s concurring opinion in *Public Citizen* did not address the issue of standing; he, Chief Justice Rehnquist, and Justice O’Connor presumptively agreed with the majority’s reasoning on that issue. If Justice Scalia had participated in this case, it is possible that he might have raised objections similar to those he raised later in *Federal Election Commission v. Akins*.

**B. Justice Breyer’s Majority Opinion in Akins**

In *Akins*, the Supreme Court concluded that an injury resulting from the government’s failure to provide required information can constitute a concrete injury sufficient for standing. *Akins* addressed

---


115 See Yackle, supra note 12, at 342 (“The ‘generalized grievance’ formulation is notoriously ambiguous.”); Solimine, supra note 13, at 1027 (discussing “whether the barrier to bring [generalized grievance] cases is a constitutional or prudential one”).

116 See Solimine, supra note 13, at 1027 (discussing ambiguities in the concept of generalized grievances).

117 See Public Citizen, 491 U.S. at 467–89 (Kennedy, J., concurring in part and concurring in the judgment).


whether voters had standing to challenge a Federal Election Commission (FEC) decision that a lobbying group was not a “political committee” within the definition of the Federal Election Campaign Act of 1971 (FECA), and accordingly, did not have to disclose its donors, funding, or expenses. FECA “imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act’s definition of a ‘political committee.'” The statute authorized “[a]ny party aggrieved by” a FEC order to seek judicial review in federal court.

The Court rejected the FEC’s argument that prudential standing considerations should bar the suit because “[h]istory associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested.” Furthermore, the Akins decision concluded that “[t]he injury of which respondents complain—their failure to obtain relevant information—is injury of a kind that FECA seeks to address.” After examining the statute’s language, the Court decided that Congress intended to protect citizens from this type of injury and that respondents, therefore, satisfied the prudential standing requirements.

Additionally, Akins concluded that Congress had “the constitutional power to authorize federal courts to adjudicate this lawsuit.” The Akins decision determined that the government’s refusal to provide information to the plaintiff voters for which the Act required disclosure was a constitutionally “genuine ‘injury in fact.’” The Court concluded that such deprivation of information, which the plaintiffs could use “to evaluate candidates for public office,” constituted a “concrete and particular” injury. Furthermore, the Court observed that the Court in Public Citizen had “held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be pub-

---

121 See Akins, 524 U.S. at 13–14; Mank, Global Warming, supra note 12, at 37.
122 Akins, 524 U.S. at 14.
123 Id. at 19 (quoting 2 U.S.C. § 437g(a)(8)(A) (1994)) (brackets in original).
124 Id.
125 Id. at 20.
126 Id.
127 Id.
128 Akins, 524 U.S. at 21.
129 Id.
licly disclosed pursuant to a statute” and implied that the same reasoning applied to Akins.\textsuperscript{130}

The government argued that the plaintiffs should not have standing because they suffered only a generalized grievance common to all other voters.\textsuperscript{131} The Court rejected this argument because the statute specifically authorized voters to request information from the FEC, which therefore overrode any prudential standing limitations against generalized grievances.\textsuperscript{132} The Court distinguished prior cases with judicially imposed prudential norms against generalized grievances by reasoning that it would deny standing for widely shared, generalized injuries only if the harm “is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the ‘common concern for obedience to law.’”\textsuperscript{133} Akins stated that Article III standing was permissible even if many people suffered similar injuries as long as those injuries were concrete and not abstract.\textsuperscript{134} If such an interest were sufficiently concrete, then it could qualify as an injury in fact.\textsuperscript{135} Accordingly, the Akins decision recognized that a plaintiff who suffers a concrete injury may sue even though many others have suffered similar injuries.\textsuperscript{136} Although a political forum might be appropriate to address widely shared injuries, this fact alone does not exclude an interest for Article III purposes.\textsuperscript{137} “This conclusion seems particularly obvious where . . . large numbers of individuals suffer the same common-law injury . . . or where large numbers of voters suffer interference with voting rights conferred by law.”\textsuperscript{138} Thus, Akins makes clear that courts should not deny standing merely because large numbers of persons have the

\textsuperscript{130} Id.
\textsuperscript{131} Id. at 23.
\textsuperscript{132} Id. at 19–21; see Mank, Standing and Statistical Persons, supra note 1, at 718; Sunstein, supra note 119, at 634–36, 642–45 (stating that Akins concluded that the statute at issue overrode any prudential limitations against generalized grievances); see Kimberly N. Brown, What’s Left Standing? FECA Citizen Suits and the Battle for Judicial Review, 55 U. Kan. L. Rev 677, 678 (2007).
\textsuperscript{133} Akins, 549 U.S. at 23. The Supreme Court has not been clear on whether generalized grievances pose a constitutional or prudential barrier to standing, and the issue has been subject to much debate. Solimine, supra note 13, at 1027 n.14. The Akins decision implied that the rule against generalized grievances is only prudential in nature, but did not explicitly decide the issue. See Akins, 524 U.S. at 19; accord Mank, Standing and Statistical Persons, supra note 1, at 718 (discussing Akins as treating generalized grievances as prudential); Sunstein, supra note 119, at 634–36 (discussing the four-part analysis of plaintiff’s standing in Akins).
\textsuperscript{134} 524 U.S. at 24–25.
\textsuperscript{135} Id. at 24; see Mank, Standing and Statistical Persons, supra note 1, at 717.
\textsuperscript{136} Akins, 524 U.S. at 24.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
same or similar injuries so long as those injuries are concrete.\(^{139}\) Furthermore, \textit{Akins} implies that Congress has the authority to extend standing to the outer limits of Article III by broadly defining what constitutes a concrete statutory injury as opposed to an abstract injury.\(^{140}\)

The \textit{Akins} decision stressed that courts should strongly consider Congress’s intent in defining statutory rights when determining whether a statutory injury is concrete.\(^{141}\) By implying that “Congress has broad authority to define which injuries are sufficient for constitutional standing,” the \textit{Akins} majority adopted a more similar approach to Justice Kennedy’s concurrence rather than Justice Scalia’s majority opinion in \textit{Lujan}.\(^{142}\) Justice Scalia emphasized that Article III prohibits Congress from granting standing to a plaintiff with merely a generalized grievance caused by the government’s failure to enforce the law.\(^{143}\) \textit{Akins}, on the other hand, implied that a generalized grievance is usually a prudential limitation that Congress can waive by defining the circumstances in which a class of litigants may seek a remedy for a widely shared injury.\(^{144}\)

\(^{139}\) \textit{Id.}

\(^{140}\) See Pye v. United States, 269 F.3d 459, 469 (4th Cir. 2001); Solimine, \textit{supra} note 13, at 1050 (“\textit{FEC v. Akins}, seem[s] to evince a more generous reading of congressional power to influence standing.”); accord Mank, \textit{Standing and Statistical Persons}, \textit{supra} note 1, at 719.

\(^{141}\) The \textit{Akins} decision stressed that courts should strongly consider Congress’s intent in defining statutory rights when determining whether a statutory injury is concrete.\(^{141}\) By implying that “Congress has broad authority to define which injuries are sufficient for constitutional standing,” the \textit{Akins} majority adopted a more similar approach to Justice Kennedy’s concurrence rather than Justice Scalia’s majority opinion in \textit{Lujan}.\(^{142}\) Justice Scalia emphasized that Article III prohibits Congress from granting standing to a plaintiff with merely a generalized grievance caused by the government’s failure to enforce the law.\(^{143}\) \textit{Akins}, on the other hand, implied that a generalized grievance is usually a prudential limitation that Congress can waive by defining the circumstances in which a class of litigants may seek a remedy for a widely shared injury.\(^{144}\)

\(^{142}\) Mank, \textit{Standing and Statistical Persons}, \textit{supra} note 1, at 719 (noting that \textit{Akins} looked to Justice Kennedy’s concurrence in \textit{Lujan} over Justice Scalia’s majority opinion on this point); see Brown, \textit{supra} note 132, at 693–94 (stating that \textit{Akins} recognized that Congress has significant power to define which injuries are significant for Article III standing); Mank, \textit{Standing and Statistical Persons}, \textit{supra} note 1, at 719 (arguing that the \textit{Akins} court emphasized the weight congressional intent should be given); Sunstein, \textit{supra} note 119, at 616–17, 645 (arguing that \textit{Akins} gives Congress the authority to waive the prudential presumption against suits involving generalized grievances, especially in suits involving informational injuries).

\(^{143}\) Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992); Mank, \textit{Standing and Statistical Persons}, \textit{supra} note 1, at 719–20; Sunstein, \textit{supra} note 119, at 643 (stating that “before \textit{Akins} . . . the ban on generalized grievances was moving from a prudential one to one rooted in Article III. \textit{Lujan} seemed to suggest that to have standing, citizens would have to show that their injuries were ‘particular’ in the sense that they were not widely shared.”) (footnotes and citations omitted). Justice Scalia also suggested that the Constitution’s Article II, section 3 provision that the President is responsible to “take Care that the Laws be faithfully executed” bars Congress from authorizing citizen suits as private attorneys general by those who lack a concrete injury. \textit{Lujan}, 504 U.S. at 577.

\(^{144}\) Mank, \textit{Standing and Statistical Persons}, \textit{supra} note 1, at 719–20; see Brown, \textit{supra} note 132 at 689–94 (arguing that \textit{Akins} differs from \textit{Lujan} by recognizing Congress’s authority to define standing in statutes); Mank, \textit{States Standing}, \textit{supra} note 1, at 1714–15 (arguing
C. Justice Scalia’s Dissenting Opinion in Akins

Justice Scalia, in a dissent joined by Justices O’Connor and Thomas, argued that the plaintiffs suffered a generalized grievance common to all members of the public. Justice Scalia contended that Article III prohibits even generalized grievances involving concrete injuries because *Lujan* mandated that an injury be concrete and that the harm be “particularized”—the injury “must affect the plaintiff in a personal and individual way.” Because the *Akins* plaintiffs’ alleged informational injury was an “undifferentiated” generalized grievance that was “common to all members of the public,” the plaintiffs must resolve the injury “by political, rather than judicial, means.” More broadly, Justice Scalia dissented in *Akins* because he believed that the majority opinion inappropriately granted the judiciary the authority to decide generalized grievances that are instead the exclusive responsibility of the executive branch under both Article III and the President’s Article II authority. Thus, he returned to the broader principle that the “standing doctrine was a ‘crucial and inseparable element’ of separation of powers principles” and “that more restrictive standing rules” would limit judicial interference with the popularly elected legislative and executive branches. Perhaps surprisingly, Justice Scalia did not explicitly argue that the Court had overruled any part of *Lujan*; he may have believed that the two cases could be reconciled or perhaps he hoped to limit the scope of *Akins* in subsequent cases, as he arguably did in his *Summers* decision.

---

146 *Id.* at 35 (Scalia, J., dissenting) (quoting 504 U.S. at 560 n.1); accord Mank, *Standing and Statistical Persons, supra* note 1, at 720.
III. Summers Rejects Probabilistic Standing and Limits Procedural Standing

The litigation that culminated in the Summers v. Earth Island Institute decision began when the U.S. Forest Service (Service) approved the Burnt Ridge Project, which involved the salvage sale—without public notice and comment—of timber on 238 acres of fire-damaged land in the Sequoia National Forest.151 Several environmental organizations then filed suit seeking an injunction to prevent the Service from implementing new regulations.152 These regulations exempted salvage sales of less than 250 acres from the notice, comment, and appeal process that Congress required the Service to apply to “significant land management decisions.”153 The plaintiffs also challenged other Service regulations that did not apply to Burnt Ridge.154 After the court granted a preliminary injunction against the Burnt Ridge salvage-timber sale, the plaintiffs and Service settled their dispute.155 Despite the government’s argument that the plaintiffs lacked standing to challenge other salvage sales once they settled the Burnt Ridge Project case, the court decided the plaintiffs’ broader challenges to the Service’s salvage sale policies.156 The court invalidated five of the Service’s regulations and entered a nationwide injunction against their application.157 The Ninth Circuit later concluded that the plaintiffs’ challenges to regulations not at issue in the Burnt Ridge Project were not yet ripe for adjudication.158 Nevertheless, the Ninth Circuit affirmed the court’s conclusion that two regulations applicable to the Burnt Ridge Project were illegal and, therefore, upheld the nationwide injunction against the application of those two regulations.159

152 Summers, 555 U.S. at 489–90 (basing claims on Act that “required the Forest Service to establish a notice, comment, and appeal process for ‘proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974’”).
154 Summers, 555 U.S. at 491.
155 Id.
156 Id. at 491–92.
157 Id. at 492.
158 Id.
159 Id. at 488.
A. Justice Scalia’s Majority Opinion Rejects Probabilistic Standing and Arguably Limits Procedural Standing

In _Summers_, Justice Scalia’s majority opinion determined that the plaintiffs failed to meet the injury portion of the standing test once they settled the Burnt Ridge Project dispute. The Court reasoned that the plaintiffs had initially satisfied the injury requirement when they submitted an affidavit alleging that an organization member “had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again,” and that the government’s actions would harm his aesthetic interests in viewing the flora and fauna at the site. Justice Scalia concluded, however, that the settlement had resolved the member’s injury and that none of the other affidavits submitted by the plaintiffs alleged an imminent injury at a specific site. Another affiant for the plaintiffs asserted that he visited a large number of national parks during his lifetime, that he had suffered injury in the past from development on Forest Service land, and that he planned to visit several unnamed national forests in the future. The Court deemed his affidavit insufficient for standing because he could not identify any particular site and time where he was likely to be harmed by salvage timber sales or other allegedly illegal actions authorized by the challenged regulations, thereby failing to satisfy the imminent injury requirement.

Justice Scalia’s majority opinion rejected the concept of probabilistic standing, which states that an organization has standing based on the probability that some members of the organization will be harmed in the future. The Sierra Club alleged in the complaint that it has more than 700,000 national members, and, accordingly, that it was probable the Service’s implementation of the challenged regulations would harm at least one of its members in the near future. The Court rejected the plaintiffs’ probabilistic standing argument because it concluded that an organizational plaintiff must identify specific mem-

---

160 555 U.S. at 491–92.
161 Id. at 494.
162 Id. at 493–96.
163 Id. at 495.
164 Id. at 495–97. "There may be a chance, but is hardly a likelihood, that [affiant’s] wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations." Id. at 495.
165 Id. at 496; Mank, _Standing and Statistical Persons_, supra note 1, at 750.
166 See _Summers_, 555 U.S. at 502 (Breyer, J., dissenting) (quoting Corrected Complaint for Declaratory and Injunctive Relief Appendix ¶ 12 at 34, Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994 (E.D. Cal. 2005) (No. CIV F-03–6386 JKS)).
bers who are being injured or will be imminently injured at a particular time and location. Justice Scalia argued that although it may be possible that a member of the plaintiff organization would meet the standing criteria at some point in the future, mere statistical probability is insufficient to meet standing requirements.

Arguably, the Summers Court assigned a rigorous standing burden for procedural rights plaintiffs. The Summers decision may have retreated from the relaxation of the imminence standard for procedural rights plaintiffs found in footnote seven of Lujan v. Defenders of Wildlife. By implicitly conceding that footnote seven in Lujan recognized that Congress has some authority to redefine the redressability requirement to enable procedural rights plaintiffs to sue, the Summers decision appeared to limit congressional authority to change standing rules by emphasizing that procedural rights plaintiffs must still meet the Article III concrete injury requirement. Congress has the power to relax the standing requirement in terms of redressability, but not the requirement of injury in fact. Instead, “the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.” Importantly, Justice Scalia stated in Summers that procedural rights plaintiffs are entitled to relaxed redressability requirements, but did not address relaxed standards for immediacy. The Summers decision, however, did not explicitly overrule the relaxed imminence test established in footnote seven of Lujan. Therefore, the impact of Summers on future procedural rights cases remains uncertain.

\[167\] Id. at 499 (majority opinion). Justice Scalia acknowledged that an organization has standing if all of its members are likely to suffer an injury. Id. (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958)).

\[168\] Id.

\[169\] Id.

\[170\] Id.

\[171\] Mank, Implications for Future Standing Decisions, supra note 1, at 10,963; see 555 U.S. at 493.

\[172\] See 555 U.S. at 496 (citing Lujan, 504 U.S. at 572 n.7 (1992)); Mank, Implications for Future Standing Decisions, supra note 1, at 10,963.

\[173\] Mank, Implications for Future Standing Decisions, supra note 1, at 10,963; see Summers, 555 U.S. at 496.

\[174\] Summers, 555 U.S. at 496.

\[175\] Id.

\[176\] Mank, Implications for Future Standing Decisions, supra note 1, at 10,963; see Summers, 555 U.S. at 497.
B. Justice Kennedy’s Concurring Opinion

In a short concurrence in *Summers*, Justice Kennedy echoed his concurring opinion in *Lujan*, and explained that he believed a plaintiff can challenge the alleged violation of a procedural right only if the plaintiff can demonstrate a separate concrete injury.\(^{177}\) Kennedy further found that the plaintiffs did not meet this standard in *Summers*.\(^{178}\) He asserted that, “[t]his case would present different considerations if Congress had sought to provide redress for a concrete injury ‘giv[ing] rise to a case or controversy where none existed before.’”\(^{179}\) Justice Kennedy concluded that the statute at issue did not include an express citizen suit provision, meaning that Congress did not intend the statute to bestow any right other than a procedural right.\(^{180}\) Like his concurrence in *Lujan*, Justice Kennedy’s concurrence in *Summers* left open the possibility that he might have concluded that the plaintiffs met Article III standing requirements, despite Justice Scalia’s more fundamental separation of powers concerns, if Congress had enacted a more explicit statute that clearly defined when a procedural injury constitutes a concrete harm to a particular class of plaintiffs.\(^{181}\)

C. Justice Breyer’s Dissenting Opinion

In his dissent in *Summers*, Justice Breyer proposed that the Court adopt a “realistic threat” test for determining when an injury is sufficiently imminent and concrete for standing.\(^{182}\) Although acknowledging that the Court had sometimes used the term “imminent” as a test in its standing decisions, he argued that the majority’s opinion wrongly used the term to prohibit standing.\(^{183}\) In contrast, prior decisions had used the term to reject standing only when the alleged harm “was merely ‘conjectural’ or ‘hypothetical’ or otherwise speculative.”\(^{184}\) Justice Breyer contended that the majority’s use of the imminent test was

\(^{177}\) 555 U.S. at 500.

\(^{178}\) Id.

\(^{179}\) Id. (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

\(^{180}\) Id.

\(^{181}\) See id.; *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment); Mank, *Implications for Future Standing Decisions*, supra note 1, at 10,963–64.

\(^{182}\) See 555 U.S. at 503–09.

\(^{183}\) Id. at 504–06.

\(^{184}\) Id. at 504 (quoting *Lujan*, 504 U.S. at 560); see also Mank, *Standing and Statistical Persons*, supra note 1, at 668.
unsuitable if a plaintiff was already injured, as was the case in Summers. 185 Furthermore, standing should not be denied if “there is a realistic likelihood that the challenged future conduct will, in fact, recur and harm the plaintiff.” 186 Justice Breyer argued that the Court’s prior standing decisions demanded only that a plaintiff establish a “realistic threat” of injury, which does not require more “than the word ‘realistic’ implies.” 187 Although he conceded that the plaintiffs could not predict where and when their members would be harmed by the Service’s sale of salvage timber, Justice Breyer reasoned that there was a realistic threat that some of the thousands of members of the plaintiff organizations would likely be harmed in the reasonably near future. 188 Accordingly, Justice Breyer concluded that the plaintiffs satisfied the Court’s standing requirements. 189 If it is likely that at least one member of the plaintiff organizations will meet all standing criteria in the near future, Justice Breyer reasoned that federal courts should recognize Article III standing even if a court does not know the details of the specific harm that may occur. 190

Perhaps anticipating that the issue might arise in the future, Justice Breyer argued that the plaintiffs would have had standing if Congress expressly sought to give standing to groups like the plaintiffs, stating:

To understand the constitutional issue that the majority decides, it may prove helpful to imagine that Congress enacted a statutory provision that expressly permitted environmental groups like the respondents here to bring cases just like the present one, provided (1) that the group has members who have used salvage-timber parcels in the past and are likely to do so in the future, and (2) that the group’s members have opposed Forest Service timber sales in the past (using notice, comment, and appeal procedures to do so) and will likely use those procedures to oppose salvage-timber sales in the future. The majority cannot, and does not, claim that such a statute would be unconstitutional. 191

185 555 U.S. at 503–04 (Breyer, J., dissenting).
186 Id.
187 Id. at 506.
188 Id. at 506–09.
189 Id.
190 See id. at 506–07; Mank, Implications for Future Standing Decisions, supra note 1, at 10,965.
191 Summers, 555 U.S. at 502–03 (Breyer, J., dissenting) (citations omitted).
In making the claim that the “majority cannot, and does not, claim that such a statute would be unconstitutional,” Justice Breyer cited Massachusetts v. EPA for support, which Justice Kennedy joined and Justice Scalia and the three other members of the Summers majority dis- sented. Based on Justice Kennedy’s previous decisions in other major standing cases, Justice Breyer appeared to rely on Justice Kennedy for support in future cases if Congress were to explicitly define injury in fact as an injury similar to the one suffered by the plaintiffs in Summers. Thus, Summers, like Lujan, Akins and Massachusetts v. EPA, demonstrated both the importance of Justice Kennedy’s vote and his belief that Congress has significant authority under Article III to define a constitutional concrete injury.

IV. Divided Lower Court Decisions on Informational Standing

Lower courts are divided in environmental cases where plaintiffs have sought standing based on alleged injuries resulting from the government’s, or private defendant’s, failure to provide information about their environmental impacts. In Foundation on Economic Trends v. Lyng, a case decided prior to FEC v. Akins, the D.C. Circuit questioned whether informational standing alone could meet the Article III injury in fact requirement. In contrast, citing Akins, a divided panel of the Sixth Circuit in American Canoe Association, Inc. v. City of Louisa Water & Sewer Commission concluded that environmental groups had standing to seek information from the government about water pollution issues, pursuant to the citizen suit provision of the Clean Water Act, that would assist their members’ understanding of pollution issues and legislative proposals. Most recently, the Ninth Circuit in Wilderness Society Inc. v. Rey interpreted Summers and Akins to implicitly restrict the scope of informational standing to statutes that give plaintiffs an explicit right to information from the government.

192 Id. at 504 (citing 549 U.S. 497, 516–518 (2007)).
193 Compare id. at 488 (majority opinion) (listing members of the Court joining the majority opinion and dissenting opinion) with Massachusetts v. EPA, 549 U.S. at 501 (listing members of the Court joining the majority opinion and dissenting opinion).
194 See 555 U.S. at 502–03 (Breyer, J., dissenting).
195 See infra notes 338–401 and accompanying text.
198 389 F.3d at 545–46; see infra notes 238–300 and accompanying text.
199 See 622 F.3d 1251, 1257–58 (9th Cir. 2010); infra notes 301–355 and accompanying text.
A. Foundation on Economic Trends v. Lyng: The D.C. Circuit Suggests Limiting Informational Standing to Informational Injuries

In *Lyng*, the D.C. Circuit expressed doubts regarding whether informational standing alone can meet the Article III injury in fact requirement, but did not actually decide the issue.\(^{200}\) The plaintiffs—including a private nonprofit organization active in issues of biotechnology and genetics engineering—sought an injunction and a declaratory judgment against officials of the United States Department of Agriculture (USDA).\(^{201}\) The plaintiffs sought an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) regarding the USDA’s “germplasm preservation program.”\(^{202}\) The USDA had undertaken a variety of actions to preserve and expand a diverse plant genetic base to assure the nation’s food supply, but there was no specific “germplasm preservation program.”\(^{203}\) “On cross-motions for summary judgment, the trial court held that the plaintiffs failed to identify ‘a particular proposal for federal action’ or ‘any revisions or changes taken by the defendants in the germplasm program that would trigger the obligation to prepare an [EIS] . . . .’”\(^{204}\)

The trial court did not address standing concerns because the defendants did not challenge the issue.\(^{205}\) After the trial court granted summary judgment, the Supreme Court issued its *Lujan v. National Wildlife Federation* decision.\(^{206}\) On appeal, the D.C. Circuit decided that *National Wildlife Federation* required it to first consider whether the plaintiffs had standing.\(^{207}\)

*Lyng* reviewed previous D.C. Circuit decisions that had discussed “informational standing” as a basis for standing and then considered whether those cases were still good law in light of *National Wildlife Federation*.\(^{208}\) In *Scientists’ Institute for Public Information, Inc. (SIPI) v. Atomic Energy Commission*, the D.C. Circuit suggested, in a footnote, that the plaintiff might have informational standing because its organizational purpose—distributing scientific information to the public—was nega-

\(^{200}\) 943 F.2d at 84–85; see also *Am. Canoe Ass’n*, 389 F.3d at 547–50 (Kennedy, J., concurring in part and dissenting in part) (discussing the *Lyng* majority’s criticism of informational standing favorably).

\(^{201}\) *Lyng*, 943 F.2d at 80.

\(^{202}\) Id.

\(^{203}\) Id. at 80–81.

\(^{204}\) Id. at 82.

\(^{205}\) Id.

\(^{206}\) Id.

\(^{207}\) *Lyng*, 943 F.2d at 80.

\(^{208}\) Id. at 80, 82–85.
tively affected by the Agency’s failure to provide an EIS. While a previous D.C. Circuit decision erroneously characterized SIPI as holding that standing could be based on an informational injury, Lyng correctly observed that the informational standing footnote in SIPI was not necessary to the decision in that case. In Action Alliance of Senior Citizens v. Heckler, the D.C. Circuit held that organizations devoted to advising senior citizens about age discrimination and other matters had standing to challenge regulations restricting the flow of public information concerning an agency’s compliance with the Age Discrimination Act of 1975 because such restrictions injured the plaintiff through the “alleged inhibition of their daily operations.”

Citing Action Alliance and SIPI, the D.C. Circuit in National Wildlife Federation v. Hodel endorsed informational standing by stating that “for affiants voicing environmental concerns . . . the elimination of the opportunity to see and use an EIS prepared under federal law does constitute a constitutionally sufficient injury on which to ground standing.” It was not clear, however, that the Department of Interior (Interior) violated NEPA when it delegated its authority to the states to approve mining plans on federal lands—a process governed by NEPA when performed by federal authorities. Furthermore, prior courts did not indicate whether NEPA provided plaintiffs with the right to demand that Interior issue EISs of new mines approved by state authorities. Nevertheless, the D.C. Circuit concluded that the plaintiffs suffered an informational injury because the plaintiff could no longer request an EIS, and therefore lost the “ability to evaluate and oppose future mining.”

In Competitive Enterprise Institute v. National Highway Traffic Safety Administration, the D.C. Circuit endorsed the plaintiffs’ informational standing theory, but concluded for other reasons that the plaintiffs lacked standing. The court agreed with the plaintiffs’ informational standing theory, stating “[a]llegations of injury to an organization’s

209 See 481 F.2d at 1086–87 n.29; see also Lyng, 943 F.2d at 83 (discussing SIPI).
211 943 F.2d at 83.
212 789 F.2d 931, 937–38 (D.C. Cir. 1986); see also Lyng, 943 F.2d at 84 (discussing Action Alliance).
213 839 F.2d 694, 712 (D.C. Cir. 1988); see also Lyng, 943 F.2d at 84 (discussing Hodel).
214 See Hodel, 839 F.2d at 712.
215 See id. at 711–12; Lyng, 943 F.2d at 84 (discussing Hodel).
216 Hodel, 839 F.2d at 712.
217 901 F.2d 107, 122–23 (D.C. Cir. 1990); see also Lyng, 943 F.2d at 84 (discussing Competitive Enter. Inst.).
ability to disseminate information may be deemed sufficiently particular for standing purposes where that information is essential to the injured organization’s activities.”\textsuperscript{218} The court, however, held that the plaintiff lacked standing because they wanted information about traffic fatalities, not environmental issues, and thus were “outside the sphere of any definition of injury adopted in NEPA cases.”\textsuperscript{219}

Although acknowledging that \textit{Hodel} and \textit{Competitive Enterprise Institute} endorsed informational standing, the \textit{Lyng} decision held that the D.C. Circuit had “never sustained an organization’s standing in a NEPA case solely on the basis of ‘informational injury,’ that is, damage to the organization’s interest in disseminating the environmental data an impact statement could be expected to contain.”\textsuperscript{220} The court realized that “if the \textit{injury in fact} is the lack of information about the environmental impact of agency action, it follows that the injury is \textit{caused} by the agency’s failure to develop such information in an impact statement and can be \textit{redressed} by ordering the agency to prepare one.”\textsuperscript{221} The court noted, however, that adopting such an expansive approach would raise complications.\textsuperscript{222} For example, a court might do away with the standing requirement in NEPA cases unless the organization alleged that the information they required did not concern the environment.\textsuperscript{223} Additionally, “[t]he proposition that an organization’s desire to supply environmental information to its members, and the consequent ‘injury’ it suffers when the information is not forthcoming in an impact statement, establishes standing [but] \textit{without more} [it] also encounters the obstacle of \textit{Sierra Club v. Morton}.”\textsuperscript{224} In \textit{Morton}, the Court concluded that it did not matter how long the Sierra Club had been interested in the issue or how qualified the organization was in assessing environmental issues, interest and qualification alone were inadequate to allow standing.\textsuperscript{225} Accordingly, the \textit{Lyng} court reasoned that standing could not be conferred based on a mere interest.\textsuperscript{226}

The \textit{Lyng} court also observed that the Supreme Court in \textit{United States v. Richardson} “rejected a similar claim of informational standing

\textsuperscript{218} \textit{Competitive Enter. Inst.}, 901 F.2d at 122.
\textsuperscript{219} \textit{Id.} at 123; see also \textit{Lyng}, 943 F.2d at 84 (discussing \textit{Competitive Enter. Inst.}).
\textsuperscript{220} 943 F.2d at 84.
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.} at 84–85 (citations omitted).
\textsuperscript{225} \textit{Sierra Club v. Morton}, 405 U.S. at 727, 739 (1972); see also \textit{Lyng}, 943 F.2d at 85 (discussing \textit{Morton}).
\textsuperscript{226} 943 F.2d at 85.
on the ground that the effect on the plaintiff there from the lack of information was undifferentiated and common to all members of the public."227 The *Lyng* court thus reasoned that there was no basis to treat a request for information from an organization, such as the plaintiff’s, differently from the individual request for information rejected in *Richardson*.228 Additionally, the *Lyng* court warned that plaintiffs could use the theory of informational injury to demand information from agencies pursuant to NEPA about any of their daily operations.229 The Court suggested that if informational injury could confer standing, then a potential plaintiff could have standing anytime an agency could not create the requested information.230

The *Lyng* court did not decide whether the plaintiffs had standing because it concluded that the Supreme Court’s decision in *National Wildlife Federation* precluded their case under section 702 of the Administrative Procedure Act (APA).231 The *Lyng* court interpreted *National Wildlife Federation* to require NEPA plaintiffs to identify a particular agency action that triggered a duty to prepare an EIS.232 The court considered NEPA suits without a triggering event to be requests for information relating to an agency’s day-to-day operations that should therefore be rejected.233 The court also concluded that the trial court should have dismissed the complaint for lack of subject matter jurisdiction.234 This conclusion derived from the understanding that the plaintiff’s request for information about the USDA’s “germplasm preservation program” was really a request for information about daily operations similar to those made in *National Wildlife Federation*.235 The *Lyng* decision did not bar all requests for information under NEPA, but limited informational requests to cases where a particular agency action triggers an injury to the plaintiff.236 Although it did not prohibit informational standing claims under NEPA, the *Lyng* court suggested that standing

---

227 *Id.* (discussing United States v. Richardson, 418 U.S. 166, 176–80 (1974)).
228 *Id.*
229 *Id.*
230 *Id.*
232 *Lyng*, 943 F.2d at 85.
233 *Id.* at 85–86.
234 *Id.* at 86–87.
235 *Id.*
236 *See id.* at 87.
should be limited to those circumstances where plaintiffs may invoke informational injury.\footnote{See id. at 85–87.}

B. American Canoe Ass’n, Inc. v. City of Louisa Water & Sewer Commission: A Divided Sixth Circuit Endorses Informational Standing Under the Citizen Suit Provision of the Clean Water Act

1. Panel Majority Holds Plaintiffs Have Informational Standing

In a post-\textit{Akins} decision, a divided panel of the Sixth Circuit concluded that environmental groups had standing to seek information from the government about water pollution issues pursuant to the citizen suit provision of the Clean Water Act (CWA) if it would assist their members in understanding pollution issues and legislative proposals.\footnote{Am. Canoe Ass’n, 389 F.3d at 546.} Two organizational plaintiffs filed a CWA citizen suit in federal court alleging that the defendants violated their National Pollution Discharge Elimination System permit and various provisions of the CWA.\footnote{Id. at 538.} The court dismissed the complaint for lack of subject matter jurisdiction because it concluded that the plaintiffs did not meet standing requirements.\footnote{Id. at 538–39, 546.} The Sixth Circuit panel, however, decided that the plaintiffs had standing and reversed and remanded the case for further proceedings.\footnote{Id.}

a. Standing for Kash’s Recreational and Informational Injuries

In \textit{Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.}, a case analyzed by the Sixth Circuit in \textit{American Canoe}, the Supreme Court held that the plaintiffs had standing to sue pursuant to the CWA citizen suit provision because they avoided swimming and recreational activities in a river due to “reasonable concerns” about pollution released by the defendant.\footnote{528 U.S. 167, 183–85 (2000).} In \textit{American Canoe} the Sixth Circuit concluded that Daniel Kash, a member of the Sierra Club, also had standing to sue under the CWA citizen suit provision.\footnote{389 F.3d at 540–43.} The plaintiff alleged that he used the Big Sandy River for recreation in the past and hoped to in the future, but declined to do so currently because of the

\footnotesize{\begin{itemize}
\item \footnote{See id. at 85–87.}
\item \footnote{Am. Canoe Ass’n, 389 F.3d at 546.}
\item \footnote{Id. at 538.}
\item \footnote{Id. at 538–39, 546.}
\item \footnote{528 U.S. 167, 183–85 (2000).}
\item \footnote{389 F.3d at 540–43.}
\end{itemize}}
pollution the defendants released into the river.\textsuperscript{244} The Sixth Circuit determined that such “averments are virtually indistinguishable from those that the Court found sufficient to establish an injury in fact in \textit{Laidlaw},” and, accordingly that the Sierra Club had representational standing to sue on behalf of its injured member.\textsuperscript{245}

Additionally, the Sixth Circuit panel concluded that the Sierra Club had standing to sue for such informational injuries because “[t]he averments of its member, Kash, establish that the lack of information caused an injury beyond the ‘common concern for obedience to law.’”\textsuperscript{246} Kash’s affidavit asserted that the defendants’ failure to provide the public with statutorily required information about the amount of pollution it released into the Big Sandy River deprived him of the ability to assess the river’s safety.\textsuperscript{247} According to the court, these allegations constituted “a concrete and particularized injury” and established standing.\textsuperscript{248} In a footnote, the court acknowledged that federal courts of appeals had disagreed over whether plaintiffs without standing to sue for a defendant’s discharge violations could have standing to sue for its violations of monitoring and reporting requirements.\textsuperscript{249} The Sixth Circuit determined it was unnecessary to resolve that issue because, by representing its members, the Sierra Club had standing to sue the defendants for their discharge violations.\textsuperscript{250}

Furthermore, the Sixth Circuit determined that the Sierra Club demonstrated that Kash’s injury was “fairly traceable to the . . . allegedly unlawful conduct [of the defendants] and likely to be redressed by the requested relief.”\textsuperscript{251} The court reasoned that plaintiffs’ informational injury would have been redressed had the defendants met their monitoring and reporting obligations.\textsuperscript{252} Similarly, Kash’s aesthetic and recreational injury from the pollution in the Big Sandy River could be traced plausibly to defendants’ effluent discharges and would be redressed by a finding against the defendants.\textsuperscript{253} Thus, plaintiffs’ claim

\begin{itemize}
\item \textsuperscript{244} \textit{Id.} at 540–42.
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.} at 542 (quoting L. Singer & Sons v. Union Pac. R.R. Co., 311 U.S. 295, 303 (1940)).
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} \textit{Am. Canoe}, 389 F.3d at 542 n.1.
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} \textit{Id.} at 542 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).
\item \textsuperscript{252} \textit{Id.} at 543.
\item \textsuperscript{253} \textit{See id.}
\end{itemize}
was sufficient to survive defendants’ motion to dismiss for lack of standing.\textsuperscript{254}

b. \textit{Organizational Standing for the American Canoe Association and Sierra Club to Sue on Their Own Behalf for the Defendants’ Monitoring and Reporting Violations}

In addition to claiming standing as representatives of their members, the American Canoe Association and the Sierra Club alleged that the defendants’ monitoring and reporting violations injured their organizations, and thus provided them with organizational standing independent of their representative capacity to sue on behalf of their members.\textsuperscript{255} The Sixth Circuit recognized Supreme Court precedent for the principle that an association may sue for its own injuries even if its members also have standing.\textsuperscript{256} The plaintiff organizations alleged an informational injury sufficient for standing because the defendants’ violations hindered their efforts to research and report on the compliance of Kentucky dischargers, and to propose and lobby for legislation to limit a facility’s discharge to protect water quality.\textsuperscript{257} The plaintiff organizations relied on \textit{Akins}, where the Court found an informational injury under the Federal Election Campaign Act, and \textit{Public Citizen v. U.S. Department of Justice}, where the Court recognized informational standing pursuant to the Federal Advisory Committee Act (FACA).\textsuperscript{258} The Sixth Circuit concluded that the plaintiff’s informational injury under the CWA was analogous to both cases.\textsuperscript{259}

The Sixth Circuit acknowledged that \textit{Akins} did not specify whether Congress can create standing by simply establishing a statutory right to information or whether there must be an additional plus factor.\textsuperscript{260} Yet, the court concluded that a plus factor existed.\textsuperscript{261} In coming to this conclusion, the Sixth Circuit compared \textit{Akins} to the Court’s decision in

\begin{itemize}
  \item \textsuperscript{254} See id.
  \item \textsuperscript{255} \textit{Am. Canoe}, 389 F.3d at 544.
  \item \textsuperscript{256} Id. (citing Warth v. Seldin, 422 U.S. 490, 511 (1975)).
  \item \textsuperscript{257} Id.
  \item \textsuperscript{258} Id.
  \item \textsuperscript{259} Id.
  \item \textsuperscript{260} Id. at 545 (citing \textit{Akins}, 524 U.S. at 24–25). \textit{Akins} emphasized the importance of information relating to the fundamental right to vote in finding standing. 524 U.S. at 24–25 (“We conclude that . . . the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”).
  \item \textsuperscript{261} See \textit{Akins}, 389 F.3d at 546.
\end{itemize}
In *Public Citizen*, the Court concluded that there was a low threshold for informational standing under the Freedom of Information Act (FOIA) and plaintiffs had to show only that the Agency refused to provide specific records upon request. Accordingly, the Court held plaintiffs seeking information under FACA had standing.

In light of *Public Citizen*, the Sixth Circuit did not interpret *Akins* to require any additional plus factor for standing if a statute grants a plaintiff the right to information that was denied.

To the extent that *Akins* implicitly requires a plus factor for informational standing, such as an additional reason for needing the information, the Sixth Circuit concluded that this demand is satisfied in *American Canoe*. Consequently, the court observed that “it is difficult to imagine what information would not make a citizen a better-informed voter, or would not affect her ability to participate in some workings of government.” The Sixth Circuit therefore determined that the monitoring and reporting information sought by the plaintiffs was similar enough to the information sought in *Akins* and *Public Citizen* to grant standing and find informational injury.

The Sixth Circuit held that the injury alleged by the American Canoe Association and the Sierra Club was sufficient to grant informational standing. Distinguishing the Court’s rejection of pure ideological standing in *Sierra Club v. Morton*, the court in *American Canoe* explained that the plaintiffs did not base their claims solely on an ideological or societal belief. Instead, the Sixth Circuit reasoned that the plaintiffs demonstrated an informational injury because the defendants’ failure to adequately monitor and report their discharges harmed the plaintiffs’ organizational interests. The court supported

---

262 *Id.* at 545–46.
263 See 491 U.S. at 449.
264 See *id*.
265 See *Am. Canoe*, 389 F.3d at 545–46 (stating that plaintiff’s generalized, but not abstract, grievance does not prohibit standing because the defendant’s disobeyed the law “in failing to provide information that the plaintiff’s allegedly need,” and thus it was not the type of grievance “condemned in *Akins*”).
266 *Id*. at 546.
267 *Id*. (citing *Akins*, 524 U.S. at 21; *Public Citizen*, 491 U.S. at 449).
268 *Id*.
269 *Id*.
270 *Id*. (citing *Morton*, 405 U.S. at 739).
271 *Am. Canoe*, 389 F.3d at 546.
its decision with a detailed list of specific harms that the plaintiff suffered as a result of the defendants’ actions.\footnote{Id. (discussing the importance of the requested information to both plaintiff organization’s operations and thus their fulfillment of standing requirements under \textit{Akins}, despite their general interest that environmental laws be faithfully executed.)}

The Sixth Circuit also relied on the Court’s decision in \textit{Havens Realty Corp. v. Coleman}, a Fair Housing Act case, for the principle that injuries to an organization’s operations are cognizable injuries for standing.\footnote{See id. at 547 (citing 455 U.S. 363, 379 (1982)).} The Court in \textit{Havens} found that the plaintiff organization had standing to sue because the defendant owner of an apartment complex harmed the plaintiff by engaging in racial steering practices that injured the plaintiff’s ability to provide housing counseling and referral services to its members.\footnote{455 U.S. at 379.} In \textit{American Canoe}, the Sixth Circuit relied on the reasoning that “[s]uch concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes far more than simply a setback to the organization’s abstract social interest . . . .”\footnote{389 F.3d at 547 (quoting \textit{Havens}, 455 U.S. at 379).} Thus, the \textit{American Canoe} court recognized that the plaintiffs suffered informational injuries as a result of the defendants’ failure to provide information required by the CWA.\footnote{Am. Canoe, 389 F.3d at 546.} Therefore, they had organizational standing because the defendants’ withholding of information hampered their ability to provide important information to their members and engage in legislative reform initiatives.\footnote{Id. at 546–47.}

2. Judge Kennedy’s Concurring and Dissenting Opinion

Judge Cornelia G. Kennedy agreed with the majority that the Sierra Club had representational standing because the defendants’ actions had injured one of its members.\footnote{Id. at 547 (Kennedy, J., concurring in part and concurring in the judgment in part and dissenting in part).} However, she disagreed with the majority’s decision that the American Canoe Association had informational standing.\footnote{Id. Since the Sierra Club had representational standing on behalf of its members, Judge Kennedy saw no need to reach the issue of whether it had informational standing. Id.} Judge Kennedy relied on the D.C. Circuit’s opinion in \textit{Lyng} to question whether an informational injury, without
more, is sufficient to satisfy the injury in fact requirement.\footnote{Id. at 547–48 (citing 943 F.2d at 84–85).} Additionally, she interpreted the Supreme Court’s decision in \textit{Morton} to hold that informational injuries alone are insufficient to satisfy the injury in fact requirement.\footnote{Id. at 548 (Kennedy, J., concurring in part and concurring in the judgment in part, and dissenting in part).} By this reasoning, Judge Kennedy cast doubt upon the broad adoption of an informational standing theory in \textit{American Canoe}.\footnote{See \textit{id}.} Judge Kennedy rejected the majority’s novel interpretation of \textit{Akins} and \textit{Public Citizen} in part because it was broader than that adopted by any other federal circuit court of appeals.\footnote{See \textit{id}.} In creating such a permissive standard, Judge Kennedy observed, the majority ignored the precedent set by \textit{Lujan} and \textit{Morton}, and interpreted \textit{Akins} and \textit{Public Citizen} far more broadly than the Court intended.\footnote{Id.}

Although Judge Kennedy acknowledged that \textit{Akins} and \textit{Public Citizen} found specific injuries based on a lack of information, she distinguished those cases because they involved statutes conferring a specific right to information upon certain individuals and groups.\footnote{See \textit{id}.} By contrast, Judge Kennedy suggested that the CWA does not create a specific right to any information.\footnote{Id. at 549.} Nevertheless, the CWA requires the discharger to file permit compliance information, which is then available as a public record.\footnote{Id.} Judge Kennedy, however, concluded the information rights under the CWA are secondary to its environmental protection goals and are thus significantly different than the rights in \textit{Akins} and \textit{Public Citizen}, where the statutes at issue were explicitly created to provide the voting public with pertinent information.\footnote{Id.}
Judge Kennedy feared that the majority’s interpretation of informational standing rights would encourage future litigation and allow “any other national organization with a passing interest in rivers or the environment [to] prosecute a claim.” Judge Kennedy characterized the plaintiff’s injury as the basic common interest of invested individuals and organizations to “uphold[] the rule of law,” and therefore too broad to allow standing. She distinguished Havens, which implicated broad societal interests because the harms were far more concentrated. Specifically, Judge Kennedy viewed the discriminatory harms to the Havens’ plaintiff organization’s work of promoting minority group access to suitable apartments as more “specific, cognizable, and particular” than the plaintiff organization’s generalized grievance in this case. Judge Kennedy dismissed the plaintiff organization’s need to access information as too general to establish standing because it would apply to any organization with a special interest in preserving the environment.

Finally, Judge Kennedy expressed doubt as to whether the inability to access this information could even be considered an injury. The American Canoe Association alleged that, without the information at issue, they could not research and report on the compliance status of pollutant emitters in Kentucky, propose legislation, or bring litigation to protect water from harmful discharges. In response, Judge Kennedy maintained that there was no evidence that the twelve alleged reporting violations impeded the plaintiff organization’s work with its members or legislative proposals, particularly in light of the fact that the plaintiffs’ complaint identified 405 violations. Therefore, Judge Kennedy concluded the American Canoe Association’s alleged injury was not sufficiently concrete to satisfy the injury in fact requirement.

The Ninth Circuit’s subsequent decision in Wilderness Society substantially supports Judge Kennedy’s narrow interpretation of Akins and

290 Id.
291 See id.
292 See id. at 549–50.
293 Id. at 550 (Kennedy, J., concurring in part and concurring in the judgment in part, and dissenting in part).
294 Am. Canoe, 389 F.3d at 549–50.
295 Id. at 550.
296 Id.
297 See id. (“[I]f the organization or any of its members were directly injured by the pollution in some concrete fashion (similar to the direct injury that Sierra Club can and did claim), the organization could easily use the 405 violations to provide the basis for a lawsuit.”).
298 Id.
Public Citizen as limited to statutes granting the public an explicit right to specific information.299

C. Wilderness Society v. Rey: The Ninth Circuit Interprets Summers to Restrict Procedural Standing to Concrete Injuries

In Wilderness Society, the Ninth Circuit interpreted the Supreme Court’s Summers decision to restrict procedural standing to only those plaintiffs who can demonstrate a concrete injury.300 The Ninth Circuit restricted the scope of informational standing to prevent plaintiffs from using it to avoid Summers’s limitation of procedural standing.301 The Ninth Circuit implicitly used a limited interpretation of Akins’s recognition of informational standing for suits brought under statutes that explicitly provide the public with the right to particular information from the government.302 The Ninth Circuit further concluded that, in light of Summers, when an environmental statute only promotes public participation and does not explicitly provide the public with a right to information about certain government projects, it should be read narrowly.303 Otherwise a broad doctrine of informational standing would allow plaintiffs to circumvent Summers’s principle that violations of a statute are not injuries in fact unless they are connected to a concrete project or result in an informational harm.304

The Forest Service Decisionmaking and Appeals Reform Act (Appeals Reform Act) requires the Secretary of Agriculture, acting through the U.S. Forest Service (Forest Service), to create notice and comment procedures for proposed actions related to “projects and activities implementing land and resource management plans.”305 Additionally, the Appeals Reform Act compels the Secretary to adjust the appeals process for decisions regarding such projects.306 In 2003, the Forest Service restricted, through its regulations, the range and accessibility of its notice, comment, and appeals procedures under the Appeals Reform Act.307 Various environmental organizations, including The Wilderness Society (TWS), filed facial challenges to three portions of the new regu-

299 See infra notes 300–354 and accompanying text.
300 622 F.3d at 1260.
301 See id.
302 See id. at 1258–60; infra notes 329–338 and accompanying text.
303 See Wilderness Soc’y, 622 F.3d at 1259–60.
304 Id. at 1260.
306 16 U.S.C. § 1612(a); Wilderness Soc’y, 622 F.3d at 1253.
307 Wilderness Soc’y, 622 F.3d at 1253.
Specifically, TWS alleged the regulations violated the Appeals Reform Act by inappropriately restricting the notice, comment, and appeals processes. In 2006, the court ruled in favor of TWS and granted it declaratory and injunctive relief.

On appeal to the Ninth Circuit, the government argued the plaintiffs did not have standing because of Summers. The trial court, prior to the Summers decision, found that TWS’s deprivation of right to notice and comment was an injury giving rise to procedural standing. The court also held that TWS had standing because the Forest Service’s withholding of notice regarding its actions constituted an informational injury. On appeal, the Forest Service argued the plaintiffs lacked procedural standing in light of Summers’s holding that mere denial of a procedural right without an additional harm is inadequate for standing. Moreover, the Forest Service contended that 36 C.F.R. section 215.20(b) remedied the informational injuries upon which plaintiffs claimed standing.

In response to the government’s argument that the Summers decision narrowed standing law, the plaintiffs made two separate arguments depending upon the regulation at issue. Regarding its challenge to section 215.12(f), TWS argued it had standing because it tied the challenge to a particular project at a specific location, and one of its members suffered an aesthetic or recreational injury cognizable pursuant to the Supreme Court’s Laidlaw decision. By contrast, while TWS acknowledged it did not connect its challenges to sections 215.20(b) and 215.13(a) to a particular project or application, they argued that

---

308 Id.
309 Id.
310 Id. at 1253–54. Initially, because TWS failed to allege a waiver of sovereign immunity in its complaint, the trial court could not grant a remedy. Id. at 1254. However, the court granted declaratory and injunctive relief after allowing TWS to amend its complaint. Id.
311 Id. at 1255.
312 Id.
313 Wilderness Soc’y, 622 F.3d at 1255.
314 Id. (citing Summers, 555 U.S. at 496).
315 Id. Section 215.20(b) exempts decisions made by the Secretary or Under Secretary from the notice, comment, and appeals procedures and states that any decision of the Secretary or Under Secretary is final. Id. at 1253.
316 Id.
317 Id. at 1255–56. Section 215.12(f) exempts from appeal those projects that the Forest Service categorically excludes from certain NEPA filing requirements based on a finding that they do not have significant environmental impacts. Id. at 1253–54.
318 Id. at 1255–56 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)).
Summers did not govern because it did not define informational injury. Additionally, TWS asserted a broader theory of informational injury from its inability to participate in the notice and comment process, as well as the Forest Service’s procedure for appeal and decision-making. The Ninth Circuit observed that if it accepted TWS’s broader approach to informational standing then the Forest Service’s standing challenge would fail for each of the three regulations.

The Ninth Circuit concluded that TWS failed to prove that its member suffered recreational and aesthetic injuries sufficient to challenge section 215.12(f). The court acknowledged that Summers did not eliminate standing for aesthetic and recreational injuries. However, the Ninth Circuit explained that proving an aesthetic or recreational injury required the plaintiffs to demonstrate that it’s member (Anderson) “had repeatedly visited an area affected by a project, that he had concrete plans to do so again, and that his recreational or aesthetic interests would be harmed if the project went forward without his having the opportunity to appeal.” Although Anderson demonstrated he repeatedly visited the Umpqua National Forest and even authored a hiking book about the area, the court concluded that his general intention to return to the national forest was too vague to confer standing. Specifically, the Ninth Circuit found the asserted interest vague because, even if Anderson planned travel to the Umpqua National Forest in the future, he had not shown sufficient evidence that he would likely visit an area affected by the Forest Service’s projects. Even if Anderson established sufficiently concrete plans to return to the forest, he failed to allege that his recreational interests would be harmed. Thus, the Ninth Circuit concluded that TWS failed to demonstrate a recreational or aesthetic injury to Anderson sufficient to establish standing to challenge section 215.12(f).

Most importantly for the purposes of this Article, the Ninth Circuit determined that Summers foreclosed TWS’s broad theory of informa-

319 Wilderness Soc’y, 622 F.3d at 1255.
320 Id.
321 Id.
322 Id. at 1257.
323 Id. at 1256.
324 Id.
325 Wilderness Soc’y, 622 F.3d at 1256.
326 Id.
327 Id. at 1257.
328 Id.
tional standing. Prior to the *Summers* decision, the trial court concluded that the plaintiffs suffered an informational injury because the Forest Service’s regulations foreclosed their opportunity to comment and appeal, and they “need not assert that any specific injury will occur in any specific national forest that their members visit.” TWS acknowledged that because *Summers* “expressly held that deprivation of procedural rights, alone, cannot confer Article III standing,” the trial court’s reasoning was no longer valid. On appeal, TWS relied on “the district court’s finding that it suffered informational injury resulting from the violation of the obligation to provide notice” pursuant to section 215.20(b), which exempted decisions of the Secretary and Under Secretary of Agriculture from otherwise applicable notice requirements. Furthermore, TWS argued a broader theory of informational injury based on its inability to appeal under each of the three Forest Service provisions. The Ninth Circuit rejected TWS’s informational standing arguments because it concluded that *Summers*’ “discussion of procedural injury casts serious doubt on the applicability of informational injury here,” although the Supreme Court had not expressly addressed that issue. Because the Appeals Reform Act provides a specific right to information similar to FOIA, the Ninth Circuit was “not convinced that the doctrine of informational injury can be applied to the statutory framework of the [Appeals Reform Act], regardless of the specific provision.”

After reviewing *Akins* and other decisions supporting informational standing, the Ninth Circuit observed that the Appeals Reform Act “must grant a right to information capable of supporting a lawsuit” in order to obtain standing for an informational injury. The court then demonstrated that the notice and appeal provisions in the Appeals Reform Act did not establish a public right to information, but instead simply bestowed a right to participate in the process.

---

329 See id. at 1258, 1260.
330 Id. at 1256 (quoting unpublished trial court opinion).
331 Wilderness Soc’y, 622 F.3d at 1257–58.
332 See id. at 1255.
333 See id. at 1258 (internal quotation omitted).
334 Id. at 1253.
335 Id. at 1258.
336 Id.
338 Wilderness Soc’y, 622 F.3d at 1258.
339 Id. at 1259.
340 Id.
tionally, the court clarified that “although an appeal might result in the dissemination of otherwise unavailable information, the statute does not contemplate appeals for this purpose, but to allow the public an opportunity to challenge proposals with which they disagree.”

Accordingly, the Ninth Circuit concluded that although the rights to public notice and appeal inherently provide access to information, this is not the same as a right to information.

The Ninth Circuit agreed with the Seventh Circuit’s decision in *Bensman v. United States Forest Service*, which “declined to find an explicit right to information in the text of the [Appeals Reform Act].” *Bensman* distinguished the informational statutes at issue from the Appeals Reform Act. According to *Bensman*, FOIA and FACA are statutes with the sole goal of providing information to the public. Conversely, the goal in the Appeals Reform Act is “to increase public participation in the decision-making process” and as a result, the court found that the Appeals Reform Act does not provide the same right to information. Although the *Bensman* decision only addressed whether the appeal provisions of the Appeals Reform Act established a right to information, the Ninth Circuit in *Wilderness Society* found the Seventh Circuit’s analysis “equally applicable” in concluding that Congress did not intend to provide a right to information when it enacted the Appeals Reform Act’s notice requirement.

Furthermore, the Ninth Circuit interpreted the Supreme Court’s *Summers* decision to implicitly bar the *Wilderness Society*’s plaintiffs’ broad theory of informational standing. The Ninth Circuit reasoned that TWS’s determination of informational injuries would effectively eliminate *Summers*’s core tenet that procedural rights plaintiffs must demonstrate a concrete injury apart from their procedural injury.

One of the main difficulties the Ninth Circuit had with TWS’s argument was that it characterized all procedural deprivations as informational losses. If this argument were adopted, the Ninth Circuit be-

---

341 *Id.*
342 *See id.*
343 408 F.3d 945 (7th Cir. 2005).
344 *Wilderness Soc’y*, 622 F.3d at 1259 (agreeing with *Bensman*, 408 F.3d at 958).
345 *See* 408 F.3d at 958.
346 *Id.*
347 *See id.*
348 *See* *Wilderness Soc’y*, 622 F.3d at 1259–60.
349 *Id.* at 1260.
350 *See id.*
351 *Id.*
lied that it would render *Summers’s* procedural injury doctrine meaningless.\(^{352}\) The Ninth Circuit, therefore, refused to use the theory of informational injury in the framework of procedural rights as recognized in the Appeals Reform Act.\(^{353}\) Thus, the Ninth Circuit in *Wilderness Society* limited informational standing to statutes that explicitly create a public right to information, and rejected the concept of informational injury for environmental statutes that merely encourage public participation through notice or appeal provisions.\(^{354}\)

V. **CONGRESS’S AUTHORITY TO AUTHORIZE INFORMATIONAL STANDING: A VINDICATION OF JUSTICE KENNEDY?**

Informational standing is a statutory creation, such as in the Freedom of Information Act, that establishes a public right to information.\(^{355}\) There is no common law analog to informational standing.\(^{356}\) Thus, two questions arise. First, are there any constitutional barriers to Congress creating informational standing rights? Second, assuming Congress has some authority to establish informational standing, how clearly must Congress specify whether a plaintiff has a right to particular information?

Justice Kennedy was the only justice to join the majority in *Lujan, Summers*, and *Akins*;\(^{357}\) therefore, any attempt to find a consistent line of reasoning in those cases must begin and end with Justice Kennedy.\(^{358}\) Justice Kennedy’s concurring opinion in *Lujan* offers the most insight into whether Congress may, through statutory rights, recognize injuries that would not have satisfied common law requirements.\(^{359}\) This opinion may enlarge, albeit marginally, the definition of concrete injury under Article III standing requirements.\(^{360}\) One may arguably infer

---

\(^{352}\) Id.

\(^{353}\) Id.

\(^{354}\) *Wilderness Society*, 622 F.3d at 1257–60.

\(^{355}\) See supra notes 93–144, and accompanying text.

\(^{356}\) See supra notes 104–108 and accompanying text (stating that plaintiffs have standing to seek information pursuant to statutory mandates).


\(^{358}\) See supra notes 119–144, 177–181 and accompanying text; *infra* notes 362–394 and accompanying text.

\(^{359}\) See *Solimine*, *supra* note 13, at 1029–30. One broad interpretation of the case is that it “might suggest that Congress can recognize injuries that would not have satisfied common law requirements, at least when statutory, as opposed to constitutional, rights are at issue.” Id. at 1030.

\(^{360}\) See *Lujan*, 504 U.S. at 578; id. at 580 (Kennedy, J., concurring in part and concurring in the judgment in part); *infra* notes 362–415 and accompanying text.
from Justice Kennedy’s concurring opinions in *Lujan* and *Summers*, as well as the *Akins* decision, that the Supreme Court is likely to give some deference to Congress if it establishes an explicit public right to information along with a relevant citizen suit provision.\(^{361}\) At the same time, however, courts are less likely to interpret notice or appeal provisions like those in *Wilderness Society* to establish an implicit right to informational standing.

**A. To What Extent May Congress Affect Constitutional Standing Requirements?**

There has been considerable confusion and controversy regarding the extent to which Congress may enact statutes that recognize injuries that would not have satisfied common law requirements.\(^ {362}\) This controversy extends to whether Congress may even enlarge the definition of concrete injury under Article III constitutional standing requirements.\(^ {363}\) Justice Scalia has argued that Article III and broader separation of powers principles limit the authority of Congress to grant standing to plaintiffs who lack a concrete injury.\(^ {364}\) This would prevent federal courts from interfering with the President’s Article II authority to enforce federal laws.\(^ {365}\) Nevertheless, Justice Scalia in *Lujan* acknowledged that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.”\(^ {366}\) Justice Blackmun and many commentators have argued that Justice Scalia’s approach to standing, however, has the practical effect of

---

\(^ {361}\) *See* *Summers*, 555 U.S. at 501 (Kennedy, J., concurring in part and concurring in the judgment) (stating that nothing in the statute shows an intent to convey anything more than a procedural right); *Akins*, 524 U.S. at 12 (discussing Congress’s constitutional power to authorize the right to sue in federal courts); *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (discussing Congress’s power to define injuries).

\(^ {362}\) *See* *Yackle*, *supra* note 12, at 382–97 (discussing Congress’s authority to modify prudential standing rules and the controversy regarding whether Congress has authority to affect core constitutional standing requirements); Solimine, *supra* note 13, at 1028–31 (examining different interpretations of congressional authority to alter standing). Whether a statute grants standing is a separate question from whether a statute establishes a private right of action to sue in federal courts, although these two issues intertwine in some cases. *See* *Yackle*, *supra* note 12, at 386.

\(^ {363}\) *See* *Akins*, 524 U.S. at 36 (Scalia, J., dissenting); *Lujan*, 504 U.S. at 576–78; Scalia, *supra* note 12, at 894–97.

\(^ {364}\) *See* *Lujan*, 504 U.S. at 577; Scalia, *supra* note 12, at 890–93; Solimine, *supra* note 13, at 1049 (arguing that Justice Scalia and Chief Justice Roberts believe that “Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones”).

\(^ {366}\) 504 U.S. at 578.
aggrandizing executive authority and undermining Congress’s ability to ensure that the executive branch faithfully enforces the law.\textsuperscript{367} Some commentators have sought a middle ground that respects both the executive and congressional role in making and enforcing federal law, as well as a limited but appropriate role for judicial review.\textsuperscript{368} Justice Kennedy’s concurring opinion in \textit{Lujan} suggests that he may take such a position with respect to Congress’s authority to modify standing requirements beyond traditional common law requirements for a concrete injury.\textsuperscript{369}

The Supreme Court’s analysis of whether Congress has the authority to transcend traditional common law injuries, or even normal constitutional standing requirements, depends in part upon the type of statute at issue.\textsuperscript{370} Based on parallels to common law traditions in England and early American federal statutes, the Court has recognized standing where a statute authorizes private persons to bring suit on behalf or as an agent of the United States.\textsuperscript{371} By contrast, the Court in \textit{Lujan} limited standing for a citizen suit statute that authorized any person to sue the government for alleged non-enforcement or under-enforcement of an environmental law, finding that Article III requires all plaintiffs in federal courts to demonstrate an injury in fact even if

\textsuperscript{367} \textit{Id.} at 602 (Blackmun, J., dissenting) (noting that the “principal effect” of Justice Scalia’s majority opinion’s restrictive approach to standing was “to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates”); see Brown, \textit{supra} note 13, at 283; Elliott, \textit{supra} note 44, at 489–90; Solimine, \textit{supra} note 13, at 1050 (“With respect to the argument that a broad reading of Article III standing improperly limits executive power under Article II, some scholars contend that it does not give sufficient weight to the balance, as opposed to the separation, of powers.”).

\textsuperscript{368} Solimine, \textit{supra} note 13, at 1052. Professor Solimine contends that liberal and conservative critiques both have persuasive arguments that can be reconciled. \textit{Id.} “The liberal critique enhances the power of the judiciary and that of private parties empowered by Congress, at the expense of representative government in general and of the executive branch in particular.” \textit{Id.} Conversely, “[t]he conservative critique enhances the power of the President and in theory encourages Congress to exercise its nondelegable oversight and appropriations functions, at the expense of giving space for the executive branch to underenforce or violate federal law.” \textit{Id.}

\textsuperscript{369} \textit{See Lujan}, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment).

\textsuperscript{370} \textit{Id.} at 576–77 (majority opinion) (discussing whether a specific statute conveys standing); \textit{id.} at 580 (Kennedy, J., concurring in part and concurring in the judgment) (discussing Congress’s power to define injuries in statutes).

\textsuperscript{371} \textit{See Vi. Agency of Natural Res. v. United States ex rel. Stevens}, 529 U.S. 765, 773–78 (2000) (discussing historical background and upholding \textit{qui tam} statute that offered a bounty to a prevailing plaintiff); Solimine, \textit{supra} note 13, at 1037–41 (discussing controversy over whether early \textit{qui tam} statutes are precedent to allow standing where citizen acts as agent of government).
Congress attempts to waive that requirement.\footnote{See Lujan, 504 U.S. at 578; Solimine, supra note 13, at 1028–30.} Conversely, \textit{Akins} implies that Congress has the authority to broaden standing requirements, at least for statutes giving the public the right to sue to obtain information from the government.\footnote{See Akins, 524 U.S. at 19–20; Solimine, supra note 13, at 1050 (“\textit{FEC v. Akins}, seem[s] to evince a more generous reading of congressional power to influence standing.”).} It is also important to observe that Congress frequently wants to limit standing beyond the base limits of Article III in order to prevent persons with minimal injuries from filing suit.\footnote{Thompson v. N. Am. Stainless, 131 S. Ct. 863, 869–70 (2011) (concluding Title VII’s limitation of suits to a “person claiming to be aggrieved” under 42 U.S.C. section 2000e-5(f) includes individual allegedly fired in retaliation for his fiancée’s filing employment discrimination suit, but not to stockholder who might be marginally economically affected by alleged discrimination and who would meet Article III injury requirement).} Accordingly, the Supreme Court has used the “zone of interests” test to deny standing to plaintiffs whose injuries are only marginally related to a statute’s purposes.\footnote{Clarke v. Sec. Indus. Ass’n, 479 U.S. 388, 399 (1987) (explaining that the “zone of interests” test denies review “if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit”).}

Justice Kennedy’s concurring opinion in \textit{Lujan} is probably the most illuminating opinion regarding the authority of Congress to modify common law injury requirements, or even constitutional standing requirements, for a concrete injury. Justice Kennedy agreed with the majority that a plaintiff must demonstrate a concrete injury and that the affiants had failed to do so because they were uncertain as to when they would return to the project sites.\footnote{\textit{Lujan}, 504 U.S. at 579.} He suggested, however, that “[a]s Government programs and policies become more complex and farreaching,” courts should perhaps expand the definition of a concrete injury to include new rights of action that do not correlate to rights recognized traditionally in common law.\footnote{See id. at 580.} Justice Kennedy reasoned that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”\footnote{\textit{Id}.} He tempered that broad pronouncement of congressional authority with the reservation that “[i]n exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”\footnote{\textit{Id}.}
While proclaiming that Congress had some discretionary authority to expand the definition of injuries beyond common law limits, Justice Kennedy acknowledged that separation of powers concerns place limits on the scope of standing.\textsuperscript{380} In particular, he observed that “the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.”\textsuperscript{381} In \textit{Lujan}, Justice Kennedy concluded that the citizen suit provision of the Endangered Species Act was problematic to the extent that it purported to extend standing to “any person,” but did not define what type of injury is caused to citizen litigants by the government’s violation of the Act or explain why “any person” is entitled to sue the government to challenge a procedural violation that does not cause a concrete injury in fact to the plaintiff.\textsuperscript{382} Justice Kennedy believed that the concrete injury requirement is not just a formality; rather, it ensures the continuance of the adversarial process by necessitating that both parties have a stake in the outcome.\textsuperscript{383} Therefore, “the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”\textsuperscript{384} 

Justice Kennedy’s argument in \textit{Lujan} is consistent with the Court’s subsequent decision in \textit{Akins}—that it would deny standing for generalized injuries if the harm is both widely shared and also of “an abstract and indefinite nature—for example, harm to the ‘common concern for obedience to law.’”\textsuperscript{385} Thus, it was arguably consistent for Justices Kennedy and Souter to concur as they did in \textit{Lujan} and join the majority opinion in \textit{Akins}.\textsuperscript{386} In his short concurring opinion in \textit{Summers}, Justice

\textsuperscript{380} See id. at 580–81.
\textsuperscript{381} Id. at 581.
\textsuperscript{382} \textit{Lujan}, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).
\textsuperscript{383} Id. at 581.
\textsuperscript{384} Id.
\textsuperscript{385} See \textit{Akins}, 524 U.S. at 23 (quoting L. Singer & Sons v. Union Pac. R. Co., 311 U.S. 295, 303 (1940)); \textit{Lujan}, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in the judgment) (stating that a plaintiff must have a concrete injury to have standing, that a mere interest in the proper administration of justice is insufficient for standing, and that there is no numerical limit on how many persons may be concretely injured by a challenged action).
\textsuperscript{386} See \textit{Akins}, 524 U.S. at 13 (listing Justices Kennedy and Souter as joining the majority opinion); \textit{Lujan}, 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment).
Kennedy echoed his views from his *Lujan* concurrence and, therefore, it seems likely that his views have not significantly changed.\(^{387}\)

Justice Kennedy rejected standing in *Lujan* and *Summers* in part because Congress had not defined what constituted an injury sufficient for standing in the relevant statutes.\(^{388}\) He suggested, however, that the plaintiffs’ injuries might have been sufficient if Congress had established a statutory framework consistent with those injuries.\(^{389}\) By contrast, Justice Scalia’s majority opinions in *Lujan* and *Summers* ridiculed the plaintiffs’ injuries as constitutionally deficient because the plaintiffs could not specify when or where they would be injured.\(^{390}\) It is doubtful that a more carefully drafted statute in either case would have persuaded Justice Scalia that the plaintiffs had constitutionally cognizable injuries.\(^{391}\) In his *Akins* dissent, Justice Scalia argued that generalized injuries to a large portion of the public are inherently unsuitable for judicial resolution, and must be addressed by the political branches of government.\(^{392}\) On the other hand, Justice Kennedy joined the majority opinion in *Akins*, which concluded that generalized grievances to a large segment of the public are justiciable if Congress specifies that a class of individuals has the right to particular information or if a large group of individuals suffers at least a small concrete harm.\(^{393}\) In light of *Akins* and his concurring opinions in *Lujan* and *Summers*, Justice Kennedy appears to believe that Congress has some power to define or redefine what constitutes a cognizable concrete injury under Article III, although Congress may not confer universal standing without defining the requisite injury.\(^{394}\)

**B. How Clearly Must Congress Specify Whether a Plaintiff Has a Right to Particular Information?**

While many individual statutes affect standing questions, Congress rarely attempts to enact comprehensive legislation that would significantly affect standing doctrine or the jurisdiction of Article III

---

\(^{387}\) See supra notes 177–181 and accompanying text.

\(^{388}\) See *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment); supra notes 177–181 and accompanying text.

\(^{389}\) See supra notes 177–181 and accompanying text.

\(^{390}\) See *Summers*, 555 U.S. at 495; *Lujan*, 504 U.S. at 563–64.

\(^{391}\) See Solimine, supra note 13, at 1049 (arguing that Justice Scalia and Chief Justice Roberts believe that “Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones”).

\(^{392}\) See *Akins*, 524 U.S. at 30, 36–37 (Scalia, J., dissenting).

\(^{393}\) See id. at 13, 24–25 (majority opinion).

\(^{394}\) See Solimine, supra note 13, at 1050.
In reaction to several restrictive standing decisions by the Supreme Court in the 1970s, some liberal Democratic members of the Senate Judiciary Committee introduced legislation that would have broadly defined both who may sue and the causation requirement; however, none of the proposed legislation was enacted. Some commentators have suggested that federal courts would seriously question the constitutionality of congressional statutes that broaden standing and thereby partially overrule restrictive Supreme Court decisions. Nevertheless, federal courts frequently, if not always, give some weight to legislative intent in determining the standing of potential plaintiffs.

Justice Kennedy’s concurring opinion in *Lujan* reveals how the Court is likely to evaluate Congress’s authority to modify the concrete injury requirement for standing. His opinion suggests that he would defer to congressional intentions if Congress carefully drafted a statute that explains which individuals are suitable plaintiffs and which types of harms constitute a sufficient injury for standing. In response to Justice Kennedy’s opinions, Professor Solimine asked a critical standing question: “How do we know a statute meets Justice Kennedy’s test?” To address this question, the statutory text, structure, and legislative history will have to be closely examined. Relying on Justice Kennedy’s approach to standing in *Lujan*, Professor Solimine argues that the Court’s decisions in *Lujan* and *Akins* “seem more reconcilable than thought by some scholars, given that the citizen suit statute in the latter

---

395 See id. at 1052.
396 Id. at 1052–53; see also Larry W. Yackle, Reclaiming the Federal Courts 66, 82–88 (1994) (discussing the positive and negative aspects of proposed legislation to expand standing rights as well as how legislation should ideally be phrased).
397 See Heather Elliott, Congress’s Inability to Solve Standing Problems, 91 B.U. L. Rev. 159, 190–92, 226 (2011) (questioning whether the Supreme Court would allow Congress to modify standing doctrine and whether congressional efforts would improve problems with the standing doctrine).
398 See Solimine, supra note 13, at 1053–56 (arguing that while federal courts should give some deference to Congress in deciding standing issues, they should not abdicate judicial responsibility to limit congressional authority if necessary).
399 See supra notes 362–394 and accompanying text.
400 See *Lujan*, 504 U.S. at 580; Solimine, supra note 13, at 1055 (discussing “Justice Kennedy’s concurring opinion in *Lujan*, which suggested that carefully drawn congressional statutes addressing standing should be upheld as constitutional”).
401 See Solimine, supra note 13, at 1055 (footnote omitted).
402 Id.
case had different language and a richer jurisprudential meaning giving context to the operative language.”

Another principle that may guide the Court in interpreting the scope of statutory standing rights is that Congress may override the Court’s prudential standing rules, provided the statute does so expressly. This requirement probably does not necessitate the level of specificity required by the clear statement rule of statutory construction. The principle that express statutory language is necessary to override the Court’s prudential standing rules could be extended to suggest that Congress may enlarge Article III standing rights at the margin by, for example, expressly establishing a statutory injury not recognized at common law.

An important question for this Article is whether the environmental statutes at issue in American Canoe and Wilderness Society are more like the citizen suit statute in Lujan or the explicit information statute in Akins. The notice and appeal provisions in Wilderness Society and the monitoring and reporting obligations in American Canoe are more like the vague “any person” language in Lujan than the explicit public information statute at issue in Akins. Because the Akins decision found informational standing rights in a statute that clearly granted voters an

---

403 See id. at 1056. In a footnote, Professor Solimine observes, “[i]t also cannot go unnoticed that Justice Kennedy concurred in both cases, and even Justice Scalia, dissenting in Akins, did not argue that the majority was overruling Lujan.” Id. at 1056 n.182. While Lujan and Akins can be reconciled to some extent in light of Justice Kennedy’s support in both cases, it is significant that Justice Kennedy’s concurrence in Lujan expressed significant reservations with Justice Scalia’s majority opinion. See supra notes 388–394 and accompanying text. Justice Scalia clearly believed that the Akins majority opinion was philosophically at odds with his view of standing as an essential component of separation of powers principles that he had articulated in Lujan and in his 1983 law review article. See supra notes 145–150 and accompanying text.


405 See Yackle, supra note 12, at 386 n.489 (commenting that the Court often interprets section 702 of the APA, which gives standing to those within the zone of interests, based on precedent construing that section rather than the strict statutory text).

406 See Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

407 See Akins, 524 U.S. at 13 (discussing a group of voters challenging the Federal Election Campaign Act); Lujan, 504 U.S. at 557–58 (discussing a challenge to a rule promulgated under the Endangered Species Act); Wilderness Soc’y, 622 F.3d at 1253 (discussing challenge to the Forest Service Decisionmaking and Appeals Reform Act); Am. Canoe, 389 F.3d at 538 (discussing violations of the Clean Water Act).

408 See Akins, 524 U.S. at 20; Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (discussing that the Endangered Species Act does not establish an injury in “any person” when the statute is violated); Wilderness Soc’y, 622 F.3d at 1259; Am. Canoe, 389 F.3d at 539.
affirmative right to information, the Ninth Circuit in *Wilderness Society* was probably correct to conclude that Congress must be explicit in granting the public the right to certain information if it intends to create an informational injury and informational standing. While giving plaintiffs informational standing might assist Congress in enforcing notice and appeal provisions, it was not unreasonable for the Ninth Circuit to require more explicit rights conferring language when determining whether plaintiffs have Article III standing. Based on his concurring opinions in *Lujan* and *Summers*, both of which demanded that Congress more explicitly define the injuries for citizen suit standing, Justice Kennedy probably would have agreed with the *Wilderness Society* decision. The decision suggested that Congress must use explicit language to establish public informational standing rights and that general notice and appeal provisions in a statute designed to promote public participation do not create a right to informational standing. As a result, Justice Kennedy probably would have disagreed with the majority in *American Canoe*, which held that the monitoring and public information requirements in the Clean Water Act are sufficiently clear to demonstrate that Congress intended to create a public right to information establishing standing rights. Instead, Justice Kennedy would have likely agreed with Sixth Circuit Judge Kennedy’s dissenting view that only explicit congressional authorization can confer informational standing rights.

**Conclusion**

In its recent *Wilderness Society* decision, the Ninth Circuit addressed the difficult question of when a statute may establish a right to informa-

410 See *Wilderness Soc’y*, 622 F.3d at 1259.
411 See id. at 1258–60.
412 See *Summers*, 555 U.S. at 500 (Kennedy, J., concurring in part and concurring in the judgment); *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment); *Wilderness Soc’y*, 622 F.3d at 1259.
413 See supra notes 300–394 and accompanying text.
414 Compare *Wilderness Soc’y*, 622 F.3d at 1259 (holding that Congress’s purpose for the statute was not to create a right to information but to allow public opportunity for comment), with *Am. Canoe*, 389 F.3d at 542 (holding that lack of information caused an injury “beyond common concern for obedience to law” and therefore established an injury sufficient for standing).
415 See *Am. Canoe*, 389 F.3d at 550 (Kennedy, J., concurring in part and concurring in the judgment in part and dissenting in part); supra notes 177–181, 362–394 and accompanying text.
tional standing. The D.C. Circuit and the Sixth Circuit previously reached different conclusions about whether environmental statutes promoting public participation or requiring environmental assessments create a right to informational standing. The Sixth Circuit broadly interpreted informational standing requirements by relying upon Akins, even though the rights provided in the Clean Water Act differed from the statute at issue in Akins. By contrast, in Wilderness Society, the Ninth Circuit interpreted Summers’s narrowing of procedural rights standing as implicitly narrowing standing rights in general, and concluded that general notice and appeal provisions that do not establish an explicit informational right are insufficient to establish informational standing.

The Wilderness Society decision and the American Canoe decision indirectly raise the broader question of when Congress may modify common law injury, or even Article III constitutional standing, requirements for a concrete injury. In turn, that question raises broader separation of powers issues. Justice Kennedy’s concurring opinion in Lujan, which he recently echoed in his concurring opinion in Summers, represents the ideological middle ground on this issue. His vote is likely to be the key vote in future cases unless the Court’s current ideological composition changes. Since both his concurring opinions in Lujan and in Summers sought explicit congressional language defining types of injuries sufficient for standing, it is also likely that Justice Kennedy would demand explicit language defining informational injuries. Thus, he would likely agree with the Ninth Circuit in Wilderness Society that general language establishing appeal and notice rights is insufficient to create a public right to information, unlike the explicit

---

416 See Wilderness Soc’y, 622 F.3d at 1259–60; supra notes 300–354 and accompanying text.
417 Compare supra notes 200–237 and accompanying text (examining the D.C. Circuit’s decisions in several standing cases), with supra notes 242–277 and accompanying text (examining the Sixth Circuit decision regarding standing in American Canoe).
418 See supra notes 238–299 and accompanying text.
419 See Wilderness Soc’y, 622 F.3d at 1256–58; supra notes 300–354 and accompanying text.
420 See Wilderness Soc’y, 622 F.3d at 1259; Am. Canoe, 389 F.3d at 542–46; supra notes 362–394 and accompanying text.
422 See supra notes 182–186 and accompanying text.
423 See supra notes 362–394 and accompanying text.
424 See supra notes 69–76, 177–181 and accompanying text.
425 See supra notes 362–394 and accompanying text.
rights-conferring language at issue in Akins. Because he typically demands explicit language from Congress to modify traditional common law standing requirements for a concrete injury, Justice Kennedy probably would have agreed with Judge Kennedy’s dissenting opinion in American Canoe.

While the decision in Wilderness Society relied on the implications of Summers to limit Akins and informational standing, the Ninth Circuit would have been better advised to examine Justice Kennedy’s concurring opinions in Lujan and Summers as a guide to the Supreme Court’s approach to when Congress may confer standing rights. According to Justice Kennedy, Congress has some discretion to establish standing rights beyond traditional common law standing requirements for a concrete injury as long as it carefully defines the injury and the class of persons entitled to sue. Justice Kennedy, however, also recognized that Article III limits Congress’s authority to grant standing to “any person” to challenge the government’s failure to observe its legal obligations.

While its decision in Wilderness Society was a defeat for environmental groups seeking to expand informational standing rights, the Ninth Circuit’s reasoning left open the possibility that Congress could explicitly grant informational standing rights to the public, as it did in Public Citizen and Akins. The Ninth Circuit reached the right result in requiring explicit congressional authorization for informational standing, even though it should have focused on Justice Kennedy’s approach to standing rights instead of Justice Scalia’s. Despite Justice Scalia’s philosophical reservations about citizen suit statutes and congressional interference with the executive branch’s Article II authority, Justice Kennedy’s concurring opinions in Lujan and Summers suggest that Congress has significant authority to expand citizen suit standing as long as it carefully defines the statutory injuries.

---

426 See supra notes 300–415 and accompanying text.
428 See supra notes 362–415 and accompanying text.
429 See Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment); supra notes 362–394 and accompanying text.
430 See Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment); supra notes 362–394 and accompanying text.
431 See Wilderness Soc’y, 622 F.3d at 1259 (discussing that Congress chose not to confer a right to information, while leaving open the possibility that such a right could be conferred); supra notes 93–150, 300–354 and accompanying text.
432 See supra notes 304–358, 395–415 and accompanying text.
433 See supra notes 145–150 and accompanying text.
434 See supra notes 362–415 and accompanying text.
HONEY, IT’S ALL THE BUZZ: REGULATING NEIGHBORHOOD BEEHIVES

PATRICIA E. SALKIN*

Abstract: Beekeeping’s popularity has surged in recent years, perhaps culminating in the introduction of the first ever White House beehive. Local apiaries provide a wide variety of benefits to communities, ranging from pollination services for gardens to producing honey that can be used in a wide array of foods and products. Apiaries are not always welcome in a community, however, perhaps because of their potential to cause a nuisance, or to harm crops or people. Although beekeeping regulation implicates both state and federal concerns, a number of localities have developed unique and practical regulations that promote backyard beekeeping, while maximizing its benefits and minimizing its potential harm. This Article examines those regulations with the hope of aiding land use regulators in developing strategies to promote beekeeping activities.

Introduction

Urban beekeeping, along with other types of sustainable development and green building, has generated quite a buzz in recent years. Since 2009, the White House has maintained a hive of 70,000 bees that produce honey for the presidential kitchen and pollinate the vegetables in First Lady Michelle Obama’s kitchen garden.1 Chicago has its own city-managed apiaries at City Hall, in both city zoos, and in the Garfield Park Conservatory.2 Other cities across the country, including New

© 2012, Patricia E. Salkin.

* Raymond & Ella Smith Distinguished Professor of Law and Associate Dean and Director of the Government Law Center, Albany Law School. The author is grateful to GLC Senior Staff Attorney Amy Lavine and Albany Law School students Laura Bomyea ’13, Katie Valder ’13, Zach Kansler ’12, and Susan Herendeen ’13 for their research assistance.


York, Denver, Milwaukee, and Santa Monica, have recently legalized beekeeping.³

Small-scale beekeeping has proven to be especially popular among people looking to obtain more of their food from local sources.⁴ Urban bees provide important pollination services to community gardens, home vegetable gardens, and fruit trees.⁵ Some people also believe that honey contributes to a healthy lifestyle by providing a minimally-processed sweetener as an alternative to highly manufactured sugar products, such as high-fructose corn syrup,⁶ and through its various uses as a homeopathic remedy.⁷ Additionally, urban beekeeping may help offset the huge losses that commercial bee populations have suffered since the emergence of colony collapse disorder in 2006.⁸

Small-scale beekeeping bolsters local economies, too. Restaurants benefit by being able to purchase local honey for dishes and cocktails.⁹

⁵ See Gross, supra note 4; Williams, supra note 4.
⁶ See, e.g., Gary Taubes, Is Sugar Toxic?, N.Y. TIMES MAG. (Apr. 13, 2011), http://www.nytimes.com/2011/04/17/magazine/mag-17Sugar-t.html?pagewanted=all (Despite the chemical similarities of different types of sugar-based sweeteners, “high-fructose corn syrup has indeed become ‘the flashpoint of everybody’s distrust of processed foods’”—quoting New York University nutritionist Marion Nestle—and that “refined sugar is making a commercial comeback as the supposedly healthful alternative to this noxious corn-syrup stuff.”).
⁷ See, e.g., P.C. Molan, The Role of Honey in the Management of Wounds, 8 J. WOUND CARE 415, 415–16 (1999) (examining the antibacterial, antioxidant, and anti-inflammatory properties of honey); Kim Mulford, Jury’s Out on Honey’s Health Benefits, but Buzz Grows, DAILY COMET (Lafourche Parish, La.) (Mar. 28, 2011), http://www.dailycomet.com/article/20110328/WIRE/110329471 (Although medical groups have not recognized apitherapy as a medical treatment, “the buzz about the benefits of the honeybee has been growing, from slurping down honey as a remedy for allergies and colds to injecting bee venom as a treatment for multiple sclerosis and arthritis.”).
⁹ See, e.g., Emily DeNitto, Locally Grown Food, From Backyard Hive, N.Y. TIMES, July 31, 2011, at WE10 (noting that one local beekeeper’s honey “will be used in their restaurants in such diverse products as vinaigrettes, gelato and pizza dough”).
Further, retail stores are provided with high quality artisanal honeys and beeswax-derived products such as candles, soaps, and cosmetics.\textsuperscript{10} Other products, such as pollen, propolis, and royal jelly, can also be harvested and produced from bees and sold as natural remedies or health supplements.\textsuperscript{11} The popularity of apiculture and bee products has even led to the establishment of bee-themed festivals and tourism events in some communities,\textsuperscript{12} as well as beekeeping and honey-processing classes.\textsuperscript{13}

Despite the benefits and growing popularity of backyard beekeeping, apiaries are not always welcomed by the neighbors. This Article is designed to provide information to land use regulators about the benefits and drawbacks of beekeeping in residential areas, and to offer


strategies for addressing beekeeping activities through local laws and ordinances.

I. Federal Beekeeping and Honey Regulations

Unlike many other agricultural products, there are relatively few federal restrictions on the production and sale of honey. The U.S. Department of Agriculture (USDA) has the authority to restrict the importation of honeybees and certain honeybee products into or through the United States to protect the beekeeping and honey industries from the introduction and spread of diseases, parasites, and undesirable genetic traits. The USDA also has oversight authority over the National Honey Board, a non-regulatory federal board that conducts research, marketing, and promotional programs. In addition, the USDA considers pollinator protection a high-priority area for their research grants.

The USDA and the Food and Drug Administration (FDA) share oversight of honey manufacturing and labeling. Packaged honey bearing any official USDA mark or grade on its label must identify its country of origin. Honey labels must also comply with the FDA’s requirements for nutrition and ingredients labeling. The FDA prohibits adulteration and misbranding of honey products, although there is

---


17 Hackett et al., *supra* note 8.


21 21 U.S.C. § 342 (2006); 21 U.S.C.A. § 343 (West 1999 & Supp. 2011) (defining adulteration and misbranding). Honey products found to be adulterated or misbranded are subject to seizure by the FDA, and violations are punishable by up to one year in prison and/or a fine of up to $1000 with increased penalties for subsequent convictions. 21 U.S.C.A. §§ 333–334 (West 1999 & Supp. 2011). See United States v. “Cal’s Tupelo Blossom U.S. Fancy Pure Honey,” 344 F.2d 288, 289 (6th Cir. 1965) (holding that a booklet and leaflet constituted misbranding of honey because they portrayed honey as a drug and a panacea for various diseases and ailments); United States v. 24 Bottles “Sterling Vinegar & Honey, etc.,” 338 F.2d 157, 159 (2d Cir. 1964) (holding that two books prescribing vinegar and honey for a variety of ailments and a product containing honey and vinegar did not
currently no national purity standard for honey. Additionally, the FDA has authority to regulate food production facilities and transportation operations to ensure that they use sanitary handling practices. Pursuant to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, the FDA requires facilities that manufacture, process, or hold honey products to register their facilities, maintain records, and give prior notice of imported shipments. This Act, however, exempts farms and restaurants from these registration and record-keeping requirements.

II. STATE BEEKEEPING AND HONEY REGULATIONS

Given the limited scope of federal honey regulations, individual states have broad authority to control beekeeping and honey production activities. In most states, apiaries are subject to registration and inspection requirements intended to prevent the spread of bee diseases and parasites. These regulations usually include procedures for constituting misbranding because the honey product itself did not have any misleading labeling and there was no evidence that the books were intended to accompany the honey product; United States v. An Article of Food, etc., 550 F. Supp. 15, 18 (W.D. Okla. 1982) (finding a product labeled as “pure raw honey” was misbranded because it fell within the standard for “table syrup” but failed to disclose optional ingredients on the label).


ducting inspections, requirements for moving bees into and out of the state, and provisions relating to quarantines, the seizure of infected or noncompliant hives, and the destruction of diseased bees and contaminated equipment. Other bee regulations include requirements for apiary siting and identification, as well as specific provisions for nuisance apiaries and abandoned apiaries. In a few states, hobbyist apiaries are exempt from general bee regulations. A bee-inspection law was held to be a valid police power regulation in _Graham v. Kingwell_, decided by the Supreme Court of California in 1933. As the court explained:

[T]he act . . . was enacted “to promote the agricultural interests” of the state and “to prevent the introduction and spread of [bee] disease.” Examination of its provisions indicates that they reasonably tend to the accomplishment of this purpose. In order to prevent the transmission of bee diseases from one location to another, provision is made in section 6 of the act for inspection of apiaries by the county inspector, for notice to the owner to eradicate disease, if found, and for the eradi-

---

30 E.g., Mont. Code Ann. § 80-6-111 (requiring general apiaries to be at least three miles apart); id. § 80-6-112 (requiring the applicant for a pollination apiary site to own, lease, or rent the property and requiring the property to be used for commercial crop farming); Wyo. Stat. Ann. § 11-7-206 (requiring most apiaries to be at least two miles apart); see North Dakota v. Knoefler, 325 N.W.2d 192, 194, 201 (N.D. 1982) (upholding defendant’s conviction for maintaining an apiary within two miles of another apiary, as prohibited by statute).
34 E.g., Idaho Code Ann. § 22-2510 (exempting hobbyist beekeepers from registration requirements); Mont. Code Ann. § 80-6-114 (exempting hobbyist apiaries from registration requirements and limiting them to five hives).
35 24 P.2d 488, 488–89 (Cal. 1933).
cation of American foulbrood by burning. This same section also declares all diseased apiaries to be public nuisances, makes provision for their abatement by the county inspector in the event the owner, after notice, fails to abate them, reserving to the owner a right to appeal the field inspector’s diagnosis. These and other provisions of the act reasonably tend to promote the bee industry by lessening, if not precluding, the transmission of bee diseases, thereby adding to the welfare and prosperity of the state.\textsuperscript{36}

Restrictions on the importation of bees and bee products were similarly upheld under the state police power in \textit{Wyant v. Figy}, a Michigan case decided in 1954.\textsuperscript{37} In \textit{Trescott v. Conner}, a Florida beekeeper who transported his hives to New York each summer challenged a Florida beekeeping law that required him to receive a certificate of health before returning to the state.\textsuperscript{38} The beekeeper argued that the provision limiting such certifications to thirty days was invalid because it did not give him sufficient time to transport his bees between the two states.\textsuperscript{39} The court noted that other beekeepers were able to comply with the provision, and concluded that “the thirty-day requirement is a reasonable one serving the purpose of detecting the possible presence of infection of bees before they are brought into Florida.”\textsuperscript{40}

While inspection laws may be generally valid, apiary inspections conducted randomly and without a warrant may run afoul of the Fourth Amendment.\textsuperscript{41} This issue was raised in a challenge to Ohio’s apiary inspection statute in \textit{Allinder v. Ohio}.\textsuperscript{42} The U.S. Court Appeals for the Sixth Circuit held that the provision for random, nonconsensual, and warrantless inspections violated apiary owners’ Fourth Amendment rights and did not fall within the administrative search exception.\textsuperscript{43} Missouri’s beekeeping law also requires bee inspectors to have probable cause that an apiary is diseased prior to conducting an

\textsuperscript{36} \textit{Id.} (alteration in original) (citation omitted).
\textsuperscript{38} 390 F. Supp. 765, 765 (N.D. Fla. 1975).
\textsuperscript{39} \textit{Id.} at 767.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} See \textit{Allinder v. Ohio}, 808 F.2d 1180, 1188 (6th Cir. 1987).
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
inspection. Nevertheless, most states permit apiary inspections at any time and without a warrant.

States have also attempted to address potential sources of conflict between apiary owners and neighboring crop growers. Apiary owners can sustain significant damages if pesticides are applied to fields where their bees are foraging, but bees can also cause damage to farmers if they are permitted to pollinate seedless crops. Regulatory provisions addressing these conflicts focus primarily on preventive notification systems and rules for apportioning liability.

The production, packaging, transportation, labeling, and sale of honey are also heavily regulated in many states. California’s honey production regulations, for example, include the establishment of grade and sampling standards to ensure uniformity among honey products, provisions authorizing the inspection of any facility where honey is produced, stored, transported, or sold, and the seizure of any noncompliant honey. Labeling standards also prohibit products called “imitation honey,” as well as adulteration, mislabeling, the use

---

45 Allinder, 808 F.2d at 1182 n.3.
46 See, e.g., Hall v. C & A Navarra Ranch, Inc., 101 Cal. Rptr. 249, 251 (Ct. App. 1972) (holding that the beekeeper may be able to recover damages, even though he failed to comply with the notification requirement when he moved his bees, because the pesticide applicator had actual knowledge of the bees’ location); Lenk v. Spezia, 213 P.2d 47, 53 (Cal. Dist. Ct. App. 1949) (holding that the beekeeper was not entitled to damages because he was notified prior to the pesticide’s application); Brown v. Sioux City, 49 N.W.2d 853, 858–59 (Iowa 1951) (holding the city liable for damage to bees caused by pesticide application at municipal airport); Anderson v. Dep’t of Natural Res., 693 N.W.2d 181, 187 (Minn. 2005) (finding that the beekeeper was entitled to damages because even if the bees were trespassers, a duty arose on the property owner’s behalf if he had actual knowledge or notice of foraging bees).
51 Id. § 29445.
52 Id. § 29447.
53 Id. § 29451.
of misleading label statements, and the use of inappropriate containers.\textsuperscript{54} Specific standards and labeling requirements are provided for comb honey, crystallized honey, and extracted honey.\textsuperscript{55} Labels also have to comply with place of origin and floral flavor requirements.\textsuperscript{56}

Beyond honey regulations, general agricultural regulations may also impact beekeepers and honey producers. Right to farm laws, for example, often apply to apicultural operations.\textsuperscript{57} Such statutes protect apiaries from liability in cases where neighbors came to the nuisance.\textsuperscript{58} However, not all states consider agriculture to include beekeeping. For example, Michigan’s Right to Farm Act was raised in a case that involved the establishment of an apiary on property that had been used for crop farming prior to its inclusion in a residential district.\textsuperscript{59} Although the defendants claimed that beekeeping was an agricultural use permitted based on the property’s preexisting farm use, the court disagreed, finding instead that an apiary was an unlawful extension of the nonconforming farm and therefore constituted a nuisance per se.\textsuperscript{60} The court also rejected the defendants’ claim that the apiary was protected by Michigan’s Right to Farm Act because the apiary was established after the enactment of restrictive zoning regulations.\textsuperscript{61}

### III. Nuisance Law and Bees

Bees can create a nuisance if they become aggressive or swarm on neighboring property, but they have not typically been considered a per se nuisance.\textsuperscript{62} Rather, courts addressing whether hives constitute a nuisance look to injuries resulting from the hive owner’s negligence, and the hives’ interference with neighbors’ enjoyment of their property.\textsuperscript{63}

---

\textsuperscript{54} \textit{Id.} §§ 29472, 29671–29674, 29677.

\textsuperscript{55} \textit{Id.} §§ 29581–29620.


\textsuperscript{60} \textit{Id.} at 54.

\textsuperscript{61} \textit{Id.} at 55.


\textsuperscript{63} \textit{See, e.g.}, Arkadelphia, 11 S.W. at 958 (“Neither the keeping, owning, nor raising of bees is in itself a nuisance. Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case.”); Ferreira v. D’Asaro, 152 So. 2d 736,
a New York case, for example, a county court determined that while keeping honeybees was generally permissible, the owner still had a “duty of maintaining them in such a manner that they will not annoy, injure or endanger the comfort, repose, health or safety of any considerable number of persons or to render a considerable number of persons insecure in the use of their property . . . .”64 In a Pennsylvania case, a township claimed that a resident’s bees constituted a public nuisance based on neighbors’ complaints about brown spots found on laundry that had been hung out to dry.65 The spots were caused by deposits of the bees’ fecal matter and were only produced during the bees’ first flight of the spring—when they left the hive heavy with wastes built up over the winter months.66 The court ruled, based on these facts, that the brown spots were not a frequent enough annoyance to create a nuisance.67

Conversely, an Ohio court concluded that a defendants’ beekeeping and honey business constituted a nuisance based on largely undisputed evidence that after the plaintiffs purchased adjacent land, their property was “invaded by an inordinate number of bees . . . which collect[ed] around their doors and windows, in the grass, and near the farm pond, stinging the plaintiffs and their guests on many occasions . . . .”68 Although the defendants argued that liability should be precluded because the plaintiffs came to the nuisance, the court concluded that when the plaintiffs bought their property there was no in-

---

66 Id. at 560.
67 Id. at 560–61.
dication that the premises were subject to any nuisance caused by the bees.\textsuperscript{69} Rather, it was only after the plaintiffs purchased their land that the defendants increased the scale of their beekeeping operation, and so it could not be said that the plaintiffs should have foreseen the injuries that would be caused by the defendants’ bees.\textsuperscript{70}

The location of beehives in relation to adjoining properties is often relevant to the question of nuisance liability. In \textit{Allman v. Rexer}, a Pennsylvania court found that “[i]t is negligence to locate the hives so near a place where persons or animals may be expected to be as to make it appear likely that the bees will be angered by their presence and attack them.”\textsuperscript{71} Similarly, a Florida court held that a property owner could be found negligent for maintaining beehives so close to neighboring properties as to create a foreseeable risk of injury from bee stings.\textsuperscript{72} However, the Supreme Court of Texas held that the owner of property where beehives are kept has no duty to warn guests about the risks of allergic reactions to bee stings when they are aware of the presence of bees, as the risk of injury to the guests in such a case is obvious.\textsuperscript{73}

The ownership of nuisance bees is also a relevant consideration. For example, in a Pennsylvania case the plaintiffs alleged that the defendant’s bees had stung them on their own property.\textsuperscript{74} But the court found that the plaintiffs failed to prove liability, as there were other hives kept in the surrounding area, and “no attempt whatsoever was made to trace the flight of the particular bee or bees involved.”\textsuperscript{75}

\section*{IV. Local Beekeeping Regulations}

Local governments must be mindful of federal and state regulations in drafting their own bee ordinances, as certain provisions could be subject to preemption. Georgia, for example, expressly precludes a variety of local apiculture regulations:

No county, municipal corporation, consolidated government, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation, or resolu-

\begin{thebibliography}{8}
\printbibliography
\end{thebibliography}
tion prohibiting, impeding, or restricting the establishment or maintenance of honeybees in hives. This Code section shall not be construed to restrict the zoning authority of county or municipal governments.\textsuperscript{76}

Agricultural use preemption statutes in some states may also apply to bees and apicultural facilities, as in Illinois, where counties may not ordinarily “impose regulations, eliminate uses, buildings, or structures, or require permits with respect to land used for agricultural purposes, which includes . . . apiculture . . . .”\textsuperscript{77} Similarly, local governments in New York are prohibited from unreasonably restricting agricultural activities in certified agricultural districts,\textsuperscript{78} and apiaries are specified as falling within this protection.\textsuperscript{79}

Where not subject to preemption, apiaries and related land uses will be subject to generally applicable zoning requirements. Beekeeping, for example, is usually defined as an agricultural use and may be prohibited in residential areas,\textsuperscript{80} and apiaries will be subject to requirements for nonconforming uses\textsuperscript{81} and accessory structures.\textsuperscript{82} Some local governments have enacted ordinances specifically pertaining to beekeeping. The following sections discuss common features of these local bee laws.


\textsuperscript{77} 55 Ill. Comp. Stat. Ann. § 5/5–12001 (West 2011). This exemption only applies to parcels of land consisting of five or more acres, or those that sell at least $1000 in agricultural products. \textit{Id.}

\textsuperscript{78} N.Y. Agric. & Mkts. § 305-a (McKinney 2004).

\textsuperscript{79} \textit{Id.} § 301 (McKinney 2004 & Supp. 2011).

\textsuperscript{80} \textit{E.g.}, \textit{Ex parte} Ellis, 81 P.2d 911, 912 (Cal. 1938) (“There is sufficient recognition in the decided cases that bees may become a nuisance in residential areas . . . [and] the facts appearing herein justify the ordinance prohibiting beekeeping within the city except in the designated areas, and that the ordinance is not unconstitutional for any reason.”); \textit{People v. Kasold}, 314 P.2d 241, 242 (Cal. Ct. App. 1957) (upholding an ordinance that prohibited beekeeping in residential districts but allowed the activity in other districts subject to restrictions on the density of beehives, because bees were not domesticated animals, and the ordinance was intended to serve the valid police power purpose of protecting people and animals from injuries).

\textsuperscript{81} \textit{See, e.g.}, Jerome Twp. v. Melchi, 457 N.W.2d 52, 54 (Mich. Ct. App. 1990) (holding that an apiary was an unlawful extension of a nonconforming agricultural operation located in a residential district).

A. Classification of Bees

Before backyard beekeeping can be permitted, some cities may need to amend their ordinances to clarify that bees are not prohibited wild animals. Last spring, for example, New York City lifted its ban on beekeeping through an amendment to its Health Code that expressly removed non-aggressive honey bees from the list of prohibited “venomous insects.”83 Similarly, Denver bans the keeping of “wild or dangerous animals,” but specifically states that domesticated honey bees do not fall within the prohibition.84 In Littleton, Colorado, beekeeping was recently designated an allowable activity in “park [and] open space” districts.85

B. Lot Size and Colony Density

One of the most common issues addressed in beekeeping ordinances is the number of hives that owners can keep on their property.86 Minimum lot sizes for beekeeping and colony density regulations help to ensure that urban and suburban apiaries do not grow so large as to create a nuisance.87 Limiting the number of hives within urban areas may also be important in order to prevent bee populations from outgrowing the supply of available foraging sites.88

---


Beekeeping is permitted in “all or most zoning districts” in Dayton, Ohio, but the city requires a lot size of at least 7500 square feet for the first hive and an additional 5000 square feet for each additional hive. Fort Collins, Colorado, has implemented a similar plan, basing the number of permitted hives on the acreage of the property. Under the regulations, two colonies can be kept on a tract of land that is less than a quarter of an acre. If the parcel is between a quarter and a half-acre, a beekeeper can have up to four colonies. The next size range covers lots ranging from a half to a full acre, and permits up to six colonies on the property. Eight colonies are permitted on any property larger than an acre, but the ordinance includes an exception for additional colonies when they are set back at least two hundred feet from all property lines.

C. Setbacks

Setbacks, like minimum lot size requirements, are commonly used to decrease the potential nuisance effect of beekeeping operations. Setbacks applying to beekeeping activities vary widely in their length and scope. In Dayton, for example, beehives are required to be at least ten feet from any lot line, ten feet from any dwelling, and at least thirty feet from any public sidewalk or roadway. Additionally, Dayton requires the hive’s entrance to face “away from the property line of the residential lot closest to the beehive.” Larger setbacks are imposed in other cities, as in Tuscaloosa, Alabama, where it is illegal to keep bees

---

92 Id. § 4-233(a)(1).
93 Id. § 4-233(a)(2).
94 Id. § 4-233(a)(3).
95 Id. § 4-233(a)(4)–(5).
98 Id.
within one hundred fifty feet of any school, public park, or playground, or within three hundred feet of any residential property line. San Diego requires that beehives must be located at least one hundred feet from any public roadway.

D. Flyway Barriers

Some ordinances require beekeepers to install a “flyway barrier,” which is usually a solid fence, wall, or dense line of hedges. These structures raise the flight path of bees leaving the hive, thereby limiting their interactions with nearby residents. Fort Collins requires six-foot tall flyway barriers spanning ten feet along the property line in both directions, unless the adjoining property is undeveloped for at least twenty-five feet past the property line. Dayton requires that if a hive is within ten feet of a rear or side property line, six-foot fencing must be constructed and must extend at least twenty feet on either side of the hive. The requirement will be waived, however, if the hive is placed on a porch or balcony that is at least ten feet off the ground and at least ten feet from the property line.

E. Access to Water

It is important for beekeepers to provide water for their bees so that they do not congregate at swimming pools, pet water bowls, bird-baths, and other water sources on neighboring properties. Requirements to this effect have been enacted in New York City and Dayton,
Ohio.\textsuperscript{108} Beekeeping associations in many other municipalities have proposed similar requirements.\textsuperscript{109} While some ordinances include only a general requirement, San Diego’s bee ordinance specifies that the water source must be within ten feet of the apiary.\textsuperscript{110}

F. Permits and Registration Requirements

Some bee ordinances include registration requirements. In New York City, for example, beekeepers must provide information regarding the number and location of their hives in order to obtain registration from the New York City Department of Health.\textsuperscript{111} Local registration requirements might raise preemption issues, however, as many states have enacted comprehensive apiary registration laws.\textsuperscript{112}

G. Apiary Identification Signs

In San Diego, beekeepers must erect a sign “prominently displayed on the entrance side of the apiary stating, in black letters not less than one inch in height on a background of contrasting color, the name of the owner or person in possession of the apiary, his address, and telephone number.”\textsuperscript{113} Fort Collins also requires that apiary owners “conspicuously post” signs with their name and contact information.\textsuperscript{114} Other cities have enacted similar requirements.\textsuperscript{115}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{108}] Dayton, Ohio, Zoning Code § 150.420.1(A)(4).
\item[\textsuperscript{110}] San Diego, Cal., Mun. Code § 44.0416 (2000), http://docs.sandiego.gov/municode/MuniCodeChapter04/Ch04Art04Division04.pdf.
\item[\textsuperscript{112}] See supra note 26 and accompanying text.
\item[\textsuperscript{113}] San Diego, Cal., Mun. Code § 44.0411.
\item[\textsuperscript{114}] Fort Collins, Colo., Mun. Code § 4-234.
\end{itemize}
\end{footnotesize}
H. Fire Safety Regulations

When harvesting honey, beekeepers typically fill the hives with smoke to subdue the bees.\footnote{Janina Muszynska & Michal Rybak, Attempt to Use Sounds in Commercial Beekeeping, 46 J. Apicultural Sci. 67, 68 (2002).} Cities may impose restrictions on smokers because they create an obvious fire hazard.\footnote{Id.} San Diego, for example, requires the apiary controller to maintain a firebreak at least thirty feet wide in all directions around the apiary.\footnote{San Diego, Cal., Mun. Code § 44.0413(a).} Within this firebreak, the first ten feet from the apiary must be kept free of combustible material and any vegetation must be six inches or shorter.\footnote{Id. § 44.0413(b).} Vegetation up to a foot tall is permitted in the remaining twenty feet.\footnote{Id. § 44.0414(a)–(b).} San Diego also requires the apiary controller to maintain basic fire-fighting materials, such as shovels, fire extinguishers, and hoses.\footnote{Id. § 44.0415(b)–(d).} Additionally, the bee smoker must be completely extinguished by water prior to transportation, or it must be placed in a securely fastened metal container.\footnote{See, e.g., Ikimulisa Livingston, Mind Your Own Bees-Ness, NYC!, N.Y. Post, July 16, 2011 at 7; Mario Moretto, Keepers Bee-Moan South Portland Ordinance, Forecaster (Maine) (June 29, 2011), http://www.theforecaster.net/content/s-south-portland-beekeeping-ordinance-070111.}

Conclusion

Designing effective beekeeping ordinances requires local governments to address concerns about nuisances, but they must also be aware of beekeepers’ complaints that local regulations are too strict and that state laws, general zoning requirements, and nuisance liability are sufficient to ensure the safe and sanitary operation of beehives. When the proper balance is struck between these competing interests, beekeeping ordinances can become an important part of a city’s urban agriculture regulations.
PRIVATE POLICING OF ENVIRONMENTAL PERFORMANCE: DOES IT FURTHER PUBLIC GOALS?

SARAH L. STAFFORD*

Abstract: Over the past two decades the role of private parties in the policing of environmental regulation has grown dramatically. In some cases the Environmental Protection Agency (EPA) has led this effort. In other situations, private parties have provided the impetus for new policing activities that are conducted independently from the EPA. Private policing can be beneficial when the increased involvement of the private sector either decreases the costs of achieving a particular level of environmental performance or increases environmental performance in a cost-effective manner. Private parties, however, could also divert regulated entities away from regulatory objectives. This Article explores the privatization of environmental enforcement by presenting six examples and highlighting their benefits and costs. Although the examples cited are not necessarily representative of all private policing, their mixed results regarding the effectiveness of private sector participation shows a need for careful evaluation of these initiatives. The Article concludes by making a case for a more deliberate approach to evaluating the role of the private sector in the enforcement of environmental regulation, and suggests that before responding to continuing calls to further privatize environmental regulation and enforcement it is first necessary to ensure that existing private participation is helping to achieve regulatory goals.

INTRODUCTION

Environmental regulation is often seen as an adversarial system that pits regulated entities against a public regulatory agency. In this simplistic view, legal requirements and an aggressive enforcement regime are necessary to ensure that regulated entities conduct themselves in ways they would not in an unregulated situation. This conception does not provide an active role for unregulated private parties—such

© 2012, Sarah L. Stafford.
* Paul R. Verkuil Distinguished Professor of Public Policy, Economics, and Law, and Associate Director of the Jefferson program in Public Policy, College of William and Mary. The author is much indebted to Alan Meese and John Duffy for their comments on this Article.
parties are envisaged only as passive beneficiaries of the increased environmental quality resulting from the regulation, or as victims of the increased costs imposed by the regulation. In reality, the relationship between regulated entities, the regulatory agency, and unregulated private parties—often quite active in environmental enforcement—is much more complex. Overall, both regulated and unregulated private parties play a central role in the implementation and enforcement of environmental regulation. During the past two decades this role has expanded significantly. In some cases, the Environmental Protection Agency (EPA) has led both formal and informal efforts to involve private parties. In other situations, private parties have provided the impetus for a new, larger role in the enforcement of environmental regulations that is, for the most part, independent of the EPA.

One of the primary motivations for the EPA to involve private parties in environmental enforcement has been a steadily declining level of enforcement resources. Between 1994 and 2010, the EPA’s enforcement budget fell from over $630 million to less than $560 million in real dollars, and staffing at the EPA’s Office of Enforcement and Compliance Assistance (OECA) fell from around 4200 full-time equivalent employees to 3400. Budget pressures, however, are not the only reason the private sector has taken a more prominent role in environmental enforcement and compliance. The EPA has also looked to the private sector to increase compliance among facilities where traditional enforcement tools have not been successful. Additionally, the private sec-

---

1 See Marc Allen Eisner, Governing the Environment: The Transformation of Environmental Regulation 93–95 (2007). One might loosely tie the increasing involvement of the private sector to the Clinton-Gore Administration, which embraced the idea of reinventing government. See id. at 94 (noting that delegating more authority to regulated entities became a central tenet of the “Reinventing Government” movement of the Clinton administration).

2 See id. at 115–16 (noting a lack of experienced leaders in environmental enforcement during the Bush administration, as well as dramatic reductions in the enforcement budget). In addition to declining resources, the Office of Enforcement and Compliance Assistance (OECA) was often without a strong leader. See id.

3 See Wayne B. Gray & Jay P. Shimshack, The Effectiveness of Environmental Monitoring and Enforcement: A Review of the Empirical Evidence, 5 Rev. of Envtl. Econ. & Pol’y 3, 7 fig. 1 (2011). The budget data includes only federal expenditures. Id.

4 See, e.g., Eisner, supra note 1, at 133–51 (describing reasons for corporations to voluntarily manage pollution).

5 See, e.g., Office of Enforcement and Compliance Assurance, EPA & Chem. Mfrs. Ass’n, EPA-305-R99-001, Root Cause Analysis Pilot Project: An Industry Survey 3 (1999). For example, the Root Cause Analysis Project was an analysis conducted jointly by the EPA and the Chemical Manufacturer’s Association from 1996 to 1998. Id. The project surveyed about two dozen chemical facilities that violated environmental regulations to
tor can be more innovative than the EPA, in part because private entities can take a holistic approach to environmental performance. The EPA has difficulty adopting this approach because environmental laws, and thus the EPA’s regulatory programs, address environmental media such as water, air, and hazardous waste separately.

Support for privatization is generally based on the belief that the market can provide some public activities or services either at lower cost, or it can provide a more beneficial alternative at the same cost as the publicly provided alternative. Conversely, if an activity can be conducted more cheaply by the government than by the private sector, or if the government can provide a higher quality good or service than the private sector, there is no justification for privatization. With respect to the implementation and enforcement of environmental regulation, private parties may be able to do some things more cost effectively than the EPA. In particular, private organizations often have better access to certain information, and can generally make decisions more quickly and with less red tape than public agencies.

Even if privatization is more efficient than public action, including private entities in environmental enforcement may not be socially beneficial. A common critique of private policing is that private activities can distort incentives for regulated entities in ways that are not consistent with the EPA’s regulatory goals. To the extent that these regulatory determine the “root causes” of noncompliance. Id. at 5. The analysis found that many of the violations were unintentional, and the most frequently identified root cause of noncompliance was that the facility was unaware of the applicability of a regulation. See id. at 10, 14, 18, 20. Traditional deterrence-based enforcement methods such as random inspections are not necessarily effective at increasing compliance. Id. at 34. The analysis identified other potential methods to improve compliance, including those that involved private actors, such as of self-audits or third party audits. Id.

6 See Eisner, supra note 1, at 141 (describing how private entities develop “an expansive sense of corporate accountability for the impacts of their products and services across the lifecycle”).

7 See Nicholas A. Ashford & Charles C. Caldart, Environmental Law, Policy, and Economics: Reclaiming the Environmental Agenda 42 (2008) (noting that traditional environmental laws are media-based).

8 See John D. Donahue, The Privatization Decision: Public Ends, Private Means 57 (1989) (noting that few people would be interested in privatization if it were not more efficient).


10 See Eisner, supra note 1, at 133–34.

11 See Eisner, supra note 1, at 265 (noting that corporations have the best information regarding their production processes and technologies).

12 Compare Eisner, supra note 1, at 150 (describing how private policing is driven by consumer demand and maximization of shareholder wealth, which limit the extent of voluntary
goals are consistent with public interests, any deviation would decrease public welfare overall. Therefore, the benefits from any private policing initiatives need to be weighed against the negative consequences of each initiative to determine whether it is actually in the public interest.

This Article provides an overview of the types of private sector environmental enforcement activities and initiatives that are currently taking place, which can be divided into three groups. The first group encompasses traditional public activities that have been formally outsourced to private entities. The second group covers private initiatives that are actively facilitated by the EPA but do not have an official mandate. The last group includes private initiatives that are largely independent of the EPA. For each group, this Article presents examples of specific programs or activities and highlights both the benefits and costs of these activities as well as the results of any empirical analyses that have been conducted. The Article then discusses more generally the overall effect of private participation on implementation and enforcement of environmental regulations within each group. It concludes by making a case for a more deliberate approach to evaluating the role of the private sector in the enforcement of environmental regulation.

I. Formal Outsourcing from the EPA to Private Entities

Enforcement of environmental regulation has been formally outsourced to private entities in two primary ways. First, Congress formally outsourced enforcement powers to private citizens by providing a private right of action in nearly all major environmental laws. Second,


If regulation is misguided or if regulatory officials have been captured by special interests, it might be possible for a deviation from regulatory goals to actually increase overall welfare. Throughout this Article, however, it is assumed that regulations are in the public interest.

See discussion infra notes 19–67.

See discussion infra notes 68–109.

See discussion infra notes 110–143.

The examples chosen to illustrate each groups’ characteristics are admittedly subjective and were intended to illustrate the variety of roles that the private sector is currently playing in environmental regulation. They were not intended to be fully representative of all of the activities being conducted.

See discussion infra notes 144–157.

the EPA has formally outsourced some of its enforcement responsibilities to regulated entities through its self-policing policy.20

A. Citizen Suits

Environmental groups have used private suits to affect environmental policy since the 1960s.21 In the 1970s Congress formally provided a private right of action in both the Clean Water Act (CWA) and the Clean Air Act (CAA).22 Since then, nearly all major environmental laws have also included provisions for citizen suits.23 Congress’s stated purpose for providing a private right of action was to complement public enforcement.24 Citizen suits were not intended to be an alternative to public enforcement, but rather a means to leverage public enforcement and to fill subsequent gaps.25 Generally, the statutes allow individuals to file private suits if the EPA or state regulators are not “diligently prosecuting” the violator.26 Successful suits may result in the issuance of consent decrees, fines paid into the U.S. Treasury, and reimbursement of the plaintiff’s litigation expenses based on market rates.27


24 See Comm. on Public Works, U.S. Senate, A Legislative History of the Clean Air Amendments of 1970, at 214 (1974) (prepared by the Congressional Research Service) (“Such suits can contribute to the effective enforcement of air pollution control measures.”).


26 See e.g., RCRA, 42 U.S.C. § 6972(b)(1) (B). The RCRA citizen-suit provision provision prohibits suits where “the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.” Id.

One of the most obvious benefits of citizen suits from a regulatory perspective is that they can supplement public enforcement efforts when federal and state enforcement resources are limited, thereby increasing the level of deterrence associated with environmental violations.28 A successful citizen suit can draw attention to a local area, type of violation, or even a particular regulated entity that is not being adequately addressed, thereby filling gaps in the public enforcement process.29 Of course, this additional enforcement comes at a cost to the private entities that bring such suits (although successful plaintiffs may recover litigation costs from the defendants).30 A citizen suit may be more cost effective than public enforcement if the private party has access to better information about particular environmental problems, or can more cheaply monitor potential polluters than federal or state regulators.31 Citizen suits may also help to overcome potential “agency capture” problems—where regulated entities pressure government officials to under-enforce regulations at particular facilities.32

A potential downside of private suits is that they are not necessarily brought to advance the public interest, presumably unlike public enforcement actions.33 Critics claim that private suits generally advance the interests of one particular group, which may not be in line with public interests.34 Additionally, some detractors assert that private suits are often brought for the plaintiff’s economic gain or increased publicity, rather than to achieve an increase in environmental performance.35


29 See Adler, supra note 28, at 44–45.

30 Id. at 45.

31 See id. at 44, 49.

32 See id. at 44, 48.

33 See id. at 58–59.

34 See id. at 58 (“[T]he priorities of environmental litigation outfits and individual citizen-suit plaintiffs will not always align with the public’s interest in greater environmental protection.”).

Overall, citizen suits play a relatively minor role in environmental enforcement. In 2009, the EPA issued around 3500 administrative compliance and penalty orders, referred 280 civil judicial actions, and brought just under 400 criminal cases. In comparison, on average nearly 50 private suits are filed annually. Most of the private suits over the last twenty years have been brought by local environmental groups or local chapters of larger organizations, such as Baykeepers or Riverkeepers.

While much has been written about the role of private suits in environmental enforcement, and several papers have presented data on the number and type of suits, there has been relatively little empirical analysis of the overall effect of private suits on enforcement. One exception is a recent paper by two economists, Christian Langpap and Jay Shimshack. This paper presents an econometric analysis of the effect that private suits against municipal wastewater treatment facilities have on regulatory inspections and enforcement. The analysis shows that, unlike Congress intended, private suits tend to act as a substitute for public enforcement rather than a complement. If citizen suits were a market rates, not the actual litigation costs incurred by the group. See Adler, supra note 28, at 50; Smith, supra, at 377 n.88.

37 See Smith, supra note 35, at 385 (citing 287 suits over a period of six years, or just under fifty per year). This estimate is generally consistent with an Environmental Law Institute study cited by Smith. Id. at 368 n. 41 (347 suits over a period of roughly six and a half years, just over fifty per year).
38 Langpap & Shimshack, supra note 27, at 237; Adler, supra note 28, at 51.
40 Langpap & Shimshack, supra note 27, at 235–36.
41 Id. at 239. The study uses data to analyze the effect of such suits on federal and state National Pollution Discharge Elimination System (NPDES) inspections and enforcement actions at “all ‘major’ municipal wastewater treatment facilities.” Id. at 236–39. Because the majority of private suits filed against wastewater treatment facilities are for water violations, the study focuses on NPDES inspection and enforcement activities. Id. at 236–37. The citizen suit data is used to estimate a predicted probability of a citizen suit at each facility based on a number of explanatory variables including the facility’s characteristics and the location. Id. at 240–41, 247–48. The predicted probability of a suit is then used as an explanatory variable in the inspection and enforcement action regressions. Id. at 243. To disentangle the causal impacts of private enforcement on public enforcement and control for potential endogeneity the authors used measures of judicial temperament and case-loads as instrumental variables. Id. at 240.
42 Id. at 235, 248. More specifically, the study found that private enforcement of municipal wastewater treatment facilities complements public monitoring but substitutes for
complement to public enforcement, such suits would increase the likelihood of public enforcement by highlighting otherwise neglected areas. However, the study found that where there is a high likelihood of a private suit, regulators are less likely to bring a public enforcement action. This implies that citizen suits do not bring public attention to particular entities or areas, but rather take the place of public enforcement. This finding amplifies the potential concerns about private suits. To the extent that private suits take the place of public enforcement in certain sectors or geographic areas, the ability for private objectives to supplant public objectives is magnified.

B. The EPA’s Audit Policy

The second example of formal outsourcing is the EPA’s self-policing policy, known informally as the Audit Policy, established in 1995. The Audit Policy allows regulated entities to self-audit and then disclose any violations that they discover to regulators in exchange for significantly reduced penalties on those violations. To receive this benefit, the violations must be discovered as a result of a self-audit (not a government initiated or mandated inspection) and must be corrected or remediated in a timely manner. In addition, the EPA has stated that when entities self-police, formal EPA investigations and enforcement actions may be unnecessary, which suggests that facilities may also experience lower levels of enforcement following a self-disclosure.

Appropriately designed self-policing policies can be very beneficial, as they can increase the number of violations that are remediated

Id. at 236. Overall, their findings suggest that “direct deterrence effects are significantly weakened by the net crowding out of public enforcement.” Id.

See id. at 238, 248.
Id. at 248–49.
Id.
See Audit Policy, supra note 20.
Id. There are a number of additional conditions the disclosure must meet to be eligible for a penalty reduction. These conditions are discussed more fully in Sarah L. Stafford, Outsourcing Enforcement: Principles to Guide Self-Policing Regimes, 32 CARDOZO L. REV. 2293, 2302–03 (2011) [hereinafter Stafford, Outsourcing].
as well as accelerate the timing of remediation.\textsuperscript{50} Moreover, enforcement resources can be redirected from self-policers to other regulated entities, increasing overall deterrence with the same level of enforcement resources.\textsuperscript{51} Poorly designed self-policing policies, however, can undermine deterrence by decreasing the cost of violating environmental regulations, and thus decrease the overall level of compliance.\textsuperscript{52} Additionally, some policies may allow facilities to strategically self-police in order to circumvent formal public enforcement.\textsuperscript{53}

While the opportunity to self-police is available to most of the one million entities regulated by the EPA, only 1200 facilities (or less than one-tenth of a percent) self-disclosed in 2009.\textsuperscript{54} In comparison, of the approximately 20,000 facilities that were formally inspected by the EPA, more than 4000 (or twenty percent) had violations that warranted some form of enforcement.\textsuperscript{55} Of course, the EPA likely chooses to inspect those facilities that it believes are most likely to be in violation, thus such entities might be expected to have a higher percentage of violations than regulated entities in general.\textsuperscript{56} Additionally, the Audit Policy pro-


\textsuperscript{54} See FRS, supra note 28 (calculating number of regulated entities); EPA, 2009 Numbers, supra note 28 (indicating number of self disclosures).

\textsuperscript{55} See EPA, 2009 Numbers, supra note 28.

\textsuperscript{56} See Enforcement \\& Compliance History Online (ECHO): Frequently Asked Questions, Envtl. Prot. Agency, http://www.epa-echo.gov/echo/faq.html#how_is_compliance (last visited Jan. 12, 2012) (noting that the EPA considers citizen tips and violation histories when selecting a facility to inspect). In addition to citizen tips and a facility’s violation history, the EPA also considers facility size, potential for environmental harm, geographic initiatives, statutory requirements, protection of sensitive ecosystems, demographics, and industry type. \textit{Id}.
vides that a particular violation can only be disclosed once, so the total number of disclosures over the life of the Audit Policy might provide a more meaningful estimate of its relative importance. Since 1999, the EPA has received more than 15,000 voluntary disclosures.

Although opponents of the Audit Policy initially argued that it would have a detrimental effect on the environment by protecting polluters from punishment and decreasing the incentives for entities to comply with regulations, empirical analyses of the policy have not found any such effects. On the contrary, the studies suggest that the Audit Policy has had a positive impact on both compliance and environmental performance. My own study of its effect on compliance with hazardous waste regulations found no evidence that overall compliance decreased as a result of the Audit Policy. Moreover, I found that state self-policing policies modeled on the federal Audit Policy decreased the probability of a violation. Michael Toffel and Jodi Short examined the effect of the Audit Policy on firm compliance with CAA regulations, rather than hazardous waste regulations, and found that self-disclosers had lower levels of abnormal releases and higher compliance rates in the five years following their disclosure. Taken together, these studies indicate that the EPA’s Audit Policy increases compliance


59 See Stafford, Does Self-Policing Help?, supra note 52, at 3.


61 See Stafford, Does Self-Policing Help?, supra note 52, at 22. The analysis used data on detected hazardous waste violations and EPA enforcement actions to statistically determine if there has been an underlying change in the compliance behavior of regulated entities. See id. at 9, 21, 22. The results show that the federal Audit Policy had no measurable effect on compliance behavior. See id. at 21, 22.

62 See id. at 22. A number of states have passed their own self-policing policies, as well as immunity and privilege legislation for environmental audits. Sarah L. Stafford, State Adoption of Environmental Audit Initiatives, 24 CONTEMP. ECON. POL’Y. 172, 172 (2006) [hereinafter Stafford, State Adoption]. State audit privilege legislation decreases the probability of a violation, while state legislation that provides complete penalty immunity for self-disclosed violations increases the probability of a violation. Stafford, Does Self-Policing Help?, supra note 52, at 21.

63 Toffel & Short, supra note 60, at 17, 29, 32. The analysis uses data on self-disclosures, self-reported abnormal releases of toxic chemicals to the environment, and compliance status to conduct an econometric analysis of the effect of self-disclosures on the number of abnormal releases and compliance status in the years following a disclosure. See id. at 17–21.
and performance, or at a minimum, does not decrease it.\textsuperscript{64} Given that overall environmental enforcement resources decreased over the time frame of these analyses,\textsuperscript{65} there is reasonable evidence that the efficiency of the EPA’s enforcement program has increased in the short run under the Audit Policy.

However, these two studies of the Audit Policy have found that self-policers benefit from a lower probability of enforcement following a disclosure.\textsuperscript{66} This finding suggests that some entities may strategically self-police in order to reduce future enforcement.\textsuperscript{67} If entities exploit these “enforcement holidays” by taking steps to reduce future compliance, long-term compliance may not necessarily increase under the Audit Policy.

II. Private Initiatives Actively Facilitated by the EPA

In addition to formally outsourcing some activities to private entities, the EPA actively facilitates a number of private initiatives that help it to implement and enforce environmental regulations. This category includes what is arguably the most influential role that private parties play in environmental regulation—consumers and investors can punish or reward companies for their environmental performance.\textsuperscript{68}

A. Information Programs to Facilitate Enforcement by the Market

In principle, consumers that care about the environment should favor products and manufacturers that are environmentally protective.\textsuperscript{69} Similarly, investors who care about the environment may also make investment decisions based on environmental performance.\textsuperscript{70} More gen-

\textsuperscript{64} See Stafford, Does Self-Policing Help?, supra note 52, at 22; Toffel & Short, supra note 60, at 32.

\textsuperscript{65} See Gray & Shimshack, supra note 3, at 7 fig. 1.

\textsuperscript{66} See Toffel & Short, supra note 60, at 29; Sarah L. Stafford, Should You Turn Yourself In? The Consequences of Environmental Self-Policing, 26 J. Pol’y Analysis & Mgmt. 305, 318 (2007).

\textsuperscript{67} See Toffel & Short, supra note 60, at 29; Stafford, State Adoption, supra note 62, at 172.


\textsuperscript{69} See Case, supra note 68, at 10,776. Many authors have written extensively about the ability of consumers and investors to exert significant influence on environmental performance. See, e.g., Grabosky, supra note 68, at 429.

\textsuperscript{70} See Case, supra note 68, at 10,780; Grabosky, supra note 68, at 435. According to the Social Investment Forum—a trade association for professionals, firms, institutions, and organizations engaged in socially responsible and sustainable investing—socially responsible investing currently encompasses an estimated $3 trillion in the U.S. investment market
erally, all investors should care about the potential liability associated with poor environmental performance and, in industries where customers care about the environment, investors may push for an increase in environmental performance to gain a competitive advantage.\textsuperscript{71}

The term “social market” has been used to describe markets where consumption and investment decisions depend not only on preferences regarding price, quality, and product features, but also on environmental or other social consequences of production.\textsuperscript{72} For social markets to function well, consumers and investors must have relevant information on all of the companies in the market.\textsuperscript{73} More specifically, for consumers and investors to be able to effect changes in corporate environmental practices by punishing and rewarding companies for their environmental performance, they must first have relevant information.\textsuperscript{74}

The EPA has developed a number of information programs designed to provide consumers and investors with relevant information about the environmental performance of regulated facilities.\textsuperscript{75} Arguably, the most socially significant disclosure program is the Toxics Release Inventory (TRI) database.\textsuperscript{76} The TRI provides information on the environmental impact of various companies by requiring regulated entities to disclose the type and level of toxic chemicals used and released into environmental media—air, water, and land.\textsuperscript{77} Programs like the TRI require additional reporting by regulated entities, thus increasing

\textsuperscript{71} See Case, supra note 68, at 10,777; Grabosky, supra note 68, at 427, 434, 436.
\textsuperscript{72} Archon Fung, Making Social Markets: Dispersed Governance and Corporate Accountability, in Market-Based Governance: Supply Side, Demand Side, Upside, and Downside 145, 146 (John D. Donahue & Joseph S. Nye Jr. eds., 2002).
\textsuperscript{73} See id. at 147. I focus on consumers and investors, although obviously other parties such as landlords, lenders, and potential buyers of firms can also take advantage of these information programs. See Vandenberghe, supra note 9, at 2045–58.
\textsuperscript{74} See Fung, supra note 72, at 147–48.
\textsuperscript{76} See Case, supra note 68, at 10,775.
their costs, although those entities are still the low-cost providers of such information.\footnote{Case, supra note 68, at 10,781 & n.108. It would be much more expensive for consumers and investors to obtain such information independently. See id.} Another information source that the EPA has developed is the Enforcement and Compliance History Online (ECHO) database which provides information on the compliance history of regulated entities.\footnote{Enforcement & Compliance History Online (ECHO), Envtl. Prot. Agency, http://www.epa-echo.gov/echo/ (last visited Jan. 12, 2012). ECHO does not require regulated entities to disclose additional information, but rather is a tool developed by the EPA to make its information more accessible to the public. Id.} Since the ECHO database is essentially an interface for data already collected and maintained by the EPA for other purposes,\footnote{Id.} the only additional costs of this program are those associated with developing and maintaining the ECHO system. Both the TRI and ECHO databases are easily accessible for direct use by consumers, investors, and third parties such as news organizations, non-profits like the Environmental Defense Fund, and investment groups such as the Investor Responsibility Research Center.\footnote{See, e.g., Pollution in Your Community, Scorecard, http://www.scorecard.org (last visited Jan. 12, 2012). The Environmental Defense Fund developed a “Scorecard” to rate companies’ environmental performances using TRI data. Environmental Defense Funds Scorecard; An Interactive and Educational Site About Pollution, NASA, http://gcmd.nasa.gov/records/Scorecard-00.html (last visited Jan. 12, 2012). This scorecard has since been transferred to an independent NGO, the Green Media Toolshed. See Pollution in Your Community, supra (follow “About Scorecard” hyperlink, then follow “The History of Scorecard” hyperlink). The Investor Responsibility Research Center used TRI data in compiling its corporate environmental profiles. Ashford & Caldart, supra note 7 at 79.}

Harnessing the power of the market to provide additional pressure on regulated entities to improve their environmental compliance has the potential to be very cost-effective.\footnote{See Fung, supra note 72, at 174–75.} In addition, consumers and investors can gain personally because they are able to make investment and consumption decisions more in line with their personal preferences without having to spend significant additional resources.\footnote{See id. at 149–50.} However, the literature identifies a number of potential concerns that can arise in social markets.\footnote{See id. at 163.} One principal critique is that consumers and investors act for their own, rather than the general public’s, interest.\footnote{See id. at 163–64. If agency priorities are not consistent with the public interest, social markets provide a direct way for the public to influence behavior. See Vandenbergh, supra note 9, at 2034.} For example, consumers might be more concerned with releases of pollution into air than water, even though water pollution may be more harmful to the
environment than air pollution.\textsuperscript{86} Thus, private parties may alter the priorities of firms in a way that is not consistent with public priorities.\textsuperscript{87} In theory, the EPA can respond to the shift in incentives by changing its own behavior to balance out that of private parties.\textsuperscript{88} To make such adjustments, the EPA would need to assess the impact of consumer and investor pressure on environmental behavior and then modify either the underlying regulations or the public enforcement strategy.\textsuperscript{89}

A second concern about social markets is that only certain private parties can participate in them. Individuals must have sufficient resources to be either investors or discriminating consumers with the ability to have an effect on the environmental behavior of entities in these markets.\textsuperscript{90} Moreover, regulated entities will not be uniformly affected by these pressures.\textsuperscript{91} Reputation-sensitive firms, firms that produce final consumer goods, and publicly traded firms will be subject to more pressure than firms that produce intermediate goods or are privately held.\textsuperscript{92} In theory, these concerns could also be addressed by evaluating the effects of social markets on environmental performance and adjusting regulation or enforcement to balance those effects.\textsuperscript{93}

Despite such concerns, a number of economic studies have shown that investors respond to the information provided by these programs.\textsuperscript{94} There are also a number of studies that provide indirect evidence that some consumers respond to the environmental performance of firms.\textsuperscript{95} To date, however, there are no reliable estimates of the number of con-

\textsuperscript{86} See Mark A. Cohen, \textit{Information as a Policy Instrument in Protecting the Environment: What Have We Learned?} 31 \textit{Envtl. L. Rep.} 10,425, 10,428 (2001). The public may "be misinformed about the risks of various pollutants and media attention might have more to do with which firms reduce emissions than any social cost-benefit analysis." \textit{Id.} at 10,430–31.

\textsuperscript{87} \textit{Id.} at 10,428.

\textsuperscript{88} See Fung, \textit{supra} note 72, at 153–56 (discussing the ability of federal agencies to supplement and clarify competing information claims by private parties).

\textsuperscript{89} \textit{See id.} at 156–57 (noting the benefits of influencing social market forces to achieve regulatory goals).

\textsuperscript{90} \textit{See id.} at 150. Additionally, future generations are unlikely to be fully represented by current investors and consumers. \textit{See Vandenbergh, supra} note 9, at 2081–82.

\textsuperscript{91} Fung, \textit{supra} note 72, at 164–65.

\textsuperscript{92} \textit{See id.} This may be changing, however, as intermediate producers are increasingly held to certain standards by other producers. \textit{See Vandenbergh, supra} note 9, at 2059–60 (describing the effect of second-order agreements upon companies, their suppliers, and other corporate associations).

\textsuperscript{93} See Fung, \textit{supra} note 72, at 156–57 (noting the benefits of influencing social market forces to achieve regulatory goals).


\textsuperscript{95} For an overview of this topic, see Stafford, \textit{Role of Market, supra} note 94, at 84.
sumers and investors who make consumption and investment decisions based on environmental preferences, nor is there any reliable indication of what those preferences are and how they line up with regulatory goals. Additionally there is only indirect evidence that regulated entities’ environmental decisions are affected by these social markets. Thus, there is very little understanding of exactly how social markets and the EPA’s information programs are affecting environmental performance overall. Moreover, there does not appear to be any process for adjusting regulatory objectives based on the presence of social markets.

B. Compliance Assistance by Private Entities

The EPA has also facilitated the participation of private entities in providing compliance assistance to regulated entities. Compliance assistance currently plays an important part in the EPA’s overall enforcement and compliance assurance strategy. The general goal of compliance assistance programs is to increase environmental performance by inducing more efficient implementation of regulatory requirements.

In 1994, the EPA began offering formal compliance assistance after its enforcement functions were reorganized to create a single Office of Enforcement and Compliance Assurance. From the beginning, the EPA’s compliance assistance strategy included partnerships with industry. The private role in compliance assistance increased significantly in 1999 when the EPA formally adopted a “wholesaler” approach—de-

96 See Shakeb Afsah et al., Regulation in the Information Age: Indonesian Public Information Program for Environmental Management 1, 9 (1997), available at http://site resources.worldbank.org/NIPRINT/Resources/RegulationInTheInformationAge.pdf (finding that the creation of a public disclosure program in Indonesia caused firms in the program to improve their environmental performance); Shameek Konar & Mark A. Cohen, Information as Regulation: The Effect of Community Right-to-Know Law on Toxic Emissions, 32 J. Envtl. Econ. & Mgmt. 109, 110 (1997) (finding that firms with the largest stock price decreases following the release of environmental information respond with the largest decreases in future pollution).


98 See id. at 128 (“Effective compliance assistance and strong, consistent enforcement are critical to achieving the human health and environmental benefits expected from our environmental laws.”).


101 Targeting & Eval. Branch, supra note 100.
veloping compliance assistance tools and materials and then involving states, localities and private providers (including NGOs, trade associations, and consultants) to deliver the assistance directly to the regulated community.\textsuperscript{102}

This approach to compliance assistance separates activities for which the EPA is likely to be the least-cost provider from those where private entities may be able to provide such services at a lower price.\textsuperscript{103} Thus, given the EPA’s intimate knowledge of the regulations and the manner in which compliance with those regulations is monitored and enforced, the Agency continues to develop guidance and compliance assistance tools.\textsuperscript{104} The EPA then provides these tools as well as compliance assistance training to private providers, who in turn provide the actual compliance assistance to facilities.\textsuperscript{105} In addition to the presumption that private providers may be able to offer the actual compliance services at a lower cost than the government, some regulated entities are more willing to seek compliance assistance from independent parties than from regulators.\textsuperscript{106} One potential downside to this outsourcing is that private providers may emphasize different compliance objectives. For example, private providers may focus on helping regulated

\textsuperscript{102} See EPA, \textit{Innovative Approaches to Enforcement and Compliance Assurance} 4, 7 (1999), available at http://www.epa.gov (follow “Publications, Newsletters” hyperlink; then follow “National Service Center for Environmental Publications” hyperlink; then search “Innovative Approaches to Enforcement and Compliance Assurance”; then follow “Search” hyperlink).

\textsuperscript{103} See supra notes 75–81 and accompanying text (discussing how the EPA compiles the ECHO and TRI databases, but shifts reporting costs to private entities that are the least-cost providers of information).

\textsuperscript{104} See \textit{Compliance Assistance}, supra note 99.


\textsuperscript{106} If private providers can provide compliance assistance at a lower “social” cost (i.e. a lower total cost to society overall) than the government, that does not necessarily imply that regulated entities that seek such assistance will pay less than if they obtain the assistance from public sources. Thus, moving to the wholesale model of compliance assistance could be more efficient, but could also shift costs from the regulatory agency to regulated entities. See \textit{Compliance Assistance}, supra note 99. However, some private providers are non-profit entities or states, many of which continue to provide compliance assistance for small businesses or contract with third parties (such as universities) to provide compliance assistance for free or at a reduced cost. See, e.g., Pollution Prevention Inst. \& Small Bus. Envtl. Assistance Program, KANSAS STATE UNIV., http://www.sbeap.org/index.php (last visited Jan. 12, 2012).
entities pass compliance inspections rather than achieving full compliance with the regulations.

There is no formal estimate of the number of private compliance assistance providers. However, one can get a sense of the potential number by examining EPA data on compliance assistance “contacts.” In 2007 the EPA had more than 50,000 contacts with compliance assistance providers (not including contacts with compliance assistance personnel employed directly by regulated entities).107 While individual providers could have had multiple contacts (e.g., participation in multiple online training programs) this figure suggests that the number of private entities actively involved in helping regulated entities implement environmental compliance programs is not insignificant.108 To date, however, there has been no formal assessment on the effect of the EPA’s “wholesaler” approach to overall compliance assistance, nor has there been any formal evaluation of the effectiveness of the EPA’s overall compliance-assistance program.109

III. INFORMAL PRIVATIZATION INDEPENDENT OF THE EPA

The final category of private activities are those that have been initiated by private entities and are largely independent of the EPA.110 There are many such initiatives, although most are specific to a particular industry or geographic area and are not well known or publicized.111 Others are larger in scale and have received a reasonable amount of attention.112 This paper presents two relatively well-known

---

107 EPA, INTEGRATED COMPLIANCE INFORMATION SYSTEM: COMPLIANCE ASSISTANCE MONTHLY MANAGERS REPORT (Sept., 19, 2009) (report provided by Karen Koslow, Acting Director of the Compliance Assistance & Sector Program Division of OECA, on file with author).


109 See Metzenbaum, supra note 108, at 6, 16, 60–61. The EPA tracks the number of entities “reached” through its compliance assistance programs and compiles feedback from entities receiving assistance as to whether that assistance is useful, but there has been no larger assessment of the compliance assistance program. See id. at 6, 16.

110 See Vandenbergh, supra note 9, at 2038 n.36. Vandenbergh identifies private second-order regulatory agreements as “private in that the parties to the agreements are nongovernmental entities. They are second-order in that they are entered into in response to the existence or absence of first-order government regulatory requirements.” Id. at 2030–31.

111 See, e.g., id. at 2064–65 (discussing “good neighbor agreements,” which fall into this category).

112 See, e.g., Eisner, supra note 1, at 163 (recognizing well known schemes such as the ISO 9000 and ISO 14000 series).
examples, the international ISO 14001 certification program and the U.S. Responsible Care program.

A. ISO 14001

Probably the best known and farthest-reaching private initiative that affects environmental performance is the ISO 14001 certification program. ISO 14001 is a set of voluntary environmental management standards established by the International Organization for Standards, an international non-governmental organization. The ISO 14001 certification program essentially works as a labeling system, conveying information to potential investors and consumers about the environmental standards to which certified companies adhere.

While the information provided by ISO 14001 certification may be used similarly to the information provided by the EPA’s TRI and ECHO databases, there are several key differences between them. First, ISO 14001 certification is voluntary whereas the EPA provides TRI data for all firms within a specified set industries (generally manufacturing), and ECHO information for all regulated entities. Second, the ISO 14001 standards were developed primarily by companies, although there was some input from government agencies and advocacy groups from a number of countries. Finally, the ISO 14001 standards are unlike most U.S. environmental regulations, they do not specify maximum pollution levels or dictate particular equipment that must be installed, but instead enumerate environmental management standards to which firms must adhere to earn certification. The standards include compliance with all local environmental regulations as well as

---

113 See id. at 167, 173.
114 See id. at 163, 165–67, 173.
115 See id. at 163, 167.
116 See id. at 15, 163; Enforcement & Compliance History Online (ECHO), supra note 79.
117 EISNER, supra note 1, at 173.
118 See 40 C.F.R. § 372.22–28 (2008) (establishing TRI reporting requirements based on industry classification, number of employees, and type and amount of chemicals used and released); About the Site, ENVTL. PROT. AGENCY, http://www.epa-echo.gov/echo/about_site.html (last visited Jan. 12, 2012) (stating that ECHO includes all regulated entities subject to the following environmental statutes: the CAA Stationary Source Program, the CWA National Pollutant Discharge Elimination System, and the Resource Conservation and Recovery Act).
119 EISNER, supra note 1, at 164.
120 Compare 42 U.S.C. § 7408 (2006) (requiring EPA administrator to establish ambient air quality standards), with EISNER, supra note 1, at 165–67 (requiring organizations to adopt a policy suitable to the environmental impact of their services, products, or activities).
continuous improvement in environmental management. Thus, the standards require firms to focus on their overall environmental impacts and to think system-wide about how to improve their environmental performance—something that U.S. media-based regulatory programs do not do.\textsuperscript{121} The program also requires a third party to certify that the entity meets all the standards.\textsuperscript{122} Because ISO 14001 standards are not tied to any particular regulatory goals other than compliance with relevant regulations, certified firms may choose to focus on areas for improvement that are different from the areas on which the EPA would like them to focus.\textsuperscript{123}

The EPA has never formally supported the ISO 14001 program.\textsuperscript{124} Although the EPA supports the use of environmental management programs, it has not integrated the idea of environmental management systems directly into regulations or provided any incentives for regulated entities to become certified.\textsuperscript{125} Perhaps as a result, ISO 14001 has not been as widely adopted in the United States as in other developed countries.\textsuperscript{126} In 2004, around 4800 U.S. firms had been certified, representing roughly five percent of total certifications worldwide and a very small percentage of the more than one million regulated entities in the United States.\textsuperscript{127} However, studies have shown that ISO 14001 certification does improve a firm’s compliance with environmental regulations as well as its environmental performance generally.\textsuperscript{128} For example, two studies by Matthew Potoski and Aseem Prakash found that ISO 14001 certification has a positive effect on regulated entities’ environmental performance, even after controlling for self-selection into the ISO

\textsuperscript{121} See Eisner, supra note 1, at 165–66. See generally CWA, 33 U.S.C. § 1251 (regarding water quality); RCRA, 42 U.S.C. § 6901 (regarding solid waste).
\textsuperscript{122} Eisner, supra note 1, at 166–67.
\textsuperscript{123} See id. at 164–65, 174.
\textsuperscript{125} See id. (confirming that this policy statement is still in force and stating that it is the “EPA’s intent to continue to promote the voluntary widespread use of EMSs”); FRS, supra note 28.
\textsuperscript{126} Eisner, supra note 1, at 167.
\textsuperscript{127} Id.
14001 program.\textsuperscript{129} The first study found that certified entities spend less time out of compliance with CAA regulations than non-certified entities.\textsuperscript{130} The second found that certified entities have larger reductions in emissions of toxic chemicals than non-certified firms.\textsuperscript{131}

B. Responsible Care

Perhaps the most well-known example of a U.S. industry-led initiative is the Responsible Care Program, introduced by the Chemical Manufacturer’s Association in 1988 partly in response to the Bhopal disaster.\textsuperscript{132} Pursuant to the program, all members of the Chemical Manufacturer’s Association, renamed the American Chemistry Council (ACC) in 2000, must commit to operating under the Responsible Care principles.\textsuperscript{133} These principles are designed to promote “continual improvement in environmental, health, and safety performance” within chemical companies.\textsuperscript{134} Members are also asked to establish at least one concrete goal in these areas and “make performance improvements towards the realization of that goal.”\textsuperscript{135} Though the program is mandatory for all trade association members, prior to 2004 there was no requirement that an outside party certify compliance with program requirements.\textsuperscript{136}

\textsuperscript{129}See Potoski & Prakash, Weak Swords, supra note 128, at 746, 756; Potoski & Prakash, Green Clubs, supra note 128, at 245.
\textsuperscript{130}See Potoski & Prakash, Green Clubs, supra note 128, at 245.
\textsuperscript{131}See Potoski & Prakash, Weak Swords, supra note 128, at 746. In any study of the effect of ISO 14001 certification, it is important to control for the fact that regulated entities voluntarily decide whether to become certified. See id. at 756. If there are particular factors or firm characteristics that both influence joining ISO 14001 and affect environmental performance, any analysis that does not control for those factors might attribute a particular change in performance to ISO 14001 certification when it is in fact due to the underlying factor. See id. Both of the Potoski and Prakash studies control for the fact that firms voluntarily self-select ISO 14001 certification using a two-step treatment-effects model. See id. at 756; Potoski & Prakash, Green Clubs, supra note 128, at 240.
\textsuperscript{132}See Eisner, supra note 1, at 161. The international Responsible Care program determines the “fundamental features” of the program, but Responsible Care is implemented by national trade associations in various countries, and thus each countries’ program is different. See generally Responsible Care, Int’l Council of Chem. Ass’n, http://www.iccachem.org/en/Home/Responsible-care/ (last visited Jan. 12, 2012).
\textsuperscript{134}Eisner, supra note 1, at 161.
\textsuperscript{135}Id.
\textsuperscript{136}Id. at 161–62.
The potential benefits of the Responsible Care program are similar to those of the ISO 14001 program; in theory, the standards require firms to think system wide about how they could improve their environmental performance. However, the Responsible Care standards are not tied to any regulatory goals, and unlike ISO 14001 they do not mandate compliance with EPA regulations. Thus, the potential concern that private standards programs may drive regulated entities’ incentives away from public regulatory objectives is more pronounced for Responsible Care than it is for ISO 14001. Any distortion in incentives away from public regulatory goals could, in theory, be balanced by a change in public implementation or enforcement activities. To do so, however, would require a more detailed evaluation of the effect of the program on environmental performance than has been conducted.

Similar to its stance on ISO 14001, the EPA does not formally recognize the Responsible Care program in its regulations and has not provided any significant incentives for regulated entities to participate. Over 220 chemical companies participate in Responsible Care. While there are over 1500 chemical companies in the United States, the largest are ACC members; therefore, although fewer than one-fifth of all chemical companies participate, most of the chemical production in the U.S. comes from companies who are participants. A study of the effectiveness of the Responsible Care program by Andrew King and Michael Lenox (in 2000, prior to the requirement for outside verification) found

---

137 See id. at 161, 165–66.
140 See Eisner, supra note 1, at 275. The EPA signed a Memorandum of Understanding with the ACC stating that for the purposes of its now defunct National Environmental Performance Track program (an EPA-led environmental certification program), it would accept Responsible Care certification in lieu of additional third party certification that regulated entities have an environmental management system in place. Memorandum of Understanding between EPA and ACC between Brian Mannix, Associate Administrator of Policy, Economics, and Innovation, U.S. EPA and Carol Henry, Vice President, Industry Performance Programs, ACC (March, 2007) (on file with author per FOIA request).
that participants did not significantly change their level of toxic emissions relative to other non-participating chemical companies.\textsuperscript{143} No studies of the Responsible Care program have been conducted since the ACC imposed the requirement for third-party certification.

IV. EVALUATING THE ROLE OF THE PRIVATE SECTOR IN THE ENFORCEMENT OF ENVIRONMENTAL REGULATIONS

To assess whether the expanded role of private parties in the enforcement of environmental regulations is beneficial from a public policy perspective, it must be determined if the increased involvement of the private sector has either decreased the overall costs of achieving a particular level of environmental performance, or has increased environmental performance in a cost-effective manner. In theory, all of the private activities and initiatives described in this Article—as well as the many others not mentioned—have tremendous potential to increase the efficiency of environmental enforcement. There is also the very real possibility that the involvement of private parties will shift incentives for regulated entities in a way that is not consistent with regulatory objectives. Assuming that regulatory objectives have been set to maximize overall welfare, such a shift would not be in the public interest. Given the potential for private participation to divert regulated entities’ performance away from regulatory objectives, a proactive approach must be taken in evaluating the effect of private participation to ensure that it is helping to achieve regulatory goals more efficiently.

This Article briefly discusses the results of several studies of particular private initiatives.\textsuperscript{144} In some cases, the studies demonstrate that private participation is having a positive effect on environmental performance; analyses of the EPA’s self-policing policy find that it has increased overall compliance, though analyses of the ISO 14001 program show that certification is correlated with an increase in both compliance and environmental performance more generally.\textsuperscript{145} Some studies,

\textsuperscript{143} See Andrew A. King & Michael J. Lenox, Industry Self-Regulation Without Sanctions: The Chemical Industry’s Responsible Care Program, 43 Acad. Mgmt. J. 698, 709 (2000). The analysis examined industry emissions before and after the program for both ACC members and non-members and found no evidence that the program had a positive effect on its members relative to non-members. See id. at 704, 709. The study did not explicitly control for the decision to participate in Responsible Care, since it is a mandatory requirement of membership in the ACC (although ACC membership is itself voluntary). See id. at 704–05.

\textsuperscript{144} See supra notes 39–45, 59–67, 94–96, 128–131, 143 and accompanying text.

\textsuperscript{145} See supra notes 59–67, 128–131 and accompanying text.
such as the one evaluating the Responsible Care program, do not report any statistically significant effect on environmental performance.\textsuperscript{146} Other studies, such as the one concerning private suits that found private enforcement supplements rather than complements public enforcement, suggest a deleterious effect on the achievement of regulatory goals.\textsuperscript{147} Although the studies surveyed in this Article are not a representative sample, their mixed findings suggest the need for careful evaluation of each one of these initiatives. Unfortunately, there is no real understanding of the effect of many programs, either because no analysis has been conducted (as is the case with the privatization of compliance assistance) or because the existing studies only tell us part of the story (as is the case with the analyses of social markets, where there is evidence of use of the information provided by the EPA, but little information on how that use ultimately affects facility behavior).\textsuperscript{148}

Additional empirical analyses of private initiatives would help provide a better understanding of the effect of these programs on the overall achievement of regulatory goals. However, additional individual studies of particular programs are unlikely to be sufficient. First, the types of studies that have been conducted do not address the most significant issue—whether this expansion of the role of private entities in the enforcement of environmental regulations is helping to achieve regulatory goals more efficiently.\textsuperscript{149} The existing studies often provide evidence of improvement in compliance rates or levels of toxic emissions, but they do not measure the extent to which regulatory goals are satisfied. This shortcoming is in part because the regulatory goals themselves have not been explicitly identified and in part because most studies look at intermediate measures such as compliance, not ultimate measures of environmental quality.\textsuperscript{150} Unfortunately, it is not an easy task to develop the types of ultimate measures that would provide the necessary information. For some time, the EPA has been working to develop a robust set of environmental indicators that will provide better information on the actual state of the environment and its evolution, and hopefully such data will be available in the near future.\textsuperscript{151}

\textsuperscript{146} See \textit{supra} note 143 and accompanying text.
\textsuperscript{147} See \textit{supra} notes 39–45 and accompanying text.
\textsuperscript{148} See \textit{supra} notes 59–67, 94–96 and accompanying text.
\textsuperscript{149} See \textit{supra} notes 39–45, 59–67, 94–96 and accompanying text.
\textsuperscript{150} See \textit{supra} notes 75–81 and accompanying text.
Even with good data on environmental quality, the determination of whether private initiatives are more efficient than public implementation and enforcement requires some sense of the relative costs of private and public approaches. In many situations, it is assumed that private entities will be more cost-effective than the government. That is unlikely to be the case for all private initiatives, however, particularly since the costs of private initiatives could be less obvious than the costs of public efforts. Unfortunately, costs are almost never included in analyses of private (or, for the most part, public) initiatives. For example, none of the studies described in this Article made any attempt to compare the cost of private activities to their public alternatives.

Since it is unlikely that all private initiatives help to achieve regulatory goals more efficiently than public efforts, there needs to be a formal evaluation process to determine which programs are beneficial and which—in their current form—are not. There also needs to be some mechanism to modify or eliminate programs that fall into the latter category. Without such a feedback mechanism, additional studies are not going to make much of a difference.\footnote{See \textit{id.} at 165 (“A recognition that policies and programs must be evaluated regularly and rigorously—and resources redeployed where good results are not being achieved—has been long absent from the environmental domain.”).}

Finally, even if studies of particular programs measured their effect on environmental quality and included a comparative analysis of costs, they might still fail to provide a full picture of the overall effect of expanded private participation because they do not illustrate the effect of these initiatives in the aggregate. First, many of these programs overlap.\footnote{See \textit{Responsible Care Management System\textsuperscript{\textregistered} & Certification}, \textit{supra} note 141.} For example, U.S. chemical producers can choose both to be members of Responsible Care and to earn ISO 14001 certification; moreover, the ACC has developed a “Responsible Care Management System” that meets the requirements of both programs.\footnote{\textit{Id.}} Second, private initiatives may reinforce each other.\footnote{See Toffel & Short, \textit{supra} note 60, at 4, 5.} For example, regulated entities that receive compliance assistance often undergo environmental audits—entities may choose to self-police any violations discovered in the course of that audit, particularly if they are fully informed about the Audit Policy as part of the compliance assistance. Alternatively, private initiatives may work against each other. For example, the potential for private citizens to pursue suits against regulated entities may discourage some entities from conducting a self-audit because the audit would
generate a paper trail that could be used against the entity in a private suit.156 Ultimately, any examination of a single private initiative in isolation that does not account for the potential interactions between programs is likely to produce biased results.157 As difficult as it would be to design a larger study, we need to examine the aggregate effects of this expansion of private roles.

**Conclusion**

Given all of the potential benefits that can come from private participation in environmental enforcement, there are currently—and will continue be—calls to expand the role of the private sector.158 But as discussed in this Article, not all private sector initiatives will ultimately be beneficial to society. Thus, before continuing to look for additional ways to increase private participation in the implementation and enforcement of environmental regulations, time and effort must be spent to develop processes to assess the effect of existing private participation.159 After gaining a better understanding of the effect of various private initiatives on the achievement of regulatory goals, a determination must then be made of how to best modify existing private initiatives and, potentially, the underlying regulations and enforcement mechanisms. Only then should expansion of the role of the private sector in the enforcement of environmental regulations be considered.

---

156 Eric W. Orts & Paula C. Murray, *Environmental Disclosure and Evidentiary Privilege*, 1997 U. ILL. L. REV. 1, 16–17. Neither attorney-client privilege, attorney work-product privilege, nor self-evaluative privilege protect the factual material disclosed in an environmental audit report. *Id.* at 40–41. For such material to be privileged, a state must pass legislation specifically granting such privilege. *Id.* at 22. The Audit Policy does not grant privilege to audit documents, although the EPA does state that its policy is to not routinely request such documents. See Audit Policy, supra note 20, at 19,625.

157 See King & Lenox, supra note 143, at 713 (noting caution in expanding theoretical conclusions when analyzing one private initiative). Not only are the results likely to be biased, but given the possibility for programs to both enhance and interfere with each other, we would not necessarily know the direction of that bias.

158 See, e.g., Russ Harding, *Michigan Can Give Businesses a Boost With Environmental Regulatory Reform*, OAKLAND PRESS, (Dec. 10, 2010), http://www.theoaklandpress.com/articles/2010/12/10/opinion/doc4d01719aa986e637326301.txt (calling for governmental officials to “perform only core regulatory functions—specifically, making final permit and enforcement decisions, rather than conducting routine administrative tasks that can be performed by the private sector”).

159 See Grabosky, supra note 68, at 423.
AN EMPIRICAL ANALYSIS OF AGRICULTURAL PRESERVATION STATUTES IN NEW YORK, NEBRASKA, AND MINNESOTA

NICHOLAS CLARK BUTTINO*

Abstract: States passed agricultural preservation statutes in part to protect their agricultural heritage. Some scholars worry that right-to-farm statutes have not succeeded in achieving this goal. The agricultural preservation statutes of New York, Nebraska, and Minnesota show three different strategies toward agricultural preservation, all of which take different stances on the protections extended to small and large farms. Despite the structural differences among the states’ statutory approach to agricultural preservation, all three experienced similar agricultural demographic shifts since the 1980s—the number of large and small farms has increased while the number of medium-sized farms has decreased. The similarity in demographic trends suggests that none of the statutes are effective. Legislatures may be able to redirect their agricultural preservation statutes by empowering agricultural advisory boards to consider not only the soundness of farming practices but also the cultural and environmental value of individual farms.

Introduction

Since Thomas Jefferson’s conception of a society of middle class farmers, the idea of the small farm has been fixed in America as an essential part of its heritage and economy. Responding to population shifts after World War II, every state passed a right-to-farm statute to maintain the economic and cultural importance of farms. Right-to-farm statutes assist farmers in two ways—they offer protection from

* Executive Note Editor, Boston College Environmental Affairs Law Review, 2011–12.


3 Agricultural preservation statutes, as used in this Note, refer to any statute designed to assist farmers. These statutes include not only right-to-farm statutes, but also tax breaks for agricultural zoning, conservation purchase programs, and limitations on corporate farming. Cf. Sam Sheronick, Note, The Accretion of Cement and Steel onto Prime Iowa Farmland:
nuisance suits and prohibit municipalities from passing burdensome zoning laws that would restrict farming operations.\textsuperscript{4} States passed most of these right-to-farm statutes in the 1970s and 1980s.\textsuperscript{5} Since then, many scholars have questioned the effectiveness and purpose of right-to-farm statutes.\textsuperscript{6} Specifically, right-to-farm statutes can shield businesses from environmental protection laws without offering substantial benefits to economic growth, conservation of open spaces, or cultural preservation.\textsuperscript{7}

In response to such criticism, scholars noted that protections for small farms tend to further the goals of right-to-farm statutes and agricultural preservation more broadly, whereas protections for large farms may be unnecessary subsidies.\textsuperscript{8} Perhaps the problem with right-to-farm statutes is that they do not adequately distinguish between plaintiffs (residents versus developers) and defendants (large commercial farms versus small family farms).\textsuperscript{9} Nevertheless, several states implemented right-to-farm statutes in the hopes of promoting environmental interests and small family farms.\textsuperscript{10}

The agricultural preservation statutes in New York, Nebraska, and Minnesota provide examples of different strategies for protecting all

---

\textsuperscript{4} See Hand, supra note 1, at 295, 299.

\textsuperscript{5} See Centner, supra note 2, at 94.


\textsuperscript{7} See Reinert, supra note 6, at 1735–38; see also Neil D. Hamilton, Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective, 3 Drake J. Agric. L. 103, 118 (1998) (arguing that right-to-farm statutes must be more comprehensive to be effective and fair).

\textsuperscript{8} See, e.g., Matt Chester, Note, Anticorporate Farming Legislation: Constitutionality and Economic Policy, 9 Drake J. Agric. L. 79, 82 (2004); Reinert, supra note 6, at 1722, 1736–37; see also Tiffany Dowell, Comment, Daddy Won’t Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers, 18 San Joaquin Agric. L. Rev. 127, 152–53 (2008–09) (suggesting that nuisance protections in right-to-farm statutes are not strong enough to ensure preservation of family farms).

\textsuperscript{9} Reinert, supra note 6, at 1736.

farms and specifically small farms.\textsuperscript{11} New York has a standard right-to-farm statute that provides farmers with protection from nuisance suits and interference from municipalities.\textsuperscript{12} Nebraska banned corporate farming from 1982 to 2006 through a constitutional amendment.\textsuperscript{13} Minnesota has both restricted corporate farming and removed nuisance protections for certain concentrated animal feeding operations (CAFOs).\textsuperscript{14} Clearly, the states have different perspectives on how to protect small farms.\textsuperscript{15}

Empirical analysis indicates that despite their different approaches to agricultural preservation, all three states show similar changes in farming trends.\textsuperscript{16} For example, in all three the number of large and

\textsuperscript{11} See Neb. Const. art. XII; § 8 (1982); Minn. Stat. § 561.19; N.Y. Agric. & Mkts. Law § 300.

\textsuperscript{12} N.Y. Agric. & Mkts. Law §§ 305-a, 308.

\textsuperscript{13} Neb. Const. art. XII, § 8 (1982); see Jones v. Gale, 470 F.3d 1261, 1271 (8th Cir. 2006) (striking down the amendment as unconstitutional under the dormant commerce clause).

\textsuperscript{14} Minn. Stat. §§ 500.24, 561.19.

\textsuperscript{15} See Neb. Const. art. XII, § 8 (1982); Minn. Stat. § 561.19; N.Y. Agric. & Mkts. Law § 300.

small farms has increased, while the number of medium-sized farms has decreased. Similarly, the number of farms with very high and low gross sales has increased in all three states, while the number of farms with moderate gross sales has decreased. Thus, despite their different approaches, all three states have experienced similar changes in farming demographics.

Part I of this Note provides an overview of the design, function, and criticisms of right-to-farm-statutes. Part II discusses the specific statutes and cases that govern agricultural preservation in New York, Nebraska, and Minnesota. Part III offers a visual and numeric comparison of demographic shifts in the three states between 1987 and 2007. Finally, Part IV analyzes these trends and suggests that legislatures should pass statutes that bolster medium-sized farms, rather than punishing large or corporate farms. It further argues that legislatures should delegate authority to agricultural advisory councils to favor the farming practices of small farms.

I. Design, Uses, and Limitations of Right-to-Farm Statutes

A. Development and Use of Right-to-Farm Statutes

Most states passed right-to-farm statutes in the late 1970s and early 1980s in response to population shifts in the American countryside after World War II. During this period, people moved out of cities and into suburban and exurban areas. The growing suburbs caused developers to convert about 3 million acres of farm land for residential purposes each year. Through right-to-farm statutes, states sought to...
slow the rate of land conversion by protecting farmers from nuisance and zoning laws. They reasoned that nuisance suits and zoning laws could make farming unprofitable. Early writings on right-to-farm statutes questioned their constitutional soundness but were hesitantly optimistic that such statutes could preserve farmland.

Right-to-farm statutes typically protect farmers in two ways: (1) by offering protection from nuisance suits, and (2) by limiting the authority of local governments to pass laws that inhibit farming. Typically, nuisance protection varies from state to state. Some states protect farmers if their nuisance-causing activities have priority in time—the “coming to the nuisance” affirmative defense. Other states, such as Minnesota, disqualify potential nuisance claims by imposing a rather brief statute of limitations. These states, however, generally allow nuisance claims arising from the farmer’s negligence. Bans on nuisance claims provide the first line of protection to farmers. They are often more effective in the early stages of land conversion projects because of the time it takes for new suburbs to develop sufficient political clout to alter zoning regulations.

Restrictions on unfavorable zoning laws are the second form of protection offered by right-to-farm statutes. Some states restrict municipalities from passing laws that limit farm use. For example, a town in New York could not pass zoning laws that would limit a farmer’s ability to construct mobile homes for migrant workers. Conversely, a state may encourage agricultural zoning to preserve farms. Agricultural zoning offers the added advantage of separating land by use. Some scholars fear that differences in cultural expectations concerning land

---

23 See Centner, supra note 2, at 88; Hand, supra note 1, at 295.
24 See Reinert, supra note 6, at 1697, 1704 n.66.
26 See Centner, supra note 2, at 88; Hand, supra note 1, at 295.
27 See Reinert, supra note 6, at 1695.
28 See Hamilton, supra note 7, at 106; Hand, supra note 1, at 306–07.
30 See Reinert, supra note 6, at 1707.
31 See id. at 1697.
32 See id.
33 See id. at 1703.
34 Id. at 1705; see also N.Y. AGRIC. & MKTS. LAW § 305-a (McKinney 2011) (forbidding municipalities from “unreasonably restrict[ing] . . . farm operations”).
36 See, e.g., N.Y. AGRIC. & MKTS. LAW §§ 304–305 (discussing the use of tax incentives in agricultural zoning).
37 See id.
use cause many of the conflicts between established farming communities and new suburban residents.\textsuperscript{38} Separating land by use can minimize cultural conflicts between farmers and new residents before either party experiences harm.\textsuperscript{39}

Some states also use other techniques to encourage agricultural preservation.\textsuperscript{40} Agricultural preservation statutes include not only right-to-farm laws but also tax incentives, development rights purchasing programs, and other laws designed primarily to protect farmland as open space.\textsuperscript{41} To illustrate, both Massachusetts and New York purchase conservation easements that restrict future development of land.\textsuperscript{42} States may also reduce assessments on farm land to decrease property taxes.\textsuperscript{43} Tax breaks and purchasing programs, like right-to-farm statutes, attempt to preserve farmland and thus are closely linked to right-to-farm statutes.\textsuperscript{44} Nevertheless, this Note focuses on different applications of right-to-farm statutes.

B. The Limitations and Controversies of Right-to-Farm Statutes

Despite right-to-farm statutes’ purpose of protecting traditional economies, cultural values, open spaces, and the environment, many scholars criticize their design and implementation.\textsuperscript{45} Scholars are concerned that right-to-farm laws create loopholes for agribusiness to skirt environmental laws.\textsuperscript{46} For example, scholars worry that right-to-farm laws allow CAFOs, especially hog farms, to avoid the Clean Water Act (CWA) and dump excess phosphorus into local rivers.\textsuperscript{47} In response to claims of CWA violations, the Environmental Protection Agency (EPA)
moved to include these farms as point sources within the statute. In so doing, the EPA subjected CAFOs to stricter limits on effluent discharge. Some believe that despite EPA’s efforts, CWA violations persist because right-to-farm statutes allow, and even promote, CAFOs that cause significant land deterioration and environmental damage. One commentator argues that right-to-farm statutes offer insufficient protection from nuisance suits, particularly for small farms, and therefore should be strengthened. The fear that environmental damage outweighs the societal benefits of right-to-farm statutes remains a powerful criticism.

Beyond their potential environmental costs, right-to-farm statutes may also be ineffective. Starting in the early 1980s, scholars began to investigate the power of right-to-farm laws and whether they would reduce conflicts over land use. By the 1990s some scholars, noting that the development of right-to-farm statutes appeared ineffective and inequitable, questioned why states did not create a comprehensive system. Protecting farmers from nuisance suits might encourage them to act inefficiently, thereby creating problems for the community. Such inefficiencies appear because of right-to-farm statutes’ lack of clarity which, if remedied by more explicit regulations, could promote bargaining between farmers and residents.

48 See id. Point sources are defined in the CWA as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (2006).
49 See 33 U.S.C. § 1342(a) (defining the requirements for regulation of point sources in the CWA); see also Terrence J. Centner, Challenging NPDES Permits Granted Without Public Participation, 38 B.C. ENVTL. AFF. L. REV. 1, 5 (2010) (discussing how the EPA changed the regulations of CAFOs in the CWA as a result of public participation).
50 Centner, supra note 2, at 92; see Hamilton, supra note 7, at 109–10; Knauf, supra note 45, at 8.
51 See Dowell, supra note 8, at 152–53.
52 See Reinert, supra note 6, at 1717–18, 1722.
53 See Duke & Malcom, supra note 45, at 302; Reinert, supra note 6, at 1724.
54 See Mark B. Lapping et al., Right-to-Farm Laws: Do They Resolve Land Use Conflicts? 38 J. SOIL & WATER CONSERVATION, 465, 467 (1983) (indicating that right-to-farm laws are often worded too vaguely, but at least attempt to solve conflicts regarding land uses); Reinert, supra note 6, at 1728.
55 See, e.g., Hamilton, supra note 7, at 118.
56 Reinert, supra note 6, at 1728.
To the extent that right-to-farm statutes are effective, scholars question whom they benefit. The traditional concern is that right-to-farm statutes give too much assistance to large commercial farms without reciprocal benefits to the environment. The agricultural community has shown mixed interest in environmental preservation. If both farmers and their neighbors use their land in socially and economically beneficial ways, one might question why legislatures should favor farmers. In turn, one could propose a Coasean solution—which emphasizes market efficiency in the law—of encouraging farmers and residents to sign contracts where farmers agree to basic environmental protection standards in exchange for more protections from litigation. The value of right-to-farm statutes remains an open question, but state legislatures continue to promote them as a matter of policy.

Additionally, both the Farm Bill and hobby farms influence the development and use of agricultural land. The Farm Bill is a comprehensive set of laws designed to provide food security, promote farming, and develop ethanol production. However, one scholar notes that the Farm Bill has caused massive industrialization of American agriculture. On a smaller scale, hobby farms—farms that are run for their owner’s enjoyment rather than as a source of income—raise some environmental concerns. Specifically, hobby farms sometimes represent a

---


59 Reinert, supra note 6, at 1715, 1722.

60 See Patricia E. Salkin & Brenda Stadel, Agricultural Land Preservation, in ZONING AND LAND USE CONTROLS § 56.01 (LexisNexis Matthew Bender 2011), available at LexisNexis ZLANDU.

61 See Baker, supra note 58, at 8; Wall, supra note 58, at 236–37.

62 See Lewis, supra note 57, at 1570, 1584; Reinert, supra note 6, at 1734–35.

63 See Reinert, supra note 6, at 1738.


66 See Eubanks, supra note 1, at 251–52.

67 See Krannich, supra note 64, at 83–84; Richardson, supra note 64, at 65–66.
step toward developing farmland for residential purposes.\textsuperscript{68} Thus, farmers are pressured to either become larger and more industrialized or sell their land for division.\textsuperscript{69}

Much of the ambiguity regarding the effectiveness of right-to-farm statutes results from confusion about whom they are designed to assist.\textsuperscript{70} State legislatures often preface their right-to-farm statutes with a vague statement of intent.\textsuperscript{71} In these cases, it is unclear whether the legislature was most interested in protecting a rural farming culture, the environment, or the viability of an agricultural economy.\textsuperscript{72} Moreover, statutes designed to protect small farms may be more useful to large farms because the scale of nuisances often increases with farm size.\textsuperscript{73} Much of the language of right-to-farm statutes, however, is more related to the cultural and environmental benefits associated with small farms than the economic influences of agribusinesses.\textsuperscript{74}

II. Statutes, Cases, and History of Agricultural Preservation

Laws by State

States employ a variety of tactics to preserve agriculture.\textsuperscript{75} New York, Nebraska, and Minnesota use three different techniques to assist farms while also trying to limit the influence of agribusinesses.\textsuperscript{76} These methods are only a sample of available strategies.\textsuperscript{77} Their statutory language, which ranges from broad statements about the historical impor-

\begin{itemize}
  \item \textsuperscript{68} See Krannich, \textit{supra} note 64, at 83–84.
  \item \textsuperscript{69} Reinert, \textit{supra} note 6, at 1699; see Eubanks, \textit{supra} note 1, at 251–52; Richardson, \textit{supra} note 64, at 65–66.
  \item \textsuperscript{70} Hamilton, \textit{supra} note 7, at 108 (stating that right-to-farm statutes are too broadly applicable).
  \item \textsuperscript{71} Reinert, \textit{supra} note 6; see, \textit{e.g.}, N.Y. Agric. & Mkts. Law § 300 (McKinney 2011) (stating that the purpose of New York agricultural preservation is “to conserve, protect and encourage the development and improvement of its agricultural land for production of food and other agricultural products”).
  \item \textsuperscript{72} Reinert, \textit{supra} note 6, at 1718–19; see, \textit{e.g.}, N.Y. Agric. & Mkts. Law § 300.
  \item \textsuperscript{73} Hamilton, \textit{supra} note 7, at 112.
  \item \textsuperscript{74} See Centner, \textit{supra} note 2, at 141. Scholars refer to farms of less than 1000 acres, with gross sales of less than $250,000, as small family farms. Chester, \textit{supra} note 8, at 80; Reinert, \textit{supra} note 6, at 1698. While the per capita sales of small farms do not match those of large farms and CAFOs, they fit more neatly within traditional conceptions of preservation. Centner, \textit{supra} note 2, at 141–42; see Salkin, \textit{supra} note 60, § 56.01.
  \item \textsuperscript{75} Centner, \textit{supra} note 2, at 147; Reinert, \textit{supra} note 6, at 1695.
  \item \textsuperscript{76} Neb. Const. art. XII, § 8 (1982); Minn. Stat. § 561.19 (2010); N.Y. Agric. & Mkts. Law § 300 (McKinney 2011).
  \item \textsuperscript{77} See Centner, \textit{supra} note 2, at 147 (listing the right-to-farm statutes of all fifty states). Some consider North Carolina to have the model right-to-farm statute. Lapping et al., \textit{supra} note 54, at 465; Reinert, \textit{supra} note 6, at 1707.
\end{itemize}
tance of agriculture, to a ban on corporate farming, to limits on nuisance protections for concentrated animal feeding operations (CAFOs), provides solid grounds for a comparative analysis.78

A. New York: A Standard Right-to-Farm Statute with an Agricultural Advisory Council

New York’s agricultural preservation statute offers a basic set of protections similar to many states.79 The statute begins with a statement of purpose.80 The purpose statement indicates that New York’s lands are in jeopardy, and therefore all efforts should be made to “protect and encourage the development and improvement of its agricultural land for production of food” and “protect agricultural lands as valued natural and ecological resources.”81 Farming land is also valuable as an economic resource, as it accounts for billions of dollars in New York’s economy.82

The statute offers both nuisance and zoning protections to farmers, declaring that “an agricultural practice shall not constitute a private nuisance,”83 and “local governments . . . shall not unreasonably restrict or regulate farm operations.”84 The statute allows for an exception to this protection when the local government can show that the “public health or safety is threatened” by the agricultural practice.85

New York’s nuisance protection for farmers has an interesting twist because the statute requires the State Advisory Council on Agriculture (Council) to determine whether an activity is a “sound agricultural practice” before farmers receive protection.86 The Governor of New York appoints members of local farming communities to the Council, which advises the State Department of Agriculture on all farming and agricultural preservation issues.87 Many states require that farmers follow some

78 See Neb. Const. art. XII, § 8 (1982); Minn. Stat. § 561.19; N.Y. Agric. & Mkts. Law § 300.
79 See Centner, supra note 2, at 113.
80 N.Y. Agric. & Mkts. Law § 300.
81 Id.
82 Nolon & Solloway, supra note 42, at 592.
83 N.Y. Agric. & Mkts. Law § 308.
84 Id. § 305-a.
85 Id.
86 Id. §§ 308, 309; Centner, supra note 2, at 113.
baseline of accepted practices, but New York’s statute attempts to define how such practices will be evaluated. The Council’s authority, especially when considered in light of the statute’s purpose statement, allows for selective protection of farming practices that are most beneficial to the economy, culture, and environment. Thus, the Council could favor the practices of small farms instead of agribusiness and CAFOs.

Case law precedent concerning New York’s right-to-farm statute instructs New York courts to uphold protections for farmers in the absence of compelling evidence to do otherwise. For example, in Town of Lysander v. Hafner, the court evaluated whether a town could pass zoning ordinances that limited a farmer’s ability to construct mobile homes for housing migratory workers. The court interpreted the meaning of “farm operations” broadly to include residential buildings and held that the town did not present sufficient evidence to show a risk to public safety—the requirement for an exception to New York’s right-to-farm law.

Additionally, case law precedent reinforces the Council’s determinations concerning agricultural practices. For example, a court upheld the Council’s determination that storage of pig manure in a large concrete container is a sound agricultural practice. The court also decided that the Council has the authority to determine practices for pesticide use. Although these rulings reinforce the authority of the Council to protect farmers, they do not embody the environmental protections envisioned in the purpose statement of New York’s agricultural preservation statutes. New York’s laws thus offer an interesting point of comparison because of their effectiveness in preserving agriculture and promoting family farms.

88 N.Y. Agric. & Mkts. Law § 308; see Dowell, supra note 8, at 133–35.
89 See N.Y. Agric. & Mkts. Law § 308; Dowell, supra note 8, at 134–35.
90 See N.Y. Agric. & Mkts. Law § 308; Dowell, supra note 8, at 135.
92 759 N.E.2d at 359.
93 Id.
94 Pure Air & Water, 669 N.Y.S.2d at 250–51.
95 Lacona, 858 N.Y.S.2d at 835–36.
96 Id. at 835.
98 See N.Y. Agric. & Mkts. Law § 300.
B. Nebraska: Nuisance Protection and a Constitutional Ban on Corporate Farming

Nebraska’s laws combined a standard nuisance protection clause and a constitutional amendment that restricted the ability of out-of-state corporations to operate farms in the state.\textsuperscript{99} The Nebraska legislature, in passing the Constitutional amendment, addressed concerns about the influences of agribusinesses and provided additional protection to family farms because only they offered sufficient cultural and environmental benefits.\textsuperscript{100} The combination of nuisance protection and limitations on corporate farming between 1982 and 2006 distinguish Nebraska’s agricultural preservation laws from those of many other states.\textsuperscript{101}

1. The Structure and Limitations of Nebraska’s Right-to-Farm Statute

Nebraska’s right-to-farm statute provides a basic set of nuisance protections for both animal and crop farms.\textsuperscript{102} The statute provides that “[a] farm . . . shall not be found to be a public or private nuisance,” as long as the farming activity is a preexisting use.\textsuperscript{103} Another section of the statute defines “farm” as “any tract of land over ten acres in area used for or devoted to the commercial production of farm products.”\textsuperscript{104} The statute thus excludes very small farms from the nuisance shield.\textsuperscript{105} The legislature makes no further distinction between types of farms in the basic right-to-farm statute.\textsuperscript{106} The statute’s “coming to the nuisance” defense, however, requires the farming practices to predate the plaintiff’s enjoyment of the land.\textsuperscript{107} Nebraska also allows

\textsuperscript{100} See Anthony B. Schutz, Corporate-Farming Measures in a Post-Jones World, 14 Drake J. Agric. L. 97, 120–21 (2009); Chester, supra note 8, at 82.
\textsuperscript{101} See Neb. Const. art. XII, § 8; Neb. Rev. Stat. § 2-4403; Jones, 470 F.3d at 1271; Schutz, supra note 100, at 106. Twelve other states have some form of corporate farming restriction. Schutz, supra note 100, at 106.
\textsuperscript{102} Neb. Rev. Stat. §§ 2-4402 to -4403; see Reinert, supra note 6, at 1707 (describing the North Carolina right-to-farm law as a model statute, and detailing its nuisance protections).
\textsuperscript{103} Neb. Rev. Stat. § 2-4403.
\textsuperscript{104} Id. § 2-4402. The statute also offers similar protections to “public grain warehouse[s].” See id. § 2-4403.
\textsuperscript{105} Id. § 2-4402.
\textsuperscript{106} Id. § 2-4403.
\textsuperscript{107} Id.
the use of zoning to protect farms, but that scheme is not part of the right-to-farm statute.\textsuperscript{108}

The Nebraska Supreme Court interprets the right-to-farm statute narrowly, thereby offering farmers protection only when their operations fit within the text of the statute.\textsuperscript{109} Most recently, the court held that the statute does not apply retroactively.\textsuperscript{110} In earlier cases, the court was not sympathetic to CAFOs for hogs, finding that construction of hog confinement areas did not protect the farmers because they changed their use of their land and thus could not avail themselves of the “coming to the nuisance” defense.\textsuperscript{111} These cases show that the court did not strike down nuisance protections for CAFOs because the farms should not have been protected within the plain meaning of the statute.\textsuperscript{112}

2. A Constitutional Amendment Banning Corporate Farming

An amendment to Nebraska’s Constitution changed the background of agricultural preservation by prohibiting out-of-state corporate farming.\textsuperscript{113} While in effect, article twelve, section eight provided that “[n]o corporation or syndicate shall acquire . . . any title to real estate used for farming or ranching in this state, or engage in farming or ranching.”\textsuperscript{114} Additionally, the amendment did not apply to “family farm[s]” where the “majority of the voting stock is held by members of a family . . . at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm.”\textsuperscript{115} In this way, the people of Nebraska tried to affirmatively ban agribusinesses to preserve their culture and heritage.\textsuperscript{116}

In \textit{Jones v. Gale}, the Eighth Circuit held article twelve, section eight of the Nebraska Constitution invalid because it violated the dormant

\begin{footnotes}
\item[108] See, e.g., \textit{id.} § 23-114.03 (allowing counties to set restrictions on the use of agricultural lands); \textit{id.} § 81-2,147.12 (preempting local laws relating to the sale of seeds).
\item[110] Soukop, 653 N.W.2d at 658 (holding that the 1998 addition of grain operators in the definition of farm did not extend retroactive protections for grain operators).
\item[111] See \textit{Flansburgh}, 370 N.W.2d at 129, 131; \textit{Cline}, 361 N.W.2d at 569, 572.
\item[112] See \textit{Neb. Rev. Stat.} § 2-4403; \textit{Flansburgh}, 370 N.W.2d at 129, 131; \textit{Cline}, 361 N.W.2d at 569, 572.
\item[113] \textit{Neb. Const.} art. XII, § 8 (1982); see Chester, \textit{supra} note 8, at 82, 84; Schutz, \textit{supra} note 100, at 106–07.
\item[114] \textit{Neb. Const.} art. XII, § 8 (1982).
\item[115] \textit{Id.}
\item[116] See \textit{id.}; Schutz, \textit{supra} note 100, at 101–02.
\end{footnotes}
The dormant commerce clause provides that, because Congress has the affirmative power to regulate commerce, states may not act to limit interstate commerce. The court specifically attacked the exception that allowed corporate farming for family farms that were managed by Nebraska residents. The statute violated the dormant commerce clause because it discriminated against out-of-state businesses. Because only part of the statute violated the dormant commerce clause, it may still be permissible for a state to ban corporate farming all together. Nevertheless, Nebraska case law required the Eighth Circuit to hold the entire statute unconstitutional instead of simply severing the offending provision.

When one considers the amendment along with the right-to-farm statute, Nebraska had developed a distinct strategy for agricultural preservation.

C. Minnesota: Limits on Nuisance Protection for CAFOs and a Ban on Corporate Farming

The Minnesota agricultural preservation statutes both provide small farms with nuisance protection and ban corporate farming. The state’s right-to-farm statute operates like those of New York and Nebraska. The statute provides that a farm “is not and shall not become a private or public nuisance after two years from its established date of operation.” It also contains a few standard limitations—the farm must be in an “agriculturally zoned area,” the farmer must follow “generally accepted agricultural practices,” and the farmer cannot operate equipment negligently. The statute defines farm as “a facility and its appurtenances for the production of crops, livestock, poultry, dairy products or poultry products, but not a facility primarily engaged...
in processing agricultural products.” 128 Interestingly, the statute does not apply to farms that can hold more than 1000 hogs or 2500 cattle. 129 Although Minnesota’s right-to-farm statute provides standard protections for farmers, the legislature must have been concerned about large CAFOs abusing environmental protection laws. 130

Minnesota has another statute that bans certain types of corporate farming. 131 In the statute’s purpose statement, “the family farm” is described as “the most socially desirable mode of agricultural production” and essential to “the stability and well-being of rural society in Minnesota and the nuclear family.” 132 The statute goes on to list certain exceptions to the ban, mostly related to family corporations. 133 The exceptions have some of the residency requirements seen in the Nebraska constitution but are more complex. 134 Consequently, the reasoning in Jones v. Gale probably does not undermine Minnesota’s ban on corporate farming. 135

Similar to Nebraska, the Minnesota courts interpret these statutes according to their plain meaning. 136 Farmers may be liable for nuisances, even when using generally accepted agricultural equipment. 137 Plaintiffs must show that the farmer used that equipment negligently. 138 For example, a dairy farm that used a clay manure storage area could commit a nuisance from the odor of that manure if the farmers did not properly construct the storage basin. 139

---

128 Id. The statute uses “agricultural operation” instead of farm. Id.
129 Id.
130 See id.
131 Id. § 500.24.
132 MINN. STAT. § 500.24.
133 Id.
134 See NEB. CONST. art. XII, § 8 (1982); MINN. STAT. § 500.24.
135 See MINN. STAT. § 500.24; Jones, 470 F.3d at 1271; see also infra notes 159–232 and accompanying text (analyzing the statutes in context).
III. Empirical Data on Demographic Changes in Farming by State, Farm Size, and Gross Sales

A. An Overview of Methods and Considerations

The U.S. Department of Agriculture keeps detailed records of changes in farming output and demographics, measured every five years.\textsuperscript{140} The Department of Agriculture and the Census Bureau have collected data on agricultural demographics since 1840.\textsuperscript{141} For the purposes of this Note, data from 1987, 1992, 1997, 2002, and 2007 will be analyzed.\textsuperscript{142} Demographic changes are important because they may signify the increase of agribusinesses at the expense of more traditional agriculture.\textsuperscript{143} The current literature, published before some of the more recent agricultural censuses, offers only a brief analysis of demographic changes and does not attempt to link those changes with specific statutes.\textsuperscript{144}

Although New York, Nebraska, and Minnesota have different agricultural protection statutes, they all exhibit similar trends—large and small sized farms are increasing in number while medium size farms are decreasing in number.\textsuperscript{145} The following section highlights the data indicating these demographic shifts.

New York and Minnesota experienced the most similar changes in demographics.\textsuperscript{146} Nebraska’s numbers are somewhat deceptive, however, because the average farm is much larger in Nebraska than New York and Minnesota.\textsuperscript{147} In 2007, the average size of a farm was 953 acres


\textsuperscript{141} Id.

\textsuperscript{142} See id.; see also Historical Census Publications, Dep’t of Agric., http://www.agcensus.usda.gov/Publications/Historical/Publications/index.asp (last visited Jan. 16, 2012) (indicating a gap of available data between 1950 and 1987).

\textsuperscript{143} Chester, supra note 8, at 80; Reinert, supra note 6, at 1698.

\textsuperscript{144} See generally Reinert, supra note 6 (analyzing the effects of right-to-farm statutes on family farms without a detailed analysis of demographic shifts).


\textsuperscript{147} 2007 Census, supra note 140, at 348–50.
in Nebraska, 197 acres in New York, and 332 acres in Minnesota.148 At the same time, Nebraska had 36,352 farms, compared to 36,352 in New York and 80,992 farms in Minnesota.149 The states all experienced similar trends in demographic shifts in size despite different statutory approaches to agricultural preservation.150

B. Demographic Changes in Number of Farms

New York, Nebraska, and Minnesota experienced similar shifts in the number of small, medium, and large farms between 1987 and 2007.151 The number of small farms increased in New York and Minnesota by 28.6% and 39.8% respectively; the number of small farms in Nebraska decreased by 1.7%.152 The number of medium-sized farms decreased in all three states, by 25.8% in New York, by 26.7% in Minnesota, and by 36.2% in Nebraska.153 The number of large farms increased in all three states—by 35.8% in New York, by 45.2% in Minnesota, and by 6.9% in Nebraska.154

The demographic shifts in gross sales in New York, Nebraska, and Minnesota mirror the shifts in average farm size.155 The number of farms with low gross sales increased in New York by 14.5% and in Minnesota by 54.9%.156 Conversely, the number of farms with low gross sales in Nebraska decreased by 2.1%.157 Farms with moderate gross

---

148 Id.
149 Id.
sales decreased in all three states—by 30.5% in New York, by 42.8% Minnesota, and by 48.1% in Nebraska.\textsuperscript{158} Differing from the data by size, the number of farms with high gross sales increased in all three states—by 107.9% in New York, by 266.4% in Minnesota, and by 216.9% in Nebraska.\textsuperscript{159}

IV. THE DEMOGRAPHIC TRENDS INDICATE THAT THE STATUTES ARE INEFFECTIVE AND COULD BE IMPROVED BY MORE TAILORED ACTION

The Department of Agriculture’s data indicates that, despite having different strategies for protecting small and large farms, New York, Nebraska, and Minnesota have similar demographic trends in the number of farms by size and gross sales.\textsuperscript{160} The lack of a correlation between divergent statutory language and statistical results suggests that these agricultural preservation statutes are not effective.\textsuperscript{161} Macroeconomic factors, such as the Farm Bill, probably have a greater effect on the success of agricultural preservation.\textsuperscript{162} Nevertheless, right-to-farm statutes can still play a role in environmental preservation.\textsuperscript{163} States can solve many of the problems associated with right-to-farm statutes by permitting state agricultural boards to consider not only sound practices but also the type of farm.\textsuperscript{164}

A. DEMOGRAPHIC DATA INDICATES THAT RIGHT-TO-FARM STATUTES ARE INEFFECTIVE

The demographic trends discussed in Part III suggest that the differences in statutory language have little influence on farming growth. Notably, small and large farms have increased in all three states, while


\textsuperscript{162} See Centner, supra note 2, at 90. See generally Eubanks, supra note 1.

\textsuperscript{163} See Reinert, supra note 6, at 1738 (suggesting how right-to-farm statutes could be amended to preserve the environment).

\textsuperscript{164} See Centner, supra note 2, at 143; Reinert, supra note 6, at 1736.
the number of medium-sized farms has decreased.\textsuperscript{165} The cause of these trends and the overall effectiveness of the statutes, however, cannot be determined from the Department of Agriculture’s data alone.\textsuperscript{166} The data offers no baseline for comparison because all states have right-to-farm statutes and all states differ in the structure of their agricultural economy.\textsuperscript{167}

Surprisingly, the data does not coincide with the expectation that divergent strategies for farm preservation would produce different results. Nebraska and Minnesota have made strong attempts to limit corporate farming but have only experienced comparable increases in the number of farms with high gross sales to New York.\textsuperscript{168} To the extent that the data differs from state to state, Nebraska’s data is the most distinctive.\textsuperscript{169} Yet Nebraska and Minnesota have the most similar statutes, suggesting that New York should have more distinctive results.\textsuperscript{170}

Nebraska’s deviation can partially be explained by the structure of its right-to-farm statute. Nebraska refused to extend nuisance protections to farms with less than ten acres.\textsuperscript{171} Accordingly, the most dramatic drop in the number of small farms occurred in farms with less than ten acres.\textsuperscript{172} The absence of this protection and the corresponding drop in the number of small farms indicates the importance of nuisance shields in maintaining farms.\textsuperscript{173} Thus, although analysis of the demographic trends as a whole downplays the significance of right-to-farm statutes, their presence is somewhat important. Other data does not show what occurs with the complete removal of nuisance protections.\textsuperscript{174} Neither Minnesota’s removal of nuisance protection for CA-

\begin{footnotes}
\textsuperscript{166} See Centner, supra note 2, at 90 (suggesting economic factors influence farming population shifts).
\textsuperscript{167} See id. at 87, 88.
\textsuperscript{170} See supra notes 75–139 and accompanying text.
FOs nor Nebraska and Minnesota’s general limitations on corporate farming correspond with shifts in farm’s land area or gross sales.\textsuperscript{175} The other small differences in Nebraska’s data trends are best explained by the differences in average farm size between Nebraska and the other two states.\textsuperscript{176}

While previous scholarship has focused on the distinction between small and large farms, the data indicates that distinguishing among three size groups reveals meaningfully different trends.\textsuperscript{177} Scholars traditionally separate farms into two categories—farms with less than both 1000 acres and $250,000 in gross sales, and larger farms.\textsuperscript{178} It makes sense, however, to break farms into three categories—farms that do not produce enough revenue to support their owners (hobby farms), family farms, and agribusinesses.\textsuperscript{179} For the purpose of this Note, hobby farms are those with less than both $10,000 in gross sales and 100 acres.\textsuperscript{180}

The drastic increases in the number of large farms and hobby farms, and corresponding decreases in medium-sized farms, indicate that economic pressures overwhelm the statutes’ strategies.\textsuperscript{181} Though right-to-farm statutes may be important for the protection of farms generally, attempts to limit corporate farming appear to be ineffective.\textsuperscript{182} Despite having an outright ban on corporate farming, Nebraska and


\textsuperscript{176} See supra notes 140–150 and accompanying text.

\textsuperscript{177} See, e.g., Centner, supra note 2, at 141–42; Reinert, supra note 6, at 1698.

\textsuperscript{178} See Chester, supra note 8, at 80; Reinert, supra note 6, at 1698. These numbers are not adjusted for inflation. But see Eubanks, supra note 1, at 229 (analyzing the national decrease in numbers of small, medium, and large farms). Gross sales provide a better indication of the economic structure of a farm, but because of inflation, land acreage offers a more consistent variable for comparison across time. See Reinert, supra note 6, at 1698.

\textsuperscript{179} See Eubanks, supra note 1, at 229. Hobby farms lack a clear definition. See, e.g., Krannich, supra note 64, at 83 (stating that three to five acre farms are hobby farms); Richardson, supra note 64, at 65–66 (indicating that hobby farms are about ten acres in size).

\textsuperscript{180} When originally analyzing the data, I expected only to find a distinction between small and large farms. I made these categories only after viewing the data and recognizing the difference between smaller family farms, which I describe as hobby farms, and larger family farms.

\textsuperscript{181} See Centner, supra note 2, at 90.

Minnesota experienced drastic increases in the number of farms with more than $250,000 in gross sales (217% and 266%, respectively). New York, which does not have such a ban, experienced a 108% increase. Conversely, all three states saw a decrease in the number of moderate income farms. The decreases by gross sales ranged from 30% to 48%. When grouped by size, the decreases ranged from 25% to 38%.

Demographic shifts away from medium-sized farms threaten many of the cultural and economic benefits that agricultural preservation statutes seek to protect. Both New York and Minnesota explicitly justify their agricultural preservation statutes on the importance of protecting cultural values, traditional economies, and the environment. Additionally, scholars attribute environmental benefits to medium-sized farms. Thus, it appears that agribusinesses and hobby farms unjustly benefit from right-to-farm statutes.

B. A Potential Solution: Granting Agricultural Advisory Councils Discretion to Favor Both Environmentally Sound Practices and Medium-Sized Farms

The disconnect between the purpose underlying right-to-farm statutes and changing demographics suggests the need to revise the laws. Proposed solutions are difficult to verify because the variation between states’ statutes and economies makes clear comparison almost impossible. Additionally, macroeconomic issues appear to drive the shifts in farming demographics. Agricultural preservation statutes can only

---

188 See Reinert, supra note 6, at 1737.
190 See, e.g., Krannich, supra note 64, at 83–84; Reinert, supra note 6, at 1737.
191 See, e.g., Krannich, supra note 64, at 83–84; Reinert, supra note 6, at 1737.
192 See Reinert, supra note 6, at 1736.
193 See Centner, supra note 2, at 90, 147 (commenting on the influence of macroeconomic factors).
194 See id. at 90; Eubanks, supra note 1, at 217.
insulate certain populations from those pressures.\textsuperscript{195} Potential solutions, such as creating more distinctions within the statutes, encouraging contractual agreements, and strengthening right-to-farm statutes offer some promise.\textsuperscript{196} Legislatures should proceed carefully in implementing any changes to right-to-farm statutes to minimize economic disruption.\textsuperscript{197} Using state agricultural boards to decide which farms and practices are most deserving of protection will promote locally appropriate changes consistent with the purpose statements of agricultural preservation statutes.\textsuperscript{198}

First, universally strengthening right-to-farm statutes will not reverse the demographic trends because of the economic pressures driving agricultural industrialization.\textsuperscript{199} Some commentators champion the enhancement of right-to-farm statues as a solution to the decreasing number of farms.\textsuperscript{200} The more extreme version of this argument contends that population migration and lack of cultural understanding are the primary threats to the American family farm.\textsuperscript{201} The more moderate approach articulates that agricultural interests need more protection because states have not integrated current right-to-farm statutes with broader economic policies.\textsuperscript{202} The moderate argument correctly characterizes many of the problems facing American agriculture as both economic and cultural.\textsuperscript{203} Economic changes, more than cultural intolerance, drive agricultural demographics.\textsuperscript{204}

Other proposed changes to agricultural preservation, such as modifying the structure of farm subsidies or encouraging contract formation, provide a background when considering the alteration of right-to-farm statutes.\textsuperscript{205} First, the Farm Bill gives rise to many of the economic influences that alter the effectiveness of right-to-farm statutes.\textsuperscript{206} Sec-

\textsuperscript{195} See Reinert, supra note 6, at 1738.
\textsuperscript{196} See Centner, supra note 2, at 145.
\textsuperscript{197} See Reinert, supra note 6, at 1738.
\textsuperscript{198} See Dowell, supra note 8, at 152–53.
\textsuperscript{199} See Centner, supra note 2, at 145.
\textsuperscript{200} See Reinert, supra note 6, at 1737.
\textsuperscript{201} See Dowell, supra note 8, at 152–53 (suggesting that states should strengthen right-to-farm statues); Eubanks, supra note 1, at 217 (describing the industrialization of farming); Hamilton, supra note 7, at 118.
\textsuperscript{202} See Dowell, supra note 8, at 128, 152–53.
\textsuperscript{203} See id. at 128.
\textsuperscript{204} See Hamilton, supra note 7, at 118.
\textsuperscript{205} See Dowell, supra note 8, at 149 (indicating that lack of understanding and education are the primary culprits of agricultural destruction); Hamilton, supra note 7, at 118.
\textsuperscript{206} See Centner, supra note 2, at 90.
\textsuperscript{207} See Eubanks, supra note 1, at 309–10; Lewis, supra note 57, at 1594–95.
\textsuperscript{208} See Eubanks, supra note 1, at 309–10.
ond, fixing inconsistencies within right-to-farm statutes would permit farmers and residents to bargain more efficiently. Nevertheless, legislatures should change how right-to-farm statutes function by altering the rights they give to farmers and residents.

Legislatures could start by enacting statutes that allow courts to differentiate between different types of plaintiffs and defendants. Offering nuisance protections only to smaller farms and allowing claims only from local residents would further the goals of agricultural preservation. The idea that residents should have some right to sue, especially if a farmer drastically changes the type of farming practiced, comports with notions of fairness. Further, distinguishing plaintiffs and defendants could account for local economic or environmental factors because they can incorporate the nuances of local farming economies.

Allowing courts to differentiate based on plaintiffs and defendants does not fully address the declining number of medium-sized farms. The argument advocates distinguishing between businesses and family farms because businesses can view nuisance as an expense rather than a threat to their livelihood. While the argument’s reasoning may be accurate, it does not properly account for the growing number of small farms. The legislatures and courts should therefore attempt to favor medium-sized farms. They should establish laws that account for local culture, climate, and individual circumstances. However, courts may lack the specialized expertise to determine the subjective cultural and environmental benefits to a given farm or farming practice.

State agricultural boards, such as New York’s Agricultural Advisory Council (Council), are the proper authorities to decide what types of farming to encourage. Statutes that define strict acreage and gross income requirements for nuisance protection might not be able to ac-

---

207 See Lewis, supra note 57, at 1584; Reinert, supra note 6, at 1734.
208 See Reinert, supra note 6, at 1738.
209 See id.
210 See id. at 1736–38.
211 Hand, supra note 1, at 311–12.
212 Reinert, supra note 6, at 1722.
213 See id. at 1736–37. Farms with 50 to 499 acres of land have been decreasing most dramatically. See id. at 1698.
214 Id. at 1722, 1733.
215 See id.; supra notes 140–150 and accompanying text.
216 See Reinert, supra note 6, at 1736.
217 See id.
218 See id. at 1737.
219 See N.Y. AGRIC. & MKTS. LAW § 309 (McKinney 2011).
count for differences in climate and economic structure. The New York State legislature has already charged the Council with determining “sound agricultural practices.” The Council should have the expertise to determine not only what practices are generally sound but also which most benefit the local economy and environment. Through the delegation of authority and discretion to their agricultural boards, states may gradually modify the application of their agricultural preservation laws.

The proposal of greater reliance on agricultural boards shifts the responsibility from courts to these boards. Greater reliance on agricultural boards does not necessarily give farmers more certainty as to how they should act. The real advantage of shifting more discretion to agricultural boards would not be the certainty offered to any individual claimant. Rather, the advantage would be that the boards could substantively change which types of farms to protect to increase fairness and environmental preservation.

Furthermore, although modifying statutes risks disrupting existing economies and does not undermine the economic forces driving farming demographic shifts, gradual change can improve the efficacy of right-to-farm statutes’ preservation of the environment. Different strategies aimed at directing the benefits of right-to-farm statutes have not been effective, and one should question why modifying statutes to promote medium-sized farms would be any different. The two dangers contradict each other—one cannot fail by causing insufficient economic change and simultaneously cause too much economic change. Nevertheless, both dangers are real, and legislatures should proceed with caution. By granting specialized agricultural boards primary oversight of developing local programs, states should be able to work gradually but effectively. Moreover, states may draw on the

220 See Reinert, supra note 6, at 1722.
221 N.Y. AGRIC. & MKTS. LAW §§ 308, 309.
222 See id. § 309.
223 See id.; Centner, supra note 2, at 107.
224 See Hamilton, supra note 7, at 109.
225 See id.
226 See Reinert, supra note 6, at 1737–38.
227 See id.
228 See id. at 1738; see also Eubanks, supra note 1, at 309 (suggesting that the Farm Bill created the economic incentives that cause farms to damage the environment).
229 See supra notes 165–191 and accompanying text.
230 See Eubanks, supra note 1, at 309.
231 See id.; Reinert, supra note 6, at 1736.
232 See Reinert, supra note 6, at 1736–38.
wisdom of their counties’ experiences with local agricultural preservation ordinances.\textsuperscript{233}

Through gradual exploration, states may improve the allocation of farming resources to preserve their cultural heritage and natural environment.\textsuperscript{234} Rigid limitations and bans on corporate farming have failed to realize the goals of cultural and environmental preservation.\textsuperscript{235} States will need to alter the language in their right-to-farm statutes to create agricultural advisory boards when appropriate and empower those boards to consider the totality of a farm’s circumstances.\textsuperscript{236} Hopefully, these changes will allow states to prioritize the most deserving farms without causing economic hardship.\textsuperscript{237}

\textbf{Conclusion}

Changing agricultural demographics will continue despite the best efforts of right-to-farm statutes, but legislatures can improve right-to-farm statutes by allowing agricultural councils to favor medium-sized farms.\textsuperscript{238} The economic efficiencies of mass production will continue to cause large farms to increase in number.\textsuperscript{239} Nevertheless, legislative attempts to design statutes that protect medium-sized farms can be more effective.\textsuperscript{240} An increasing number of large farms offer economic benefits and a reliable food supply.\textsuperscript{241} Legislatures should therefore not attempt to ban corporate farming, but rather should provide nuisance protections to medium-sized farms.\textsuperscript{242} Agricultural preservation boards are currently empowered to make decisions only on agricultural practices.\textsuperscript{243} Legislatures should expand the powers of their agricultural preservation boards to consider the local circumstances and the needs

\begin{itemize}
\item \textsuperscript{233} See id. at 1738.
\item \textsuperscript{234} Id. at 1735–38; see also Centner; supra note 2, at 110 (suggesting that regulatory solutions can prevent litigation).
\item \textsuperscript{235} See supra notes 165–191 and accompanying text.
\item \textsuperscript{236} See Reinert, supra note 6, at 1736. See generally N.Y. AGRIC. & MKTS. LAW §§ 308, 309 (McKinney 2011) (implementing a basic framework to evaluate “[s]ound agricultural practices”).
\item \textsuperscript{237} See id. at 1737.
\item \textsuperscript{238} See id. at 1737–38.
\item \textsuperscript{239} See Centner, supra note 2, at 90.
\item \textsuperscript{240} See Reinert, supra note 6, at 1735–38.
\item \textsuperscript{241} See Centner, supra note 2, at 90–91.
\item \textsuperscript{242} See Reinert, supra note 6, at 1737. See generally N.Y. AGRIC. & MKTS. LAW §§ 308, 309 (McKinney 2011).
\item \textsuperscript{243} See Reinert, supra note 6, at 1737. See generally N.Y. AGRIC. & MKTS. LAW §§ 308, 309 (creating and empowering an agricultural advisory council).
\end{itemize}
of the individual farmer.\textsuperscript{244} In this way, the economic, agricultural, and social role of small farms will be protected for generations to come—thus fulfilling the motivations of agricultural preservation statutes.

\textsuperscript{244} See Reinert, \textit{supra} note 6, at 1737. \textit{See generally} N.Y. Agric. & Mkts. Law §§ 308, 309.
Figure 1a: New York Farms by Size:

Figure 1b: New York Farms by Economic Class:

Figure 2a: Nebraska Farms by Size:
Figure 2b: Nebraska Farms by Economic Class:

![Nebraska Farms by Economic Class](image)

Figure 3a: Minnesota Farms by Size:

![Minnesota Farms by Size](image)

Figure 3b: Minnesota Farms by Economic Class:

![Minnesota Farms by Economic Class](image)
Table 1a: New York Farms by Size

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 9 Acres</td>
<td>2,517</td>
<td>2,129</td>
<td>2,226</td>
<td>2,959</td>
<td>2,914</td>
<td>15.8</td>
</tr>
<tr>
<td>10 to 49 Acres</td>
<td>6,114</td>
<td>5,201</td>
<td>5,499</td>
<td>8,359</td>
<td>8,799</td>
<td>43.9</td>
</tr>
<tr>
<td>50 to 69 Acres</td>
<td>2,603</td>
<td>2,187</td>
<td>2,402</td>
<td>3,102</td>
<td>3,230</td>
<td>24.1</td>
</tr>
<tr>
<td>70 to 99 Acres</td>
<td>3,254</td>
<td>2,704</td>
<td>2,786</td>
<td>3,415</td>
<td>3,684</td>
<td>13.2</td>
</tr>
<tr>
<td>100 to 139 Acres</td>
<td>4,008</td>
<td>3,482</td>
<td>3,482</td>
<td>4,109</td>
<td>4,158</td>
<td>3.7</td>
</tr>
<tr>
<td>140 to 179 Acres</td>
<td>3,126</td>
<td>2,774</td>
<td>2,649</td>
<td>2,848</td>
<td>2,775</td>
<td>-11.2</td>
</tr>
<tr>
<td>180 to 219 Acres</td>
<td>2,709</td>
<td>2,257</td>
<td>2,084</td>
<td>2,308</td>
<td>2,061</td>
<td>-23.9</td>
</tr>
<tr>
<td>220 to 259 Acres</td>
<td>2,246</td>
<td>1,928</td>
<td>1,752</td>
<td>1,591</td>
<td>1,537</td>
<td>-31.6</td>
</tr>
<tr>
<td>260 to 499 Acres</td>
<td>7,289</td>
<td>6,120</td>
<td>5,491</td>
<td>5,078</td>
<td>4,141</td>
<td>-43.2</td>
</tr>
<tr>
<td>500 to 999 Acres</td>
<td>3,112</td>
<td>2,713</td>
<td>2,530</td>
<td>2,457</td>
<td>2,014</td>
<td>-35.3</td>
</tr>
<tr>
<td>1,000 to 1,999 Acres</td>
<td>654</td>
<td>680</td>
<td>688</td>
<td>812</td>
<td>760</td>
<td>16.2</td>
</tr>
<tr>
<td>2,000 to 4,999 Acres</td>
<td>106</td>
<td>125</td>
<td>154</td>
<td>194</td>
<td>243</td>
<td>129.2</td>
</tr>
<tr>
<td>&gt; 5,000 Acres</td>
<td>5</td>
<td>6</td>
<td>14</td>
<td>23</td>
<td>36</td>
<td>620.0</td>
</tr>
<tr>
<td>1 to 99 Acres</td>
<td>14,488</td>
<td>12,221</td>
<td>12,913</td>
<td>17,835</td>
<td>18,627</td>
<td>28.6</td>
</tr>
<tr>
<td>100 to 999 Acres</td>
<td>22,490</td>
<td>19,274</td>
<td>17,988</td>
<td>18,391</td>
<td>16,686</td>
<td>-25.8</td>
</tr>
</tbody>
</table>

Table 1b: New York Farms by Economic Class

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; $1,000</td>
<td>5,051</td>
<td>4,056</td>
<td>4,071</td>
<td>9,130</td>
<td>8,884</td>
<td>75.9</td>
</tr>
<tr>
<td>$1,000 to $2,500</td>
<td>4,117</td>
<td>3,268</td>
<td>3,636</td>
<td>4,802</td>
<td>3,622</td>
<td>-12.0</td>
</tr>
<tr>
<td>$2,500 to $4,999</td>
<td>4,061</td>
<td>3,389</td>
<td>3,424</td>
<td>3,496</td>
<td>3,291</td>
<td>-19.0</td>
</tr>
<tr>
<td>$5,000 to $9,999</td>
<td>3,892</td>
<td>3,536</td>
<td>3,484</td>
<td>3,283</td>
<td>3,809</td>
<td>-2.1</td>
</tr>
<tr>
<td>$10,000 to $24,999</td>
<td>4,426</td>
<td>4,156</td>
<td>4,269</td>
<td>4,203</td>
<td>4,809</td>
<td>8.7</td>
</tr>
<tr>
<td>$25,000 to $49,999</td>
<td>3,337</td>
<td>2,601</td>
<td>2,673</td>
<td>2,695</td>
<td>2,746</td>
<td>-17.7</td>
</tr>
<tr>
<td>$50,000 to $99,999</td>
<td>5,560</td>
<td>3,973</td>
<td>3,335</td>
<td>3,017</td>
<td>2,292</td>
<td>-58.8</td>
</tr>
<tr>
<td>$100,000 to $249,999</td>
<td>5,554</td>
<td>5,053</td>
<td>4,442</td>
<td>3,876</td>
<td>3,271</td>
<td>-41.1</td>
</tr>
<tr>
<td>$250,000 to $499,999</td>
<td>1,262</td>
<td>1,555</td>
<td>1,441</td>
<td>1,616</td>
<td>1,836</td>
<td>45.5</td>
</tr>
<tr>
<td>$500,000 to $999,999</td>
<td>333</td>
<td>518</td>
<td>639</td>
<td>646</td>
<td>970</td>
<td>191.3</td>
</tr>
<tr>
<td>&gt; $1,000,000</td>
<td>150</td>
<td>221</td>
<td>343</td>
<td>491</td>
<td>822</td>
<td>448.0</td>
</tr>
<tr>
<td>$1 to $9,999</td>
<td>17,121</td>
<td>14,249</td>
<td>14,615</td>
<td>20,711</td>
<td>19,606</td>
<td>14.5</td>
</tr>
<tr>
<td>$10,000 to $249,999</td>
<td>18,877</td>
<td>15,783</td>
<td>14,719</td>
<td>13,791</td>
<td>13,118</td>
<td>-30.5</td>
</tr>
<tr>
<td>&gt; $250,000</td>
<td>1,745</td>
<td>2,274</td>
<td>2,423</td>
<td>2,755</td>
<td>3,628</td>
<td>107.9</td>
</tr>
</tbody>
</table>
### Table 2a: Nebraska Farms by Size

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 9 Acres</td>
<td>5,090</td>
<td>3,698</td>
<td>2,591</td>
<td>1,656</td>
<td>2,270</td>
<td>-55.4</td>
</tr>
<tr>
<td>10 to 49 Acres</td>
<td>4,296</td>
<td>4,302</td>
<td>4,733</td>
<td>5,664</td>
<td>6,581</td>
<td>53.2</td>
</tr>
<tr>
<td>50 to 69 Acres</td>
<td>1,101</td>
<td>1,074</td>
<td>1,174</td>
<td>1,483</td>
<td>1,456</td>
<td>32.2</td>
</tr>
<tr>
<td>70 to 99 Acres</td>
<td>2,875</td>
<td>2,510</td>
<td>2,557</td>
<td>2,732</td>
<td>2,825</td>
<td>-1.7</td>
</tr>
<tr>
<td>100 to 139 Acres</td>
<td>2,140</td>
<td>1,913</td>
<td>2,058</td>
<td>2,247</td>
<td>2,232</td>
<td>4.3</td>
</tr>
<tr>
<td>140 to 179 Acres</td>
<td>5,050</td>
<td>3,911</td>
<td>3,975</td>
<td>3,718</td>
<td>3,591</td>
<td>-28.9</td>
</tr>
<tr>
<td>180 to 219 Acres</td>
<td>1,987</td>
<td>1,659</td>
<td>1,678</td>
<td>1,647</td>
<td>1,507</td>
<td>-24.2</td>
</tr>
<tr>
<td>220 to 259 Acres</td>
<td>2,706</td>
<td>2,148</td>
<td>2,038</td>
<td>1,742</td>
<td>1,576</td>
<td>-41.8</td>
</tr>
<tr>
<td>260 to 499 Acres</td>
<td>12,627</td>
<td>10,196</td>
<td>8,932</td>
<td>7,921</td>
<td>6,755</td>
<td>-46.5</td>
</tr>
<tr>
<td>500 to 999 Acres</td>
<td>12,153</td>
<td>10,966</td>
<td>10,338</td>
<td>9,049</td>
<td>7,717</td>
<td>-36.5</td>
</tr>
<tr>
<td>1,000 to 1,999 Acres</td>
<td>6,494</td>
<td>6,283</td>
<td>6,717</td>
<td>6,632</td>
<td>5,965</td>
<td>-8.1</td>
</tr>
<tr>
<td>2,000 to 4,999 Acres</td>
<td>2,906</td>
<td>3,091</td>
<td>3,439</td>
<td>3,497</td>
<td>3,735</td>
<td>28.5</td>
</tr>
<tr>
<td>&gt; 5,000 Acres</td>
<td>1,077</td>
<td>1,172</td>
<td>1,224</td>
<td>1,367</td>
<td>1,502</td>
<td>39.5</td>
</tr>
<tr>
<td>1 to 99 Acres</td>
<td>13,362</td>
<td>11,584</td>
<td>11,055</td>
<td>11,335</td>
<td>13,132</td>
<td>-1.7</td>
</tr>
<tr>
<td>100 to 999 Acres</td>
<td>36,663</td>
<td>30,793</td>
<td>29,019</td>
<td>26,324</td>
<td>23,378</td>
<td>-36.2</td>
</tr>
<tr>
<td>&gt; 1000 Acres</td>
<td>10,477</td>
<td>10,546</td>
<td>11,380</td>
<td>11,496</td>
<td>11,202</td>
<td>6.9</td>
</tr>
</tbody>
</table>

### Table 2b: Nebraska Farms by Economic Class

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; $1,000</td>
<td>2,099</td>
<td>1,979</td>
<td>3,577</td>
<td>3,559</td>
<td>3,964</td>
<td>88.9</td>
</tr>
<tr>
<td>$1,000 to $2,500</td>
<td>2,595</td>
<td>1,987</td>
<td>2,081</td>
<td>2,793</td>
<td>2,936</td>
<td>13.1</td>
</tr>
<tr>
<td>$2,500 to $4,999</td>
<td>3,405</td>
<td>2,664</td>
<td>2,394</td>
<td>3,050</td>
<td>2,911</td>
<td>-14.5</td>
</tr>
<tr>
<td>$5,000 to $9,999</td>
<td>5,515</td>
<td>4,021</td>
<td>3,497</td>
<td>4,118</td>
<td>3,515</td>
<td>-36.3</td>
</tr>
<tr>
<td>$10,000 to $24,999</td>
<td>10,923</td>
<td>8,445</td>
<td>6,733</td>
<td>6,489</td>
<td>4,882</td>
<td>-55.3</td>
</tr>
<tr>
<td>$25,000 to $49,999</td>
<td>10,681</td>
<td>8,362</td>
<td>6,962</td>
<td>6,187</td>
<td>4,221</td>
<td>-60.5</td>
</tr>
<tr>
<td>$50,000 to $99,999</td>
<td>11,305</td>
<td>9,274</td>
<td>8,005</td>
<td>6,601</td>
<td>5,292</td>
<td>-53.2</td>
</tr>
<tr>
<td>$100,000 to $249,999</td>
<td>10,188</td>
<td>10,850</td>
<td>10,852</td>
<td>9,177</td>
<td>7,979</td>
<td>-21.7</td>
</tr>
<tr>
<td>$250,000 to $499,999</td>
<td>2,512</td>
<td>3,573</td>
<td>4,851</td>
<td>4,374</td>
<td>5,828</td>
<td>132.0</td>
</tr>
<tr>
<td>$500,000 to $999,999</td>
<td>779</td>
<td>1,109</td>
<td>1,636</td>
<td>1,938</td>
<td>3,531</td>
<td>353.3</td>
</tr>
<tr>
<td>&gt; $1,000,000</td>
<td>500</td>
<td>659</td>
<td>866</td>
<td>1,069</td>
<td>2,653</td>
<td>430.6</td>
</tr>
<tr>
<td>$1 to $9,999</td>
<td>13,614</td>
<td>10,651</td>
<td>11,549</td>
<td>13,520</td>
<td>13,326</td>
<td>-2.1</td>
</tr>
<tr>
<td>$10,000 to $249,999</td>
<td>43,097</td>
<td>36,931</td>
<td>32,552</td>
<td>28,454</td>
<td>22,374</td>
<td>-48.1</td>
</tr>
<tr>
<td>&gt; $250,000</td>
<td>3,791</td>
<td>5,341</td>
<td>5,717</td>
<td>7,381</td>
<td>12,012</td>
<td>216.9</td>
</tr>
</tbody>
</table>
Table 3a: Minnesota Farms by Size

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 9 Acres</td>
<td>4,613</td>
<td>3,517</td>
<td>3,090</td>
<td>3,591</td>
<td>3,687</td>
<td>-20.1</td>
</tr>
<tr>
<td>10 to 49 Acres</td>
<td>9,481</td>
<td>8,927</td>
<td>10,104</td>
<td>16,546</td>
<td>16,927</td>
<td>78.5</td>
</tr>
<tr>
<td>50 to 69 Acres</td>
<td>2,808</td>
<td>2,595</td>
<td>2,987</td>
<td>4,089</td>
<td>4,570</td>
<td>62.7</td>
</tr>
<tr>
<td>70 to 99 Acres</td>
<td>6,534</td>
<td>5,501</td>
<td>6,033</td>
<td>6,983</td>
<td>7,577</td>
<td>16.0</td>
</tr>
<tr>
<td>100 to 139 Acres</td>
<td>6,272</td>
<td>5,385</td>
<td>5,523</td>
<td>5,999</td>
<td>6,556</td>
<td>4.5</td>
</tr>
<tr>
<td>140 to 179 Acres</td>
<td>9,333</td>
<td>7,486</td>
<td>6,992</td>
<td>6,884</td>
<td>6,976</td>
<td>-25.3</td>
</tr>
<tr>
<td>180 to 219 Acres</td>
<td>5,812</td>
<td>4,818</td>
<td>4,544</td>
<td>4,350</td>
<td>4,155</td>
<td>-28.5</td>
</tr>
<tr>
<td>220 to 259 Acres</td>
<td>5,862</td>
<td>4,956</td>
<td>4,210</td>
<td>3,992</td>
<td>3,813</td>
<td>-35.0</td>
</tr>
<tr>
<td>260 to 499 Acres</td>
<td>19,289</td>
<td>16,621</td>
<td>14,611</td>
<td>13,050</td>
<td>12,220</td>
<td>-36.6</td>
</tr>
<tr>
<td>500 to 999 Acres</td>
<td>10,814</td>
<td>10,497</td>
<td>9,781</td>
<td>8,986</td>
<td>8,323</td>
<td>-23.0</td>
</tr>
<tr>
<td>1,000 to 1,999 Acres</td>
<td>3,619</td>
<td>3,913</td>
<td>4,251</td>
<td>4,554</td>
<td>4,264</td>
<td>17.8</td>
</tr>
<tr>
<td>2,000 to 4,999 Acres</td>
<td>611</td>
<td>806</td>
<td>1,165</td>
<td>1,715</td>
<td>1,767</td>
<td>189.2</td>
</tr>
<tr>
<td>&gt; 5,000 Acres</td>
<td>23,436</td>
<td>20,540</td>
<td>22,214</td>
<td>31,209</td>
<td>32,761</td>
<td>39.8</td>
</tr>
<tr>
<td>1 to 99 Acres</td>
<td>20,411</td>
<td>17,104</td>
<td>21,904</td>
<td>31,804</td>
<td>31,626</td>
<td>54.9</td>
</tr>
<tr>
<td>100 to 999 Acres</td>
<td>50,249</td>
<td>40,865</td>
<td>32,821</td>
<td>31,935</td>
<td>28,752</td>
<td>-42.8</td>
</tr>
<tr>
<td>&gt; $250,000</td>
<td>3,576</td>
<td>5,144</td>
<td>7,800</td>
<td>9,084</td>
<td>13,104</td>
<td>266.4</td>
</tr>
</tbody>
</table>

Table 3b: Minnesota Farms by Economic Class

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; $1,000</td>
<td>6,076</td>
<td>5,054</td>
<td>9,829</td>
<td>13,181</td>
<td>11,410</td>
<td>87.8</td>
</tr>
<tr>
<td>$1,000 to $2,500</td>
<td>5,839</td>
<td>4,671</td>
<td>4,818</td>
<td>9,662</td>
<td>9,775</td>
<td>67.4</td>
</tr>
<tr>
<td>$2,500 to $4,999</td>
<td>6,509</td>
<td>5,387</td>
<td>5,260</td>
<td>6,959</td>
<td>8,434</td>
<td>29.6</td>
</tr>
<tr>
<td>$5,000 to $9,999</td>
<td>8,293</td>
<td>7,028</td>
<td>6,179</td>
<td>7,289</td>
<td>7,696</td>
<td>-7.2</td>
</tr>
<tr>
<td>$10,000 to $24,999</td>
<td>13,588</td>
<td>11,187</td>
<td>9,207</td>
<td>9,130</td>
<td>8,261</td>
<td>-39.2</td>
</tr>
<tr>
<td>$25,000 to $49,999</td>
<td>12,983</td>
<td>10,168</td>
<td>8,033</td>
<td>7,390</td>
<td>6,127</td>
<td>-52.8</td>
</tr>
<tr>
<td>$50,000 to $99,999</td>
<td>15,385</td>
<td>12,482</td>
<td>9,402</td>
<td>8,126</td>
<td>6,684</td>
<td>-56.8</td>
</tr>
<tr>
<td>$100,000 to $249,999</td>
<td>12,830</td>
<td>13,958</td>
<td>12,839</td>
<td>10,018</td>
<td>9,537</td>
<td>-25.7</td>
</tr>
<tr>
<td>$250,000 to $499,999</td>
<td>2,716</td>
<td>3,816</td>
<td>5,046</td>
<td>5,289</td>
<td>6,412</td>
<td>136.1</td>
</tr>
<tr>
<td>$500,000 to $999,999</td>
<td>625</td>
<td>974</td>
<td>1,933</td>
<td>2,611</td>
<td>3,901</td>
<td>524.2</td>
</tr>
<tr>
<td>&gt; $1,000,000</td>
<td>235</td>
<td>354</td>
<td>821</td>
<td>1,184</td>
<td>2,791</td>
<td>1,087.7</td>
</tr>
<tr>
<td>$1 to $9,999</td>
<td>20,411</td>
<td>17,104</td>
<td>21,904</td>
<td>31,804</td>
<td>31,626</td>
<td>54.9</td>
</tr>
<tr>
<td>$10,000 to $249,999</td>
<td>50,249</td>
<td>40,865</td>
<td>32,821</td>
<td>31,935</td>
<td>28,752</td>
<td>-42.8</td>
</tr>
<tr>
<td>&gt; $250,000</td>
<td>3,576</td>
<td>5,144</td>
<td>7,800</td>
<td>9,084</td>
<td>13,104</td>
<td>266.4</td>
</tr>
</tbody>
</table>
BALANCING THE NEED FOR ENERGY AND CLEAN WATER: THE CASE FOR APPLYING STRICT LIABILITY IN HYDRAULIC FRACTURING SUITS

Hannah Coman*

Abstract: Hydraulic facturing is a process used to extract natural gas from shale formations. This process has been used commercially since the 1940s, but has recently become prevalent as more shale formations have been discovered, specifically the Marcellus Shale formation in Pennsylvania. Although natural gas is a relatively clean source of domestic energy, there have been numerous allegations of water contamination caused by hydraulic fracturing, and several lawsuits have been filed as a result. Two of these suits (Berish v. Southwestern Energy Production Co. and Fiorentino v. Cabot & Gas) are pending in the U.S. District Court for the Middle District of Pennsylvania. Both complaints seek recovery under a strict liability cause of action—asserting that hydraulic fracturing is an “ultrahazardous and abnormally dangerous” activity. Although it is unlikely that the court will adopt a strict liability framework in deciding these cases, this Note argues that such a framework is both legally appropriate and beneficial to helping balance our energy needs and the importance of clean water. These pending cases will likely set the standard for future hydraulic fracturing contamination cases in Pennsylvania, and potentially across the United States.

Introduction

The ability to ignite running tap water is just one of the signs that hydraulic fracturing may have contaminated the water.1 Hydraulic fracturing is a process during which a fracturing fluid is pumped into the ground to extract natural gas from previously inaccessible deposits.2

* Senior Articles Editor, Boston College Environmental Affairs Law Review, 2011–12.


The recent increase in demand for natural gas coupled with technical advances in drilling have dramatically increased the number of hydraulic fracturing projects, especially in Pennsylvania. Natural gas has become extremely attractive as an energy source mainly due to the volatility of energy prices and the need for domestic, relatively clean energy sources. In the United States, conventional gas deposits still produce large quantities of fuel but are in decline. Hydraulic fracturing provides access to unconventional deposits, thereby geographically expanding the “gaslands” and unlocking, in some regions, a “Saudi Arabia of Natural Gas.” As T. Boone Pickens recently said, in comparison to oil, natural gas is “cleaner, cheaper . . . abundant, and ours.” This expansion is likely to continue—it is predicted that by 2020, twenty percent of our natural gas will come from hydraulic fracturing. While some trumpet natural gas as America’s “New Energy Frontier,” others have questioned the wisdom of the break-neck pace of expansion, es-

---


6 See Wiseman, supra note 4, at 233. Natural gas from conventional deposits peaked in the 1970s. Id.


8 Abrahm Lustgarten, Buried Secrets: Is Natural Gas Drilling Endangering U.S. Water Supplies?, PRO PUBLICA (Nov. 13, 2008, 1:00 PM), http://www.propublica.org/article/buried-secrets-is-natural-gas-drilling-endangering-us-water-supplies-1113. In fact, burning gas, used primarily to heat homes and make electricity, emits twenty-three percent less carbon dioxide than burning oil. Id. Furthermore, gas is the country’s second-largest domestic energy resource after coal. Id.

9 EPA, supra note 2, at 1. This trend is also apparent worldwide—“[d]espite rising prices, natural gas is forecast to continue to be the fastest-growing primary fossil fuel energy source worldwide.” Sims et al., supra note 5, at 266.

10 Natural Gas, AM. PETROL. INST. (Nov. 24, 2010), http://www.api.org/aboutoilgas/natgas/.
especially since the environmental and health risks of hydraulic fracturing are dire at worst, and unknown at best.\footnote{11}

One of the main environmental and health concerns related to hydraulic fracturing is clean water. Both water and energy are necessary in large quantities for the United States to continue to function and thrive. A justice on the Texas Supreme Court recently wrote that while water, not oil, is the lifeblood of Texas, “oil and gas are its muscle.”\footnote{12}
The same could be said of the United States as a whole. Unfortunately, the United States will have to make some difficult and serious decisions about the nation’s water and energy supplies, especially in regards to hydraulic fracturing.\footnote{13}

Currently, there are two pending hydraulic fracturing cases before the U.S. District Court for the Middle District Court of Pennsylvania (Berish v. Southwestern Energy Production Co. and Fiorentino v. Cabot & Gas) involving strict liability causes of action that implicate state law.\footnote{14} This Note discusses the possible success and impact of these two claims on the future of hydraulic fracturing. The outcome in these cases will affect the future of hydraulic fracturing in Pennsylvania, and could have implications for hydraulic fracturing across the United States. Part I introduces hydraulic fracturing and its environmental concerns, current federal and state regulation of the process, and the pending lawsuits in Pennsylvania. Part II examines the historical foundations and rationale of strict liability. Part III analyzes the current status of the strict liability doctrine and pertinent case law. Finally, Part IV examines the likelihood of successfully applying a strict liability framework to the two pending hydraulic fracturing cases in Pennsylvania. The Note concludes that strict liability is both legally appropriate and socially benefi-


\footnote{12}{Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 26 (Tex. 2008) (Willettt, J., concurring).}


cial, although it is highly unlikely that the court will apply this form of liability in these cases.

I. HYDRAULIC FRACTURING: DIVIDING ROCKS, POLITICS, AND COMMUNITIES IN PENNSYLVANIA

A. What Is Hydraulic Fracturing?

Hydraulic fracturing, often referred to as “fracing,”\textsuperscript{15} is a process which uses water to stimulate and extract natural gas from geologic formations with low permeability.\textsuperscript{16} Hydraulic fracturing wells are drilled in three ways—vertically, vertically and horizontally, or directionally—and can range from slightly less than 1000 feet to greater than 8000 feet deep.\textsuperscript{17} Once the well is drilled, the drillers pump water, sand, and additives into the wellbore at extremely high pressures.\textsuperscript{18} This pressure causes the fracturing of the surrounding rock and the injection of sand or other “propping agents”\textsuperscript{19} into the rock fractures, which hold them open.\textsuperscript{20} Once the pressure on the fracturing fluid (water and chemical additives) is reduced, all of the fluid is supposed to return to the surface for disposal or re-use, and the natural gas flows from the fractures in the rock into the wellbore for subsequent extraction.\textsuperscript{21}

Ultimately, hydraulic fracturing is a process that removes natural gas from unconventional deposits—those that present increased technical challenges and require additional expense to extract natural gas.\textsuperscript{22} These unconventional natural gas resources include geologic formations such as shale and coalbeds.\textsuperscript{23} Fracing has been used com-

\textsuperscript{15} “Fracing” is pronounced and sometimes spelled “fracking.” Wiseman, supra note 4, at 233 n.22.

\textsuperscript{16} See Arthur, supra note 3, at 1; EPA, supra note 2, at 1.

\textsuperscript{17} EPA, supra note 2, at 1.


\textsuperscript{19} These “propping agents,” also referred to as “proppants,” are “ultra-hard sand grains and tiny manmade ceramic balls.” James MacPherson, Tiny Particles Used by Oil Drillers in Big Demand, R&D Mag. (Jan. 10, 2011), http://www.rdmag.com/News/2011/01/Tiny-particles-used-by-oil-drillers-in-big-demand/.\textsuperscript{20}

\textsuperscript{20} EPA, supra note 2, at 1; Hydraulic Fracturing Facts: The Process, supra note 18.

\textsuperscript{21} See EPA, supra note 2, at 1–2.

\textsuperscript{22} Unconventional Natural Gas Resources, supra note 7. The definition of unconventional natural gas resources evolves over time, but it generally includes: “deep gas, tight gas, gas-containing shales, coalbed methane, geopressurized zones, and Arctic and sub-sea hydrates.” Id.

\textsuperscript{23} See id.
mercially in the United States for this purpose since the 1940s, but has recently increased due to technological advances and demand. In fact, unconventional gas deposits comprise an increasingly large percentage of our nation’s natural gas supply.

### B. Environmental Concerns

Despite the fact that hydraulic fracturing has become an integral part of our nation’s energy profile, fracturing comes with grave environmental concerns. Although many people are troubled by the amount of water used in the process, the procedure for dealing with waste water, and the adverse impact on air quality, this Note will focus solely on whether gas companies should be held strictly liable for contaminated drinking water due to hydraulic fracturing. There are numerous complaints from people living near hydraulic fracturing wells alleging that their well water has been contaminated by this process. As a result, many people are concerned about the possible contamination of drinking water from fracturing fluid and “degradation products and naturally occurring materials in the geologic formation (e.g. metals, radionuclides) that are mobilized and brought to the surface during the hydraulic fracturing process.”

---

27 *See* Am. Petrol. Inst., *Freeing Up Energy, Hydraulic Fracturing: Unlocking America’s Natural Gas Resources* 2 (2010). “Hydraulic fracturing is so important that without it, we would lose 45 percent of domestic natural gas production and 17 percent of our oil production within five years.” *Id.*
28 *See* Edith Honan, *Water Waste a Kink in New York Shale Gas Future*, Reuters (Feb. 19, 2010, 1:36 PM), http://www.reuters.com/article/idUSN1918902220100219?pageNumber=1. “The volume of water needed for hydraulic fracturing varies by site and type formation.” EPA, *supra* note 2, at 2. For example, a coalbed well may require 50,000 to 350,000 gallons of water, while one horizontal well in a shale formation may need 2 million to 5 million gallons of water for the fracturing process. *Id.*
Hydraulic fracturing fluid is approximately ninety percent water, nine percent sand, and roughly one percent chemical additives.32 The precise makeup of these chemical additives is unknown because many companies consider the ingredients to be trade secrets.33 Nevertheless, a few of the chemicals commonly found in fracturing fluid are hydrochloric acid, ethylene glycol, ammonium persulfate, citric acid, potassium chloride, potassium carbonate, and isopropanol.34 There have even been reports that some fracturing fluids may also contain diesel fuel,35 benzene, and arsenic.36 Despite the fact that chemical additives only comprise roughly one percent of the fracturing fluid, the process of using these chemicals is alarming because of the total amount of fracturing fluid used in the extraction process.37

The hydraulic fracturing process uses an incredible amount of fracturing fluid. For example, water usage—which comprises nearly ninety percent of fracturing fluid—can range from 50,000 to 5 million gallons of water.38 Problematically, not all of the fracturing fluid is recovered after the stimulation process; rather, the rest remains in the

---

33 See Howell, supra note 11. Despite this, eight of nine major energy companies voluntarily disclosed descriptions of the chemical components they use in fracturing. See Matthew Daly, EPA: Halliburton Issued Subpoena for Refusing to Disclose Hydraulic Fracturing, ‘Fracking,’ Chemical Ingredients, HUFFINGTON POST (Nov. 9, 2010, 5:41 PM), http://www.huffingtonpost.com/2010/11/09/epa-halliburton-subpoenae_n_781045.html. The only company to refuse to disclose this information was Halliburton, which was subsequently subpoenaed by the Environmental Protection Agency. See Press Release, EPA, Eight of Nine U.S. Companies Agree to Work with EPA Regarding Chemicals Used in Natural Gas Extraction (Nov. 9, 2010), available at http://yosemite.epa.gov/opa/admpress.nsf/6427a6b7538955c5852573590030230/a9649644c546959852577d6005e63d6!OpenDocument.
35 Mike Soraghan, Two Oil-Field Companies Acknowledge Fracking with Diesel, N.Y. TIMES (Feb. 19, 2010), http://www.nytimes.com/gwire/2010/02/19/19greenwire-two-oil-field-companies-acknowledge-fracking-w-90863.html. Although the three largest oil-field service companies signed a memorandum of agreement with the EPA in 2003 to discontinue hydraulic fracturing with diesel near underground water supplies, both Halliburton and BJ Services acknowledged in 2008 that they had violated the agreement. Id.
38 See EPA, supra note 2, at 2.
Depending on the site, the amount recovered ranges from fifteen to eighty percent of the total fracturing fluid injected. Therefore, even though the chemical additives only compose roughly one percent of the fracturing fluid, the use of these chemicals presents increased potential for harms to the environment and the public health as a result of the volume of fracturing fluid used in the process.

In addition to possible contamination due to chemical additives, there are reports that hydraulic fracturing can sometimes bring metals present in the rock bed to the surface. A recent study found that when the fracturing fluid is pumped into the underground rock, the uranium naturally present in the rock is “solubilized,” meaning it dissolves in water. As a result, when the fluid “come[s] back to the surface, it could contain uranium contaminants, potentially polluting streams and other ecosystems and generating hazardous waste.” Although these small amounts of uranium are not a radioactive risk, “it is still a toxic, deadly metal.”

C. Current Regulation of Hydraulic Fracturing

Before engaging in a discussion of the pending contamination cases in Pennsylvania, an understanding of the current regulatory and the political environment surrounding fracking is necessary.

1. A Swiss Cheese Approach to Federal Regulation

Hydraulic fracturing, while extremely controversial, currently enjoys several major exemptions from federal environmental regulations. For example, the Safe Drinking Water Act (SDWA) requires the regulation of all underground injections within Underground Injection Control (UIC) programs—meaning that an applicant must receive a permit to conduct underground injection activity. Originally, a permit was

---

[39] See id.
[40] Id.
[44] Id.
[45] Id.
[46] Id.
[48] 42 U.S.C. § 300h(b)(1)(A) (2006); Legal Envtl. Assistance Found., Inc. v. EPA, 118 F.3d 1467, 1474 (11th Cir. 1997) (stating that it is “clear that Congress dictated that all underground injection be regulated under the UIC programs”).
only supposed to be granted if the applicant demonstrated “that the underground injection will not endanger drinking water sources.” Before 2005, the Environmental Protection Agency (EPA) did not consider hydraulic fracturing to be an “underground injection,” so it did not require a permit. An Alabama court ruled in 1997, however, that the EPA’s interpretation of “underground injection” was incorrect and that hydraulic fracturing should fall under the SDWA.

In response to the court’s ruling, the EPA issued a study on hydraulic fracturing and its effect on the environment. The study did not find a causal connection between contamination cases and injecting fracturing fluid into coalbed methane wells. As a result, the EPA concluded that the environmental effects of hydraulic fracturing did not merit further study. Nonetheless, the methodology and impartiality of the expert panel that reviewed the EPA’s findings was questioned by several people within and outside of the Agency. The EPA study was limited in scope and only focused on underground injection of fluids and whether that caused contamination of underground sources of drinking water. Furthermore, the study neglected to investigate the effects of fracing in shale formations.

After the study was published, Congress officially exempted hydraulic fracturing from EPA regulation in the 2005 Energy Policy Act.

49 Legal Envtl. Assistance Found., 118 F.3d at 1474.
50 See Wiseman, supra note 4, at 243.
53 See id.
54 See id.
57 Id.
Known as the “Halliburton Loophole,”59 this Act allowed fracking to continue without the same regulation mandated for other types of drilling and mining.60 This change in the SDWA brought a brief pause to the legal and political debate over whether the federal government should regulate fracking.61 The debate was renewed in 2009 when Democratic members of Congress introduced twin bills—collectively called the Fracturing Responsibility and Awareness of Chemicals Act (FRAC Act)—that sought to repeal the exemption for hydraulic fracturing in the SWDA, but they were never reported out of committee.62 Recently, Democratic Senate and House members reintroduced the FRAC Act, but it is unlikely the bill will pass given Republican control of the House and industry opposition.63

The complexity of the debate surrounding hydraulic fracturing is evidenced by disagreement among environmentalists.64 Some environmentalists are proponents of fracking because natural gas emits less greenhouse gas than either oil or coal.65 Many environmentalists also believe that natural gas could become the primary source of electricity in the U.S. and serve as a bridge from carbon-heavy sources to renewable sources while renewable energy sources are being developed.66

Given the social and political debate over hydraulic fracturing, the U.S. House of Representatives Appropriation Conference Committee,
in its 2010 budget reports, found that the topic merited further study. As part of the study, the EPA requested that nine companies voluntarily disclose the chemical additives in their fracting fluid. Some question the validity of this new study, claiming that it has been co-opted by the oil and gas industry and that its scope has been overly narrowed.

Statutory loopholes for the fracting process can also be found in other environmental statutes. For example, the Emergency Planning and Community Right to Know Act does not require oil and gas producers to report their annual releases of toxic chemicals. Although the Clean Water Act (CWA) prohibits oil and gas operators from discharging pollutants into U.S. waters without a permit, “[p]roponents of fracting argue that the Clean Water Act doesn’t cover fracting fluid because it enters the earth far below the water table, and thus doesn’t have a chance to pollute ground water.” Other sources contend, however, that the CWA could potentially apply to ground sources like wells and aquifers. While there is currently a gap in the federal regulation of hydraulic fracting, many states and towns affected by fracting are attempting to regulate the process.

2. “It’s the Economy, Stupid”; State and Local Regulation

Pennsylvania is directly affected by hydraulic fracting because of the exponential increase in the amount of fracting at the Marcellus Shale. Potentially more significant is the fact that Pennsylvania water-

68 See Press Release, EPA, supra note 33.
69 Urbina, supra note 64.
70 See Wiseman, supra note 4, at 243.
sheds supply more than 15 million people—mainly in Philadelphia and New York City—with water.\(^{76}\) As a result, the threat of water contamination does not only affect specific plaintiffs, but also the future of the water quality in Pennsylvania and New York generally.\(^{77}\) There is much debate and little progress on the Pennsylvania state and local government levels as to whether fracking regulations should be passed.\(^{78}\) For example, the Pittsburgh City Council voted unanimously to forbid natural gas drilling due to health and environmental concerns.\(^{79}\) A continuous effort to pass legislation to regulate fracking at the state level, however, has been curtailed by political and economic considerations.\(^{80}\)

Although the debate surrounding hydraulic fracturing is about energy and the environment, sometimes politics and the economy play a more substantial role. For example, newly elected Republican Governor Tom Corbett is viewed as a supporter of the gas industry in Pennsylvania.\(^{81}\) He has pledged to end outgoing Democratic Governor Ed Rendell’s executive order prohibiting the issuing of more drilling leases in state forests.\(^{82}\) Additionally, in May 2010, a study financed by the gas industry estimated that gas companies spent $4.5 billion developing shale deposits in Pennsylvania.\(^{83}\) In return, this investment generated $389 million in state and local tax revenue and more than 44,000 jobs.\(^{84}\) The increase in economic activity is predominantly in the trucking and short-line railroad industries, as well as quarries and steel-pipe making companies.\(^{85}\)

Simultaneously, however, environmental concerns among Pennsylvania residents have intensified so much that some hydraulic fracturing companies have begun using armed and uniformed escorts when meet-
ing with residents.\textsuperscript{86} Due to the politically and economically charged nature of this issue,\textsuperscript{87} potential plaintiffs in hydraulic fracturing cases are not waiting for new legislation or regulation. Instead, many are relying on the common law to address their concerns.\textsuperscript{88}

D. Residents Say, “Get the Frac Out of Here!”

Many residents who live close to hydraulic fracturing sites are worried about water contamination.\textsuperscript{89} In fact, courts and state and local governments in Colorado, New Mexico, Alabama, Ohio, and Pennsylvania have documented more than 1,000 cases of contamination from hydraulic fracturing.\textsuperscript{90}

Two lawsuits have recently been filed by Pennsylvania residents from Susquehanna County against companies participating in hydraulic fracturing for allegedly contaminating their well water.\textsuperscript{91} Susquehanna County has a population of 40,000 people and has been traditionally one of Pennsylvania’s poorest counties.\textsuperscript{92} Historically, the primary industries in Susquehanna were agriculture, blue stone quarrying, and light manufacturing.\textsuperscript{93} This changed with the discovery of the Marcellus Shale Formation.\textsuperscript{94} The first hydraulic fracturing well was

\footnotesize\textsuperscript{86} Krauss & Zeller, supra note 64.

\footnotesize\textsuperscript{87} See Jennifer A. Dlouhy, \textit{Natural Gas Backers Warn Against Tough Fracturing Rules}, Hous. Chron. (Nov. 18, 2010, 8:07 PM), http://www.chron.com/disp/story.mpl/business/energy/7301640.html. In response to political pressure to regulate and study the environmental effects of hydraulic fracturing, the American Petroleum Institute has warned that “tougher government regulations threaten jobs, the economy and the abundance of low-cost fuel.” \textit{Id.}

\footnotesize\textsuperscript{88} See generally Berish Complaint, supra note 14; Fiorentino Complaint, supra note 14.

\footnotesize\textsuperscript{89} See generally Tom Zeller, Jr., \textit{EPA Considers Risks and Potential of Gas Extraction}, N.Y. Times, July 24, 2010, at B1 (describing residents’ complaints and fears regarding hydraulic fracturing); \textit{Survey: Drinking Water Pollution Concerns Fueling Awareness Among Americans of “Fracking” Used to Extract Natural Gas}, CIVIL SOCIETY INST. (Dec. 21, 2010), http://www.civilsocietyinstitute.org/media/a122110release.cfm (demonstrating that a large majority of Americans are unwilling to trade clean drinking water for dirty energy production).

\footnotesize\textsuperscript{90} Lustgarten, supra note 8.


\footnotesize\textsuperscript{92} Krauss & Zeller, supra note 64.

\footnotesize\textsuperscript{93} \textit{Id.}

drilled in Susquehanna in 2006, and by 2011 there were nearly 200 wells in the county with many more well-drilling permits pending.\footnote{Krauss & Zeller, supra note 64.}
The alleged environmental consequence from this development has caused much discontent among residents.\footnote{Id.}

The plaintiffs in \textit{Berish} alleged that due to releases, spills, and discharges from hydraulic fracturing they were exposed to “hazardous gases, chemicals, and industrial wastes” which caused “[p]laintiffs to incur health injuries, loss of use and enjoyment of their property, loss of quality of life, emotional distress, and other damages.”\footnote{Berish Complaint, supra note 14, ¶ 2.} Similarly, plaintiffs in \textit{Fiorentino} alleged that they were exposed to “combustible gases, hazardous chemicals, threats of explosions and fires” and as a result, they are “in a constant state of severe emotional distress consistent with post traumatic stress syndrome.”\footnote{Fiorentino Complaint, supra note 14, ¶ 43.} Both complaints seek recovery under a strict liability cause of action—asserting that hydraulic fracturing is an “ultra hazardous and abnormally dangerous” activity.\footnote{See Berish Complaint, supra note 14, ¶ 52; Fiorentino Complaint, supra note 14, ¶ 77.}

One important factor the court will consider in both cases is the location of the hydraulic fracturing wells in relation to the plaintiffs’ residences and water supplies.\footnote{Infra notes 180–206 and accompanying text (discussing the importance of the location of the activity in strict liability analysis).} In \textit{Berish}, the plaintiffs are from two small towns approximately ten miles apart, and about thirty minutes from Scranton, Pennsylvania.\footnote{See Berish Complaint, supra note 14 ¶¶ 2–4; The Town of Kingsley, PA http://kingsleystation.community.officelive.com/default.aspx (last visited Jan. 19, 2012); Driving Directions from Kingsley, PA to South Gibson, PA, GOOGLE MAPS, http://maps.google.com (follow “Get Directions” hyperlink; then search “A” for “Kingsley, PA” and search “B” for “South Gibson, PA”; then follow “Get Directions” hyperlink).} The current population of Kingsley is fifty people, but the population around the outskirts of the town is approximately 200.\footnote{The Town of Kingsley, PA, supra note 101.} The locations of the fracing wells are within 700 to 1700 feet from plaintiffs’ properties, homes, and water supplies.\footnote{Berish Complaint, supra note 14, ¶ 11.} In \textit{Fiorentino}, the sixty-three plaintiffs reside or resided in two different small towns.\footnote{Fiorentino Complaint, supra note 14, ¶¶ 4–22.} One of the towns is about an hour northwest of Scran-
ton, Pennsylvania.\textsuperscript{105} These plaintiffs’ residences and water supplies are approximately 400–1300 feet from the fracking well.\textsuperscript{106}

In response to such suits, the gas industry often defends the hydraulic fracturing process by either claiming that the process is completely safe and that it did not cause the contamination, or that as long as there is proper well construction the groundwater in the area is protected from the chemicals used in the fracking fluid.\textsuperscript{107} Additionally, drilling companies also often argue that existing state regulation is sufficient.\textsuperscript{108} In \textit{Fiorentino}, the defendant gas company claimed that since “drilling is similar to the operation of underground pipelines or storage tanks” it is therefore not an “abnormally dangerous” activity.\textsuperscript{109} The court applied Pennsylvania state law and ruled that the issue of whether hydraulic fracturing is an abnormally dangerous activity should be discussed at trial, and thus did not dismiss the claim at summary judgment.\textsuperscript{110} Courts in Pennsylvania have not yet conclusively determined whether to use negligence or strict liability to determine fault for contamination of ground water caused by hydraulic fracturing; however, they have adopted sections 519 and 520 of the \textit{Restatement (Second) of Torts} to guide judgments in common law.\textsuperscript{111}

\section*{II. Common Law Liability for Hydraulic Fracturing}

The pending negligence and strict liability cases against hydraulic fracturing companies are examples of technology evolving faster than the legislation and regulation.\textsuperscript{112} Often, in cases such as these, the best
strategy for plaintiffs is to rely on common-law remedies instead of statutory law or regulations.

A. The Allocation of Fault in Common Law

There are several ways to allocate fault in common law, two of which are negligence and strict liability. Negligence “imposes liability for harms that are caused by the failure of an actor to exercise ‘due care’ or ‘reasonable care.’” This standard is usually based on how a “reasonably careful person” would behave, but may also involve a cost-benefit analysis of taking such care. In cases where a potential plaintiff could prevent damage by simply being careful, negligence is an appropriate cause of action. In contrast, strict liability “means that any action that causes contamination may give rise to liability.” The activity that led to the contamination would not be prohibited through strict liability, but instead the defendant would simply have to pay for any damages of the behavior. Additionally, plaintiffs do not have to prove carelessness under strict liability, which can be especially difficult in environmental contamination cases. Strict liability, however, is limited to cases involving “abnormally dangerous activities.” In order to fully understand strict liability, it is necessary to first be familiar with its historical foundations and its underlying rationale.


114 Sykes, supra note 113, at 1918.

115 Id. In his essay, Sykes cites to Judge Learned Hand’s famous inquiry in United States v. Carroll Towing, which argues that “the reasonableness of care ought to rest on a balancing of costs and benefits, captured by the likelihood of accidents, their anticipated severity, and the burden involved in measures to avoid them.” Id. (quoting 159 F.2d 169 (2d Cir. 1947)).


117 See id.


119 See id.

120 Restatement (Second) of Torts § 519(1) (1977); Sykes, supra note 113, at 1918–19.
B. Historical Foundations of Strict Liability

The origin of strict liability can be traced to the classic English case *Rylands v. Fletcher.*121 In *Rylands*, the defendants constructed a reservoir on their own land and filled it with water.122 Beneath the plaintiff’s reservoir, however, were abandoned underground mines that began under the neighbors’ property, but eventually intersected with those under the newly-created reservoir.123 As soon as the reservoir was filled, the water went through the abandoned mines and into the neighbor’s functioning mines, causing their destruction.124 Although the court found that the defendants were not negligent in building a reservoir on their land, they were still held liable.125 The court held that if a landowner brings something onto the land which would not otherwise be there, and that thing is dangerous if not properly cared for, the landowner is responsible for any damages that result, even if the behavior was not deliberate or negligent.126 The decision in *Rylands* highlighted the fact that while certain activities are appropriate at certain locations, they are not appropriate everywhere.127

Although *Rylands* established a precedent in England, it was not unanimously followed in the United States.128 U.S. courts resisted the idea of strict liability partly because it would provide damages to harmed plaintiffs, thereby inhibiting the expansion of the western frontier.129 Therefore, U.S. courts did not follow the *Rylands* analysis, but instead held defendants strictly liable only for injuries sustained by plaintiffs from explosives.130 Another reason many courts did not accept the *Rylands* principle is that they misinterpreted the case to mean that a defendant is “absolutely liable in all cases whenever anything under his control escapes and causes harm.”131 In contrast, Professor Prosser un-

122 *Rylands,* L.R. 3 H.L. at 331–32.
123 *Id.*
124 *Id.*
125 *Id.* at 340.
126 *See id.*
130 Jones, *supra* note 121, at 1709.
understood Rylands to mean that “the defendant will be liable when he damages another by a thing or activity inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings.”\textsuperscript{132} By the 1930s, almost half of American jurisdictions followed either the rule of Rylands or some derivative.\textsuperscript{133}

C. Rationale for Strict Liability

There are different theories as to when courts should use a strict liability analysis. For example, Judge Posner believes strict liability exists to make plaintiffs whole when negligence cannot—especially when causation is difficult to prove.\textsuperscript{134} Other scholars argue that courts should use strict liability more liberally. One commentator suggests that there are only two reasons for rejecting strict liability: “(1) high transaction costs in incidents characterized by low losses (e.g., the water leak cases); and (2) interactive situations (e.g., highway accidents and contacts with electric power lines).”\textsuperscript{135} Part of the reason some advocate for wider use of strict liability is, in contrast to negligence, it guarantees more accountability for accidents.\textsuperscript{136}

The strict liability doctrine results in a cost-effective precaution because “rational actors who bear the costs of the harms that they cause will take all cost-effective measures that are available to economize on that liability.”\textsuperscript{137} Thus, by holding a party strictly liable for harm caused by its actions, the party will make efficient market decisions and change its actions so as to internalize the cost of the damages incurred by its risky activity.\textsuperscript{138} There are several legal scholars who believe that “strict liability is more effective than negligence in deterring socially harmful conduct” and therefore should be invoked in most instances of accidental injury.\textsuperscript{139}


\textsuperscript{133} Boston, supra note 127, at 604.

\textsuperscript{134} Jones, supra note 121, at 1752.

\textsuperscript{135} Id. at 1754.

\textsuperscript{136} Id. at 1753.

\textsuperscript{137} Sykes, supra note 113, at 1919.

\textsuperscript{138} See Hoffman, supra note 116, at 539.

\textsuperscript{139} See Jones, supra note 121, at 1707. Professor Jones, for example, advocates that strict liability should be recommended “in all instances of accidental injury except when: (1) the accident is one that typically involves interacting behavior of victim and injurer, or (2) recognition of the strict liability claim will lead to excessive transaction costs.” Id.
Another rationale for liberally applying strict liability is the allocation of risk principle.\textsuperscript{140} This principle is based on the concept of fairness; if one party decides to create an abnormal or undue risk of harm to members of the community, that party should be held responsible for the harm caused.\textsuperscript{141} Essentially, strict liability incentivizes an actor to avoid accidents by denying the actor any excuse.\textsuperscript{142} It gives the actor an incentive to experiment with methods of preventing accidents, such as relocating, changing, or reducing the activity causing the accident.\textsuperscript{143} Regardless of the rationale for its application, strict liability is undoubtedly a very powerful tort doctrine.\textsuperscript{144}

III. Current Status

The \textit{Restatement (Second) of Torts} incorporates the historical foundations and rationale of strict liability into its definition. The \textit{Restatement} provides that one who “carries on an abnormally dangerous activity” is liable for any resulting harm even if the utmost care has been used to prevent harm.\textsuperscript{145} To determine whether an activity is “abnormally dangerous,” six factors are taken into consideration:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm . . . will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.\textsuperscript{146}

The drafters of the \textit{Restatement} used these six factors because they did not believe it was possible to create a definition inclusive enough to cover every potential case.\textsuperscript{147} The comments which accompany the \textit{Restatement} clarify two important additional points: (1) it does not matter

\begin{footnotesize}
\textsuperscript{140} Hoffman, \textit{supra} note 116, at 538.
\textsuperscript{141} \textit{Id.} at 538–39.
\textsuperscript{142} \textit{See} Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990).
\textsuperscript{143} \textit{See id.}
\textsuperscript{144} \textit{See generally} Hoffman, \textit{supra} note 116, at 536–43 (describing strict liability’s development, rationale, and eventual application to carbon capture and storage).
\textsuperscript{145} \textit{Restatement (Second) of Torts} § 519(1) (1977).
\textsuperscript{146} \textit{Id.} § 520 (1977).
\textsuperscript{147} Boston, \textit{supra} note 127, at 620.
\end{footnotesize}
whether the activity is undertaken in pursuit of profit or pleasure, \(^{148}\) and (2) the doctrine of strict liability is not limited to the defendant’s land—the activity could also occur on public land. \(^{149}\)

All six of the factors are important and need to be considered, but strict liability does not require that each factor be present. \(^{150}\) Many courts have treated factors (a), (b), and (c) as crucial to the analysis, but have inconsistently applied factors (d), (e), and (f). \(^{151}\) The first three factors act as a threshold, distinguishing negligence from strict liability, by addressing whether reasonable care eliminates the risk of the activity in question. \(^{152}\) The last three factors are more fact-based and allow for a substantial amount of judicial discretion. \(^{153}\) The essential question is whether the dangers caused by the activity and the inappropriateness of the location are so great that, despite a contribution to the community, the defendant “should be required as a matter of law to pay for any harm it causes without the need of a finding of negligence.” \(^{154}\)

**A. Differentiating Strict Liability from Negligence**

The first three factors of the analysis determine whether an act was negligent. \(^{155}\) It is imperative to make this determination at the start of the analysis because strict liability is inappropriate to determine fault when reasonable care can eliminate a substantial amount of risk. \(^{156}\) The *Restatement* is unclear as to whether strict liability can be applied simply in the absence of negligence, or whether it must first be demonstrated that proving negligence is impossible. \(^{157}\) Historically, courts favored negligence over strict liability for land and water contamination cases, \(^{158}\) but courts have recently invoked strict liability more frequently. \(^{159}\) Some experts even encourage the adoption of strict liability to avoid

\(^{148}\) *Restatement (Second) of Torts* § 520 cmt. d (1977).

\(^{149}\) *Id.* § 520 cmt. e (1977).

\(^{150}\) *Id.* § 520 cmt. f (1977).

\(^{151}\) Boston, *supra* note 127, at 622.

\(^{152}\) Hoffman, *supra* note 116, at 543.

\(^{153}\) *Id.*

\(^{154}\) *Id.* at 541–42 (quoting Margie Searcy-Alford, *A Guide to Toxic Torts* § 27.06[2] (2006)).


\(^{156}\) Boston, *supra* note 127, at 598.

\(^{157}\) *Id.* at 622.

\(^{158}\) Jones, *supra* note 121, at 1740.

\(^{159}\) *Id.*
the complex and expensive litigation necessary to prove damages and causation in negligence cases.\textsuperscript{160}

According to the \textit{Restatement}’s factors listed above,\textsuperscript{161} the existence of a high degree of risk of some harm to another (factor a) should be balanced against the likelihood that the harm will be great (factor b).\textsuperscript{162} For example, courts have not imposed strict liability on activities relating to the transportation of natural gas, such as explosion or leak in transmission line cases.\textsuperscript{163} Yet, many courts have recognized the dangerous qualities of natural gas and consider the installation of natural gas lines to be an inherently dangerous activity.\textsuperscript{164} Despite finding activities relating to natural gas to be inherently dangerous, courts often do not impose strict liability on the installation and maintenance of natural gas pipelines because these activities are highly regulated.\textsuperscript{165} Therefore, although the harm could be great (factor a), since the industry is well-regulated, the likelihood that such an accident will occur is low (factor b).\textsuperscript{166}

Similarly, courts usually do not impose strict liability for natural gas drilling.\textsuperscript{167} This is not a general rule, however, but instead is a case by case determination.\textsuperscript{168} For example, in \textit{Williams v. Amoco Production Co.}, part of the reason why strict liability was not applied was because the natural gas that leaked into the irrigation well did not permanently damage the fertility of the soil, crops, or livestock.\textsuperscript{169} Instead, the presence of natural gas in the water only reduced the amount of water available for irrigating the plaintiff’s crops.\textsuperscript{170} Since the harm in this

\begin{footnotesize}
\begin{enumerate}
\item See Allan Ingelson et al., \textit{Long-Term Liability for Carbon Capture and Storage in Depleted North American Oil and Gas Reservoirs—A Comparative Analysis}, 31 \textit{Energy L.J.} 431, 467 (2010).
\item See \textit{Restatement (Second) of Torts} § 520 cmt. g (1977).
\item See \textit{id.}
\item See, e.g., Foster v. City of Keyser, 501 S.E.2d 165 (W. Va. 1997) (relying on the doctrine of \textit{Res Ipsi Loquitur} instead of strict liability to hold the natural gas company liable for a natural gas explosion); New Meadows Holding Co. v. Wash. Water Power Co., 687 P.2d 212, 216 (Wash. 1984) (affirming that the transmission of natural gas through underground lines is not subject to strict liability).
\item Foster, 501 S.E.2d at 176.
\item New Meadows Holding Co., 687 P.2d at 216.
\item See \textit{id.}; \textit{Restatement (Second) of Torts} § 520 cmt. g (1977).
\item See, e.g., Williams v. Amoco Prod. Co., 734 P.2d 1113, 1123 (Kan. 1987) (holding that strict liability should not apply to natural gas drilling because it is not abnormally dangerous or a non-natural use of the land).
\item See \textit{id.}
\item \textit{Id.}
\item Id. “This is true because natural gas is in solution in the water until agitated and, upon reaching the surface, dissipates into the atmosphere.” \textit{Id.}
\end{enumerate}
\end{footnotesize}
particular case was minimal, the court determined that the company should not be held strictly liable.\textsuperscript{171} According to the \textit{Restatement}, a high degree of harm must be present to overcome a low probability of injury.\textsuperscript{172} In contrast, when the damage resulting from contamination significantly affects the water supply, courts may hold the defendant strictly liable.\textsuperscript{173} The Supreme Court of Kansas has held defendants strictly liable for water contamination resulting from salt water, sewage drain-off from cattle pens, and inadequately treated waste from a creamery.\textsuperscript{174} In these cases, the court found that permanent damage to one’s clean water supply was so harmful (factor a) that it outweighed its low-probability of occurring (factor b).\textsuperscript{175}

The “inability to eliminate the risk by the exercise of reasonable care” (factor c) emphasizes the idea that, unlike negligence, fault does not have to be proven in strict liability cases.\textsuperscript{176} In \textit{Berry v. Shell Petroleum}, the court affirmed the defendant’s liability without proving causation for water contamination when salt water leaked from an oil well into plaintiffs’ well water and rendered it unfit for use.\textsuperscript{177} The court explained that it did not matter that the refinery was operated carefully; instead, the decisive factor was simply that the harm occurred.\textsuperscript{178} The first three factors are necessary to determine whether an activity is ultrahazardous and not simply negligent. If the activity is not negligent then the court must consider factors (d), (e), and (f).\textsuperscript{179}

\textbf{B. Social Policy Concerns}

Courts have broad discretion in deciding strict liability cases because factors (d), (e), and (f) are very fact sensitive and incorporate

\textsuperscript{171} See id.

\textsuperscript{172} \textit{Restatement (Second) of Torts} § 520 cmt. g (1977).


\textsuperscript{175} See \textit{Berry}, 33 P.2d at 958; \textit{Atkinson}, 436 P.2d at 823–24; \textit{Klassen}, 165 P.2d at 608. In these cases the court does not apply the strict liability analysis from \textit{Restatement} section 520, instead the court imposed strict liability simply because they were water contamination cases. \textit{Koger}, 926 P.2d at 686.

\textsuperscript{176} See \textit{Restatement (Second) of Torts} § 520 cmt. h (1977).

\textsuperscript{177} 33 P.2d at 960.

\textsuperscript{178} See \textit{id.} at 957.

\textsuperscript{179} \textit{Restatement (Second) of Torts} § 520 cmt. h (1977).
social policy. \footnote{180} Factor (d), the “extent to which the activity is not a matter of common usage,” is a limitation on the doctrine of strict liability. \footnote{181} In Williams v. Amoco Production Co., the court stated that the drilling and operation of natural gas wells in a specific area is a “matter of common usage.” \footnote{182} Factor (d) inherently assumes that a common activity will be a “well-developed technology with reciprocal risk exchange between participants and bystanders.” \footnote{183}

Factor (e), whether an activity is inappropriate to a certain location, is central to the strict liability test. \footnote{184} There are certain activities in which the likelihood of harm and the degree of risk are different depending on the location of the activity. \footnote{185} In Branch v. Western Petroleum, the court affirmed that an oil company should be held strictly liable for groundwater contamination from formation water that contained oil, gas, and high concentrations of salt and other chemicals—all of which make well water unusable. \footnote{186} The court made this decision even though the production of formation water is a natural and necessary by-product of producing oil and gas. \footnote{187} It justified strict liability partly because the company maintained the formation water containing the harmful chemicals adjacent to the plaintiff’s well. \footnote{188} The proximity to the well made it an abnormally dangerous and inappropriate use of the land. \footnote{189} While this factor is often a determinative part of the analysis, courts should apply it cautiously. \footnote{190} If a court is too focused on factor (e), the strict liability analysis could quickly turn into a negligence analysis based on the reasonableness of the activity at that particular location. \footnote{191}

Under factor (f), courts also take the location of the activity into consideration when evaluating how the activity benefits the community. \footnote{192} Thus, if a community is dependent on the income produced by an abnormally dangerous activity, a court may consider that activity rea-

\footnote{180} See Hoffman, supra note 116, at 542–44.
\footnote{181} See Restatement (Second) of Torts § 520 cmt. i (1977).
\footnote{182} Williams, 734 P.2d at 1123. “[T]he Hugoton Gas Field is the largest known reservoir of natural gas in the world . . . . Thus, the drilling and operation of natural gas wells in this area is a common, accepted, and natural use of the land.” Id.
\footnote{183} Hoffman, supra note 116, at 542.
\footnote{184} See id.
\footnote{185} See Restatement (Second) of Torts § 520 cmt. j (1977).
\footnote{186} Branch v. W. Petrol., Inc., 657 P.2d 267, 270, 279 (Utah 1982).
\footnote{187} Id. at 270.
\footnote{188} Id. at 274.
\footnote{189} Id.
\footnote{190} Hoffman, supra note 116, at 542.
\footnote{191} Id.
\footnote{192} See Restatement (Second) of Torts § 520 cmt. k (1977).
This element is incorporated into factor (f), which presumably allows communities to benefit from progressive ideas and technologies, instead of stifling innovation with strict liability. In analyzing this factor, courts will often weigh the value of the activity to the community against its dangerous attributes. Some critics discount the usefulness of this factor because “almost any activity has some value for the community.” Others question its utility because it allows, and maybe even encourages, externalities that are paid for by accident victims. A recent concurring opinion from a Justice on the Supreme Court of Texas illustrates this point—in addressing whether trespassing claims could be made in hydraulic fracturing cases, the Justice explicitly chose the benefits of natural gas over the risk of contaminated water. The opinion concluded that “[a]mid soaring demand and sagging supply, Texas common law must accommodate cutting-edge technologies able to extract untold reserves from unconventional fields.”

Despite this example, there are several cases which hold that certain activities should be subjected to strict liability notwithstanding the benefit to the community. The court in Berry v. Shell Petroleum, for example, held that the water supply of the state is of “greater importance than the operation of a business at a reduced cost.” In Branch v. West Petroleum, the court found that an industrial polluter can and should assume the entire cost of his activities rather than externalize the cost of the pollution, which would make an innocent party pay. Many jurisdictions have imposed strict liability on specific types of groundwater contamination, either by statute or by recognizing the activity that led to the contamination as abnormally dangerous. Courts regularly impose strict liability defendants strictly liable on the oil and gas industry, mining industry, and manufactured gas industry. This occurs because these activities can result in extensive harm to innocent bystanders.

---

193 Id.
194 See Jones, supra note 121, at 1711.
195 Hoffman, supra note 116, at 543.
196 Id.
197 See Jones, supra note 121, at 1711–12.
198 See Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 26–29 (Tex. 2008) (Willett, J., concurring).
199 Id. at 29.
200 Berry, 33 P.2d at 958.
201 Branch, 657 P.2d at 275.
203 Id. at 136.
ers. In addition, oil and gas companies have exclusive control over their activities, whereas the victims are often unable to protect their water supply from contamination. While courts tolerate externalities in some cases, if the harm is significant they generally hold defendants strictly liable.

IV. STRICT LIABILITY SHOULD APPLY TO HYDRAULIC FRACTURING

In determining whether to apply strict liability to hydraulic fracturing, the U.S. District Court for the Middle District of Pennsylvania will likely consider the specific nature of hydraulic fracturing, the Restatement (Second) of Torts, and case law governing oil and gas use. Due to social policy and political considerations, this court will likely not apply strict liability to hydraulic fracturing companies. This Note argues that case law supports the decision to hold defendants strictly liable and courts should do so given environmental and social policy concerns.

A. Hydraulic Fracturing: The Case for Strict Liability

The threshold issue for the court will be to distinguish negligence from strict liability by determining whether reasonable care would eliminate the risk associated with hydraulic fracturing. In addressing this question, the court will rely on the first three factors from the Restatement: “(a) existence of a high degree of risk of some harm to [another]; (b) likelihood that the harm . . . will be great; [and] (c) inability to eliminate the risk by the exercise of reasonable care.”

In the case of hydraulic fracturing, there is not a high likelihood of harm occurring (factor a), but this should be outweighed by the very high likelihood that if harm occurs it would be great (factor b). The technology for hydraulic fracturing has been in use since the 1940s and there have been more than one million wells drilled in the United

204 Id. at 136–37.
205 Jones, supra note 121, at 1744.
206 See, e.g., Enos Coal Mining Co. v. Schuchart, 188 N.E.2d 406, 408 (1963) (finding that despite public interest, blasting operations were so dangerous that defendants must pay for damages).
207 See supra notes 15–111 and 145–206 and accompanying text.
208 See supra notes 47–88 and accompanying text.
210 See id. § 520; supra notes 155–179 and accompanying text.
211 RESTATEMENT (SECOND) OF TORTS § 520 cmt. g (1977); supra notes 155–179 and accompanying text.
States. In comparison to the number of wells drilled, the number of cases of contaminated drinking water caused by hydraulic fracturing (more than one thousand) is relatively small. Yet, permanent contamination of drinking water can result in a high degree of personal, physical, and emotional harm through exposure to various hazardous gases, chemicals, and industrial wastes. If the court were to hold companies strictly liable for this harm, the decision would be similar to Berry v. Shell Petroleum, where the court found defendants strictly liable for contaminating plaintiff’s drinking water with salt water.

In addition, an essential element of the strict liability analysis is factor (c), whether reasonable care could eliminate the risk. Although no study has clearly determined whether reasonable care would significantly decrease the risk of contamination in shale hydraulic fracturing, the process itself is inherently risky and it does not seem possible that reasonable care could eliminate all risk. The process of pumping dangerous chemicals into the ground surrenders all control over those chemicals. In fact, companies are only able to retrieve fifteen to eighty percent of the hydraulic fluid injected, depending on the site. The hydraulic fluids are transmitted beyond the defendant’s control and the plaintiffs are unable to avert any subsequent harm. Where there are passive victims—as is the case in Berish v. Southwestern Energy Production Co. and Fiorentino v. Cabot & Gas—many scholars agree that strict liability would provide a better remedy than negligence.

Importantly, factor (c) does not determine whether risks of harm arising from hydraulic fracturing could be eliminated through the exercise of “all conceivable precautions.” Instead, the standard in the

213 New Meadows Holding Co. v. Washington Water Power Co., 687 P.2d 212, 216 (Wash. 1984) (concluding that since the gas companies are subject to strict federal and state safety regulations, such as programs for corrosion control, pipeline testing, gas leak investigation, and odorizers, the riskiness of natural gas transmission is sufficiently low); Lustgarten, supra note 8.
214 See Berish Complaint, supra note 87, ¶ 1.
215 See Berry, 33 P.2d at 960.
216 See Restatement (Second) of Torts § 520 cmt. h (1977).
217 See EPA Findings on Hydraulic Fracturing Deemed “Unsupportable,” supra note 55. This is part of the reason why the EPA began to study hydraulic fracturing in shale last year. See Press Release, EPA, supra note 33.
218 See Deweese, supra note 73, at *3.
219 EPA, supra note 2, at 2.
220 See Jones, supra note 121, at 1744.
221 See Hoffman, supra note 116, at 552.
222 See Restatement (Second) of Torts § 520 cmt. h (1977).
Restatement is that of reasonable precautions and care. Many representatives of companies involved in hydraulic fracturing argue that the process is safe and that there is no need for increased regulation or oversight, thus implying that reasonable care is currently exercised. If the industry argument is to be accepted, it supports the decision to impose strict liability because the fact that contamination from hydraulic fracturing occurs demonstrates that contamination cannot be prevented by reasonable care. This logic is exemplified in Berry, where the court concluded that exercising reasonable care did not excuse the company from liability, but rather the mere fact that the water was contaminated was enough to impose liability. Considered together, the first three factors of the analysis suggest that strict liability should apply instead of negligence. Once the cases at issue overcome this threshold question, the court will likely then consider social policy concerns.

B. The Social Policy Concerns of Allowing Hydraulic Fracturing

The second inquiry incorporates the final three factors: (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried out; and (f) extent to which the value of the activity to the community is outweighed by its dangerous attributes. The court will first analyze where the hydraulic fracturing is taking place and whether hydraulic fracturing is a matter of common usage at that location. Guidance from the Restatement suggests that oil drilling is not abnormally dangerous when it takes place on “oil lands,” but that it could be abnormally dangerous if it occurs in other areas. It is unclear how common the activity must be to qualify as a common usage. This issue is further complicated by Susquehanna County’s current transition from an agriculturally driven economy to one more dependent on natural gas.

---

223 Id.
225 See Restatement (Second) of Torts § 520 cmt. h (1977).
226 Berry, 33 P.2d at 957.
227 See Restatement (Second) of Torts § 520 (1977).
228 Id.
229 See id. cmt. i.
230 Id.
231 See id.
232 See Krauss & Zeller, supra note 64.
which started in 2006, undoubtedly affects what is considered a common usage of the land.  

Similarly, there is no clear delineation as to what locations are appropriate for hydraulic fracturing. Previous courts have held oil and gas well companies strictly liable for wells in thickly settled communities, but not in rural areas. Therefore, the Pennsylvania courts will need to consider that although Susquehanna County is often referred to as a rural area, the definition of rural is open to wide interpretation. For example, it is unclear whether the area where the contamination occurred, in towns as close as thirty minutes away from the city of Scranton, is sufficiently rural. Furthermore, the court will evaluate how close the hydraulic wells were to the plaintiffs’ property and water supply. In both lawsuits, all of the wells were drilled less than 2000 feet (0.38 miles), with some as close as 400 feet, from the plaintiffs’ residences and water supplies. If building a well 400 feet from a person’s water supply was performed while exercising reasonable care, as the defendants claim, then strict liability should clearly apply because risk cannot be eliminated at this distance. Furthermore, the plaintiffs should not be expected to move from their homes and communities to avoid the harm.

In addition to being a non-natural use based on the history of that region, hydraulic fracturing is a non-natural use because it brings minerals from the bed rock to water situated above that level, which would

233 See Restatement (Second) of Torts § 520 cmt. i (1977); Krauss & Zeller, supra note 64.
234 See Restatement (Second) of Torts § 520 cmt. j (1977).
236 See Restatement (Second) of Torts § 520 cmt. k (1977).
237 See id. cmt. j; The Town of Kingsley, PA, supra note 101.
238 See The Town of Kingsley, PA, supra note 101.
239 See Branch v. W. Petrol., Inc., 657 P.2d 267, 270 (Utah 1982) (taking into account the proximity of the plaintiff’s well to the activity in holding the defendant strictly liable); Restatement (Second) of Torts § 520 cmt. k (1977).
240 See Berish Complaint, supra note 14, ¶ 11; Fiorentino Complaint, supra note 14, ¶ 35.
241 See Branch, 657 P.2d at 270 (imposing strict liability because dumping formation water adjacent to plaintiff’s property was too close); Restatement (Second) of Torts § 520 cmt. g (1977); Berish Complaint, supra note 14, ¶ 11; Fiorentino Complaint, supra note 14, ¶ 35.
242 See Jones, supra note 121, at 1744; The Town of Kingsley, PA, supra note 101.
not otherwise occur. Similarly, in Berry, the court applied strict liability to oil drilling operations near the plaintiff’s residence that brought salt water to the surface and contaminated plaintiff’s drinking water. The court concluded that the “salt water had been harmless as long as it was left in the ground, but once it was raised to the surface of the earth it became a harmful agent.” The court went on to say that “[t]he right to recover results from the company having the harmful substance on its land and permitting it to escape to the damage of plaintiff.” Like the salt water in Berry, the unnatural minerals brought to the water level by fracing introduce a harm that favors the application of strict liability under factor (e).

Finally, factor (f)—the extent to which the value of the activity is outweighed by its risk to the community—provides the most judicial discretion because it is very fact-sensitive. In these cases, the court has the opportunity to weigh the importance of domestic energy and local economic growth against the importance of clean water. If hydraulic fracturing is sufficiently valuable to Pennsylvania communities, the court may not regard it as abnormally dangerous because of the value of the activity itself. Although many residents have environmental concerns, many are eager to profit by selling the mineral rights below their land. As a result, communities in Pennsylvania affected by hydraulic fracturing are divided as to whether the risks associated with hydraulic fracturing are worth the monetary benefits to the community and to the nation.

Due to the lack of regulation and the difficulty proving causation, plaintiffs can likely recover only for the damage caused by hydraulic fracturing if the court imposes strict liability. Applying strict liability is not only necessary to make plaintiffs whole, but it would also demonstrate the importance of water quality, which is an issue that will only

243 See Berry, 33 P.2d at 957; ‘Fracking’ Mobilizes Uranium in Marcellus Shale, supra note 43.
244 Berry, 33 P.2d at 957.
245 Id.
246 Id.
247 See id.
248 See Restatement (Second) of Torts § 520 cmt. k (1977).
249 See, e.g., Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 26–27 (Tex. 2008) (Willett, J., concurring).
250 See Restatement (Second) of Torts § 520 cmt. k (1977); Krauss & Zeller, supra note 64 (comparing communities’ responses to hydraulic fracturing and the water damage it has caused in Louisiana and in Pennsylvania).
251 See Mufson, supra note 94.
252 See supra notes 15–111 and accompanying text.
253 See supra notes 47–88, 155–179 accompanying text.
increase in importance in the future. Traditionally, water quality cases have been more important in the western, arid states where agriculture is more prevalent. Yet hydraulic fracturing water quality cases in Pennsylvania should be treated with equal importance because the same area that contains natural gas also supplies more than 15 million people with water. As a result, the threat of contamination from hydraulic fracturing should not only concern current plaintiffs, but any other party interested in Pennsylvania’s future water quality.

Imposing strict liability would not end hydraulic fracturing in Pennsylvania. Instead, it would mean that the defendants in these cases would be free to continue to lease land and to drill on that land, but they would be held responsible for the externalities caused by fracking, such as contamination. Therefore, the defendants would have a significant incentive to limit accidents, and might even explore alternative drilling areas or other best practices. By imposing a cost for accidents, strict liability would be a compromise between those who want to drill and explore natural gas deposits and those who want to limit natural gas exploration.

Conclusion

As soon as the first natural gas well was drilled in Susquehanna County in 2006, a political and legal battle emerged with both sides fighting for conflicting environmental principles. While some environmentalists support natural gas drilling because it burns cleaner than coal, other environmentalists are shocked and dismayed at the threat of water contamination. The potential for severe environmental damage is compounded by both the speed in which the industry has developed in Pennsylvania and the lack of comprehensive federal and state regulation.

254 See Dye, supra note 13; O’Callaghan, supra note 13.
255 See Hoffman, supra note 116, at 554.
256 Bateman, supra note 3.
257 See id.
258 See supra notes 134–144 and accompanying text (explaining how strict liability would force drillers to internalize the cost).
259 See supra notes 134–144 and accompanying text.
261 See Krauss & Zeller, supra note 64.
262 See id.
263 See id.
264 See supra notes 47–88 and accompanying text.
Currently, the best method for plaintiffs to acquire a remedy for their harms is at common law, specifically through the application of a strict liability cause of action. The courts’ conclusions will likely be determined by whether, in their cost-benefit analysis, the attributes of natural gas outweigh its destructive effects. The court should impose strict liability because it would be a balance between both sides—it would compensate current and future plaintiffs for harm endured, but also allow hydraulic fracturing to continue.

Natural gas exploration and drilling will not necessarily contaminate the nation’s water supply. But, strict liability would serve as a strong incentive to limit future contamination. As the nation continues to seek solutions to improve its energy options and retain a clean water supply, water quality issues and energy production issues will clash with greater frequency. The decision currently facing the court is an opportunity to create a strong precedent for addressing these issues.

265 See Ingelson, supra note 160, at 467.
266 See Restatement (Second) of Torts § 520 (1977).
267 See supra notes 133–143 and accompanying text.
268 See Fracking Boon or Doom, supra note 11.
270 See Dye, supra note 13; O’Callaghan, supra note 13.
SCOPE OF REVIEWABLE EVIDENCE IN NEPA PREDETERMINATION CASES: WHY GOING OFF THE RECORD PUTS COURTS ON TARGET

JESSE GARFINKLE*

Abstract: Plaintiffs challenging an agency’s environmental impact statement on the grounds of predetermination have been met with different judicially created evidentiary standards. Under the Fourth Circuit’s approach, as applied in National Audubon Society v. Department of the Navy, courts should restrict the scope of reviewable evidence to the administrative record. Under the Tenth Circuit’s approach, however, extra-record evidence may also be considered in determining predetermination claims. In Forest Guardians v. U.S. Fish and Wildlife Service, the Tenth Circuit considered emails, intra-agency correspondence, and a grant agreement outside the scope of the administrative record, and concluded that the agency had not predetermined the outcome of its impact statement. This Note advocates for the universal adoption of the expansive Tenth Circuit approach because of the importance of extra-record evidence in predetermination cases and its minimal risk to agency independence.

Introduction

Federal agencies stand at the front lines of both the national defense and preservation of the environment. To this end, the National Environmental Policy Act (NEPA) requires agencies to carefully consider the environmental impacts of their proposed monitoring or executing actions before proceeding. A key mechanism to ensure the proper execution of this duty is NEPA’s proscription of an agency’s commitment of resources to a certain course of action prior to the completion of this analysis. In prohibiting such premature commitments, NEPA not only seeks to ensure comprehensive environmental analyses but also to eliminate sunk costs—namely the premature investment of resources into undesirable courses of action that may result


2 See id. § 4332.
3 40 C.F.R. § 1500.1 (2010).
in negative environmental consequences.\textsuperscript{4} This prohibition serves to prevent predetermined outcomes of environmental analyses.\textsuperscript{5}

Although NEPA imposes this critical mandate, the statute is silent on the enforcement of this duty and thus it is left entirely to reviewing courts.\textsuperscript{6} Courts have long struggled with the proper standards for reviewing predetermination claims in environmental analyses under NEPA, and the permissible scope of evidence on review continues to divide federal circuit courts.\textsuperscript{7} Courts consistently disagree on the propriety of broad evidentiary review, the efficacy of narrowly tailored review in rooting out predetermination, and the inherent dangers and safeguards of off the record judicial review.\textsuperscript{8} In its recent opinion, \textit{Forest Guardians v. U.S. Fish and Wildlife Service}, the Tenth Circuit highlights the central debate regarding the consideration of evidence not included in the administrative record.\textsuperscript{9} Whereas the Fourth Circuit applies a narrow evidentiary scope allowing only evidence on the record,\textsuperscript{10} the Tenth Circuit uses an expansive approach that allows examination of extrinsic evidence.\textsuperscript{11}

This Note explores how the Tenth Circuit’s broad evidentiary approach ensures both rigorous enforcement of NEPA’s procedures and adequate protection of the nation’s environment from the risks of agency predetermination.\textsuperscript{12} Part I of this Note considers the statutory and regulatory framework that imposes agency responsibilities, and addresses the issue of predetermination. Parts II and III explore both statutory and common law standards for evaluating agency predetermination claims. Part IV demonstrates the need for a broad evidentiary approach, consistent with that of the Tenth Circuit, in assessing allegations of predetermination.

\textsuperscript{4} See infra notes 28–51 and accompanying text.
\textsuperscript{5} See infra notes 73–78 and accompanying text.
\textsuperscript{6} See infra notes 95–102 and accompanying text.
\textsuperscript{7} Compare \textit{Forest Guardians v. U.S. Fish & Wildlife Serv.}, 611 F.3d 692, 716–17 (10th Cir. 2010), with \textit{Nat’l Audubon Soc’y v. Dep’t of the Navy}, 422 F.3d 174, 198–99 (4th Cir. 2005).
\textsuperscript{8} Compare \textit{Forest Guardians}, 611 F.3d at 716–17 (considering extra-record emails, meeting minutes, and a grant agreement), \textit{and Metcalf v. Daley}, 214 F.3d 1135, 1143–44 (9th Cir. 2000) (considering extra-record contracts), \textit{and Davis v. Mineta}, 302 F.3d 1104, 1112 (10th Cir. 2002) (considering extra-record addendum to a services agreement), \textit{with Nat’l Audubon}, 422 F.3d at 198–99 (refusing to consider extra-record evidence), \textit{and Fayetteville Area Chamber of Commerce v. Volpe}, 515 F.2d 1021, 1026 (4th Cir. 1975) (noting reluctance to examine subjective impartiality of agency decisionmakers).
\textsuperscript{9} See 611 F.3d at 716–17; \textit{Nat’l Audubon}, 422 F.3d at 198–99.
\textsuperscript{10} \textit{Nat’l Audubon}, 422 F.3d at 198–99.
\textsuperscript{11} See \textit{Forest Guardians}, 611 F.3d at 716–17.
\textsuperscript{12} See infra notes 145–197 and accompanying text.
I. Statutory and Regulatory Framework

A. The National Environmental Policy Act

Environmental protection has long been a serious concern in modern American government. Congress enacted NEPA in recognition of “the profound impact of man’s activity on the interrelations of all components of the natural environment,” and as a means to restore order and maintain environmental quality. NEPA declares a national policy encouraging the prevention and elimination of environmental damage. In pursuit of this purpose, Congress instructs all federal agencies to preserve, protect, and enhance the environment.

Congress delineates the responsibilities of federal agencies under NEPA in section 102(2). First, it requires federal agencies to consider every significant environmental aspect of a proposed action. Under this directive, NEPA mandates that a federal agency include, in every recommendation or report on legislative proposals and other major federal actions significantly affecting the quality of the environment, a detailed statement on the environmental impact and unavoidable adverse environmental effects of the proposed action, as well as alternatives to the proposed action. This document is called an Environmental Impact Statement (EIS).

Second, it guarantees that relevant

---

14 Id.
15 Id.
16 Id. §§ 4331–4332.
17 Id. § 4332.
19 42 U.S.C. § 4332(C). Agencies must:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.
information will be made available to the public, thus allowing citizens to play a role in both the decision-making and implementation processes.\textsuperscript{21} By requiring a comprehensive evaluation of environmental impacts prior to a Record of Decision,\textsuperscript{22} NEPA seeks to avoid sunk costs arising from investment in a course of action that may not be the best alternative as determined by the EIS.\textsuperscript{23} Sunk costs result when a proponent of an action invests significant expenses or resources into early stages of a proposal.\textsuperscript{24} Aside from wasting money, time, and resources, such actions often harm the environment in ways that statutes like NEPA are designed to prevent.\textsuperscript{25} Courts are often left with tremendously difficult, and highly pressured, decisions as to whether to enforce environmental laws or to avoid wasted resources and sunk costs.\textsuperscript{26} Additionally, the prevention of such sunk costs plays a role in preserving the viability of alternatives that could otherwise be precluded if significant investment in a more harmful course of action had already occurred.\textsuperscript{27}

B. Council on Environmental Quality

NEPA’s procedural requirements alone are insufficient to ensure meaningful environmental protection, and thus section 202 of the statute created the Council on Environmental Quality (CEQ)\textsuperscript{28} to oversee the it’s implementation.\textsuperscript{29} Although NEPA does not expressly authorize the CEQ to promulgate regulations, President Carter added this responsibility by Executive Order in 1977.\textsuperscript{30} These regulations instruct federal agencies on how to comply with NEPA’s procedures and poli-

\textsuperscript{22} 40 C.F.R. § 1505.2 (2010). A Record of Decision must include: (a) what the decision was; (b) alternatives considered in making the decision, including preferred alternatives; (c) whether all practicable means of avoiding or minimizing environmental harm have been adopted, and if not, why they were not. Id.
\textsuperscript{24} Id. at 393–94.
\textsuperscript{25} See id. at 394.
\textsuperscript{26} Id.
\textsuperscript{27} See id. at 400.
\textsuperscript{29} See id. § 4344.
\textsuperscript{30} Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977). “Subsection (h) of Section 3 (relating to responsibilities of the Council on Environmental Quality) of Executive Order No. 11514, as amended, is revised to read as follows: ‘(h) Issue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA],’ including the [Environmental Impact Statement] process.” Id.
cies.\textsuperscript{31} CEQ regulations are binding on all federal agencies\textsuperscript{32} and serve as formal guidance to the courts on the application of NEPA.\textsuperscript{33} The CEQ’s regulatory processes explicitly ensure that environmental information is made available to the public before decisions are made or actions are taken.\textsuperscript{34}

An environmental impact analysis occurs in two distinct forms under CEQ regulations pursuant to NEPA.\textsuperscript{35} The first method of analysis is the EIS, which an agency must prepare when it has reason to believe that a proposed action may have environmental impacts.\textsuperscript{36} EISs must be “analytic rather than encyclopedic,”\textsuperscript{37} and concise, varying in length with potential environmental problems and project size.\textsuperscript{38} An EIS must state the alternatives considered, and any subsequent decisions that rely on it must meet the procedural and policy requirements of NEPA.\textsuperscript{39} The spectrum of alternatives considered within an EIS must also include potential alternatives to be considered by the ultimate agency decision-maker.\textsuperscript{40} Section 1502.14(e) of the CEQ regulations allows for, and arguably encourages, preferred alternatives in the EIS process.\textsuperscript{41} Additionally, the CEQ addresses the danger of agency predetermination by mandating that an agency must not commit resources that would prejudice selection of alternatives before making a final decision.\textsuperscript{42} This prohibition is justified by the CEQ’s intention that the EIS serve as the means of assessing the environmental impact of proposed actions, rather than justifying decisions retroactively.\textsuperscript{43} Furthermore, CEQ regulations require that “until an agency issues a [R]ecord of [D]ecision . . . no action concerning the proposal shall be taken which would: (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives.”\textsuperscript{44} This prohibition is aimed at preventing sunk

\textsuperscript{31}40 C.F.R. § 1500.1(a) (2010).
\textsuperscript{32}Id. § 1507.1.
\textsuperscript{34}See 40 C.F.R. § 1500.1(b).
\textsuperscript{35}See id. § 1501.3 (establishing the Environmental Assessment (EA)); id. § 1502 (establishing the Environmental Impact Statement (EIS)).
\textsuperscript{36}See 40 C.F.R. § 1502.
\textsuperscript{37}Id. § 1502.2(a).
\textsuperscript{38}Id. § 1502.2(b)–(c).
\textsuperscript{39}Id. § 1502.2(d).
\textsuperscript{40}Id. § 1502.2(e).
\textsuperscript{41}Id. § 1502.14(e).
\textsuperscript{42}40 C.F.R. § 1502.2(f).
\textsuperscript{43}Id. § 1502.2(g).
\textsuperscript{44}Id. § 1506.1(a).
costs that may result in the preclusion of better alternatives or the im-
proper selection of a more environmentally harmful course of action.45

The second form of environmental impact analysis under NEPA is
the Environmental Assessment (EA).46 An EA is a concise public docu-
ment that must provide sufficient evidence and analysis to determine
whether a “finding of no significant impact” (FONSI) is warranted or
an EIS is required.47 CEQ regulations require that “[a]gencies shall
prepare an [E]nvironmental [A]ssessment . . . when necessary under
the procedures adopted by individual agencies to supplement these
regulations.”48 An EA is not required when an agency is otherwise pre-
paring an EIS, as the environmental impacts are adequately examined
and reported.49 An EA, however, assists an agency’s preparation of an
EIS when one is necessary.50 If significant environmental impacts are
demonstrated by an EA, the agency must prepare an EIS; if not, the
agency issues a FONSI.51

II. Judicial Review of Agency Decisions Under NEPA

A. Arbitrary and Capricious

When courts are called to review an agency’s Environmental Im-
pact Statement (EIS) or Environmental Assessment (EA) under NEPA,
they are presented with a limited number of flexible standards that
provide a significant amount of judicial discretion in their applica-
tion.52 NEPA provides no explicit guidance to courts in reviewing an
agency’s compliance with its procedural provisions.53 It also does not
contain a citizen suit provision to enable private parties to enforce vi-
lations of its requirements.54 Due to this omission, private citizens and
environmental groups must file suit under the Administrative Proce-

45 Kopf, supra note 23, at 400.
46 40 C.F.R. § 1501.3. This Note will refer to both EISs and EAs as environmental im-
pact analyses, and, in discussing agency predetermination for the purposes of this Note,
the two forms of analysis are treated as the same.
47 Id. § 1508.9(a).
48 Id. § 1501.3(a).
49 See id.
50 Id. § 1508.9(3).
51 See id. § 1501.4.
52 See Administrative Procedure Act, 5 U.S.C. § 706(2) (2006); Daniel R. Mandelker,
NEPA Law and Litig. § 8.7 (2d ed. & Supp. 2010).
53 See Mandelker, supra note 52, § 8.7.
due Act (APA). Federal district courts have jurisdiction over cases involving agency compliance with the provisions of NEPA.

Section 706 of the APA enables federal courts to find unlawful and invalidate agency actions, findings, and conclusions if they violate any of six specified standards. In Marsh v. Oregon Natural Resources Council, the Supreme Court tackled the question of judicial review under NEPA in accordance with APA standards. In Marsh, the Court considered a suit, brought by a nonprofit organization, to enjoin the building of a dam based on allegations that the Army Corps of Engineers had violated NEPA’s EIS requirements. The Court determined that a “reasonableness” standard would not provide enough deference to the informed discretion of the agency. Reluctant to engage in its own determination of “reasonableness” on substantive matters, the Court held that the “arbitrary and capricious” standard should instead be applied to NEPA cases. This standard, applied under the APA to NEPA, allows a court to set aside an agency’s action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The Marsh Court took notice of the Ninth Circuit’s use of the reasonableness standard, but noted that the standard was not uniformly adopted among the circuits and that very little pragmatic difference existed between the two standards. Although departing from the Ninth Circuit’s

55 Id.
58 Id. Section 706 reads:

Under the APA, a court can set aside any agency action which is: “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to [trial-type proceedings]; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

60 Id. at 360.
61 Id. at 375–78. Although deference should be given, the Court warned that “courts should not automatically defer to the agency’s express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information.” Id. at 378.
62 Id. at 375–78.
64 490 U.S. at 377 n.23.
application of the reasonableness standard, the Court agreed that it makes sense to distinguish the strong level of deference accorded to an agency in deciding factual or technical matters from the lesser deference given when considering predominantly legal questions. Thus, the arbitrary and capricious standard is now applied consistently in substantive NEPA cases.

B. Hard Look Doctrine

In the wake of prolonged debate regarding the proper application of the arbitrary and capricious standard, the “hard look” doctrine emerged from Greater Boston Television Corp. v. FCC. In that case, the court explained that the “supervisory function calls on the court to intervene . . . if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision making.” If the agency took a hard look at the issue, however, the court should affirm the agency’s action even if the court would “have made different findings or adopted different standards.” Furthermore, the opinion stated that a court should not disturb an agency decision due to immaterial errors because the doctrine of harmless error is appropriate in such circumstances. This doctrine has become the cornerstone for judicial review on federal administrative agency actions, and courts use it to apply the APA’s arbitrary and capricious standard in determining whether an agency analysis was adequate under NEPA.

C. Predetermination: The Irretrievable and Irreversible Commitment of Resources

In applying these standards, courts uphold CEQ regulations prohibiting predetermined decisions prior to the completion of an EIS or

65 See id. at 376–77.
66 See, e.g., Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 716–17 (10th Cir. 2010); Nat’l Audubon Soc’y v. Dep’t of the Navy, 422 F.3d 174, 198–99 (4th Cir. 2005); Metcalf v. Daley, 214 F.3d 1135, 1141 (9th Cir. 2000).
68 444 F.2d 841, 851 (D.C. Cir. 1970); Kirby, supra note 67, at 216.
69 444 F.2d at 851.
70 Id.
71 Id.
72 See, e.g., Forest Guardians, 611 F.3d at 710–11; Nat’l Audubon, 422 F.3d at 181; Metcalf, 214 F.3d at 1145.
EA by finding that such predetermination precludes an agency from taking the requisite hard look.\textsuperscript{73} Section 1502.2 clearly prohibits such predetermination, stating that “[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision.”\textsuperscript{74} Courts have established a threshold for such predetermination, namely the “irretrievable and irreversible commitment of resources” to a course of action prior to the completion of the environmental impact analysis.\textsuperscript{75} The temporal threshold of such a commitment of resources is consistent with the CEQ’s stance that judicial review of agency compliance only occur after an agency has either filed the final EIS or FONSI, or takes action that will result in irreparable harm to the environment.\textsuperscript{76} Courts have held that such an irreversible commitment of resources “seriously impede[s] the degree to which [an agency’s] planning and decisions could reflect environmental values.”\textsuperscript{77} In light of NEPA’s guiding policies and the CEQ’s procedural regulations, courts have consistently held that violations of the arbitrary and capricious standard occur when an agency prematurely and irretrievably commits resources to an alternative prior to the completion of an environmental impact analysis.\textsuperscript{78}

D. Record Rule

Courts have widely recognized that an agency need not be “subjectively impartial” in making a conclusion about environmental impacts pursuant to section 1502.14(e)’s allowance for preferred alternatives,\textsuperscript{79} as well as the inevitability that an agency will develop a preference for one form of action over others.\textsuperscript{80} Furthermore, courts adhere to the principle that the judiciary should not engage in substantive analysis of the wisdom of a chosen plan of action, as judges are neither experts in the field nor tasked with such statutory responsibility.\textsuperscript{81} There is a clear lack of consensus, however, on how to fulfill the judicial role in reviewing agency decisions, with some courts willing to review only evidence

\textsuperscript{73} See Metcalf, 214 F.3d at 1145; 40 C.F.R. § 1502.2(f) (2010).
\textsuperscript{74} 40 C.F.R. § 1502.2(f).
\textsuperscript{75} Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988).
\textsuperscript{76} 40 C.F.R. § 1500.3.
\textsuperscript{77} Metcalf, 214 F.3d at 1143.
\textsuperscript{78} See, e.g., id. at 1145; Conner, 848 F.2d at 1446, 1462.
\textsuperscript{79} 40 C.F.R. § 1502.14.
\textsuperscript{80} See Forest Guardians, 611 F.3d at 712.
\textsuperscript{81} See Nat’l Audubon, 422 F.3d at 198–99.
in the administrative record and others allowing the consideration of extrinsic evidence.\textsuperscript{82}

The seminal case in the debate regarding the consideration of evidence outside of the administrative record is \textit{Citizens to Preserve Overton Park v. Volpe}, in which the Supreme Court considered a suit brought by private parties to enjoin the Department of Transportation (DOT) from releasing funds for construction of a highway.\textsuperscript{83} The Court held that judicial review is to be based on the full administrative record that was before the ultimate decisionmaker at the time of the decision.\textsuperscript{84} This limitation derived primarily from section 706 of the APA, which instructs a reviewing court to review the whole record or those parts cited by a party.\textsuperscript{85} The Court’s interpretation of this language has led to the modern doctrine known as the “record rule,” which effectively limits a reviewing court’s consideration of the evidence to the administrative record.\textsuperscript{86}

Courts have recognized some exceptions to the record rule.\textsuperscript{87} The Supreme Court held that extra-record investigation may be appropriate when there has been a strong showing of bad faith or improper behavior on the part of the decisionmakers, or where the absence of formal administrative findings necessitates an investigation to determine the reasons for the agency’s choice.\textsuperscript{88} In addition to these general exceptions explicitly established by the Supreme Court,\textsuperscript{89} an exception tailored specifically for NEPA review also exists.\textsuperscript{90} The Second Circuit, in \textit{Suffolk County v. Secretary of the Interior}, noted that “a primary function of the court is to [e]nsure that the information available to the [decisionmaker] includes an adequate discussion of environmental effects

\textsuperscript{82} See Forest Guardians, 611 F.3d at 716–17; Nat’l Audubon, 422 F.3d at 198–99.
\textsuperscript{83} 401 U.S. 402, 406 (1971).
\textsuperscript{84} Id. at 420. The Court did recognize that “[t]he court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided.” Id.
\textsuperscript{85} Administrative Procedure Act, 5 U.S.C. § 706 (2006); \textit{Overton Park}, 401 U.S. at 419.
\textsuperscript{88} \textit{Overton Park}, 401 U.S. at 420; French, supra note 87, at 941, 952–53.
\textsuperscript{89} Saul, supra note 86, at 1308–11. The general exceptions to the record rule include: (1) [w]here there is a strong showing of bad faith or improper behavior; (2) [w]here a “bare” record frustrates effective judicial review; (3) [w]here a agency considered materials that it failed to include in the record; and (4) [w]here additional information is necessary to explain complex issues. Id.
\textsuperscript{90} French, supra note 87, at 948–53.
and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.\textsuperscript{91} The court recognized allegations that an EIS has omitted serious environmental consequences, or has failed to adequately discuss some reasonable alternative, raise issues important enough to warrant the introduction of new evidence.\textsuperscript{92} These issues are sufficiently important to allow for the consideration of extrinsic evidence both in challenges to the sufficiency of an EIS and in suits attacking an agency’s decision to issue a FONSI.\textsuperscript{93} Although the Supreme Court has not explicitly recognized this NEPA exception to the record rule, multiple circuit courts of appeal have applied it in reviewing agency decisions under NEPA.\textsuperscript{94}

III. Scope of Evidentiary Review in NEPA Predetermination Cases

Although courts generally agree on the application of the Administrative Procedure Act standard,\textsuperscript{95} there is no statutory instruction regarding the proper scope of evidence to be considered by a court in reviewing agency impact analyses.\textsuperscript{96} There have been significant inconsistencies in judicial reviews of citizen suits specifically alleging agency predetermination.\textsuperscript{97} Courts have generally agreed on the “trigger point” for predetermination, holding that an agency has violated NEPA when it made an irreversible and irretrievable commitment of resources to an outcome prior to making its final decision.\textsuperscript{98} Two distinct approaches, however, have been taken by courts regarding the appropriate scope of admissible evidence to determine if an agency has crossed this threshold.\textsuperscript{99} Some courts, such as the Fourth Circuit, have adopted a narrow approach in reviewing agency Environmental Impact Statements (EIS)

\textsuperscript{91} 562 F.2d 1368, 1384 (2d. Cir. 1977) (citations omitted); French, \textit{supra} note 87, at 950.
\textsuperscript{92} 562 F.2d at 1384–85; French, \textit{supra} note 87, at 950.
\textsuperscript{93} See \textit{supra} note 87, at 950.
\textsuperscript{94} See, e.g., \textit{Forest Guardians}, 611 F.3d at 716–17; \textit{Metcalf}, 214 F.3d at 1143–44.
\textsuperscript{95} See \textit{Forest Guardians} v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 704 (10th Cir. 2010); \textit{Metcalf} v. Daley, 214 F.3d 1135, 1141 (9th Cir. 2000).
\textsuperscript{96} French, \textit{supra} note 87, at 938.
\textsuperscript{97} \textit{Compare Forest Guardians}, 611 F.3d at 716–17, with Nat’l Audubon Soc’y v. Dep’t of the Navy, 422 F.3d 174, 198–99 (4th Cir. 2005).
\textsuperscript{98} See \textit{Forest Guardians}, 611 F.3d at 714–15; \textit{Metcalf}, 214 F.3d at 1145; Conner v. Burford, 848 F.2d 1441, 1446 (1988).
\textsuperscript{99} \textit{Compare Forest Guardians}, 611 F.3d at 716–17 (allowing consideration of extra-record evidence), \textit{with Nat’l Audubon}, 422 F.3d at 198–99 (refusing to consider extra-record evidence).
that limits reviewable evidence to the impact analysis prepared by the agency and prohibiting the consideration of any external material.\textsuperscript{100} Other courts, such as the Tenth Circuit, have adopted a broad approach that allows examination of any material that tends to show that an agency passed the trigger point for predetermination.\textsuperscript{101} Under this latter approach, courts have considered government contracts, agency correspondence, and other relevant evidence.\textsuperscript{102}

This section first explores the evolution of the Fourth Circuit’s narrow approach, beginning with \textit{Fayetteville Area Chamber of Commerce v. Volpe}\textsuperscript{103} and culminating in \textit{National Audubon Society v. Department of the Navy}.\textsuperscript{104} The Tenth Circuit’s approach is then examined as applied by both the Ninth and Tenth Circuits. The expansive standard is applied first by the Ninth Circuit in \textit{Metcalf v. Daley}\textsuperscript{105} and more recently in the Tenth Circuit’s decisions in \textit{Davis v. Mineta},\textsuperscript{106} \textit{Lee v. U.S. Air Force},\textsuperscript{107} and \textit{Forest Guardians v. U.S. Fish and Wildlife Service}.\textsuperscript{108} These cases provide factual applications and competing reasoning for the exclusion or inclusion of extra-record evidence.

\section*{A. Cases Utilizing the Narrow Scope of Review}

\subsection*{1. Roots of the Fourth Circuit’s Narrow Approach: \textit{Fayetteville Area Chamber of Commerce v. Volpe}}

In \textit{Fayetteville Area Chamber of Commerce v. Volpe}, Fayetteville’s Chamber of Commerce challenged an EIS submitted by the Department of Transportation (DOT) analyzing the environmental impacts of potential locations for a highway bypass in North Carolina.\textsuperscript{109} The plaintiffs argued that a state highway official’s administrative decision approving the location of the bypass precluded the proper EIS from being prepared under NEPA, as it was essentially evidence of predetermination.

\begin{footnotesize}
\begin{itemize}
\item[100] Nat’l Audubon, 422 F.3d at 198–99.
\item[101] Forest Guardians, 611 F.3d at 716–17.
\item[102] See id. at 716 (considering extra-record agency meeting minutes, correspondence, and grant agreement); Lee v. U.S. Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004) (considering, but not admitting, an extra-record affidavit); Metcalf, 214 F.3d at 1143 (considering an extra-record contract).
\item[103] 515 F.2d 1021, 1023–24 (4th Cir. 1975).
\item[104] 422 F.3d at 198–99.
\item[105] 214 F.3d at 1143.
\item[106] 302 F.3d 1104, 1112 (10th Cir. 2002).
\item[107] 354 F.3d at 1242.
\item[108] Forest Guardians, 611 F.3d at 704.
\item[109] 515 F.2d at 1023–24.
\end{itemize}
\end{footnotesize}
of the EIS’s outcome.110 The Fourth Circuit refused to consider the prior administrative decision as evidence of such predetermination, basing its decision on the Eighth and Ninth Circuits’ stance that the test for compliance with an EIS “is one of good faith objectivity rather than subjective impartiality.”111 This distinction is elucidated in *Environmental Defense Fund, Inc. v. Corps of Engineers*, where the Eighth Circuit stated that it is possible for agency officials to comply in good faith with NEPA, even if they personally oppose its philosophy or have preconceived attitudes and opinions as to the propriety of the project.112 Deeming the administrative decision evidence of subjective intent, and thus disregarding it, the court found that the EIS was completed with good-faith objectivity and therefore upheld its validity because it was neither arbitrary nor capricious.113

2. Modern Day Narrow Approach: *National Audubon Society v. Department of the Navy*

In *National Audubon Society v. Department of the Navy*, the plaintiffs alleged that the U.S. Navy failed to conform to NEPA requirements in its EIS for the proposed construction of an aircraft-landing training field within five miles of a national wildlife refuge.114 The plaintiffs, two counties and multiple environmental organizations, alleged that numerous agency emails and documents strongly suggested that the site for the landing field was predetermined as a political decision to appease surrounding communities’ concerns about jet noise.115 The trial court held that the Navy “reverse-engineered” the EIS to justify its predetermined choice of landing site.116 The Fourth Circuit, however, held that the lower court was overly broad in both the scope of its review and its injunction.117 The Fourth Circuit refused to consider the internal documents as evidence of a predetermined decision to locate the landing strip at a specific site prior to beginning its EIS, citing Fayetteville’s admonition against examining an agency’s “subjective impartiality.”118

---

110 See id. at 1023.
111 Id. at 1026.
112 470 F.2d 289, 296 (8th Cir. 1972).
113 *Fayetteville*, 515 F.2d at 1026, 1028.
114 422 F.3d at 181–83.
116 *Nat’l Audubon*, 422 F.3d at 183.
117 Id. at 181, 207.
118 Id. at 199 (citing *Fayetteville*, 515 F.2d at 1026).
Nevertheless, because of significant defects in the Navy’s EIS, the court ultimately concluded that the Navy failed to take a hard look at the environmental impacts of the project, and thus remanded the case in part and required the Navy to undertake further environmental study.\textsuperscript{119}

B. Cases Utilizing Broad Scope of Review

1. The Ninth Circuit’s Expansive Approach: \textit{Metcalf v. Daley}

In \textit{Metcalf v. Daley}, the plaintiffs challenged a finding of no significant impact (FONSI) prepared by the National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NMFS) in regard to a proposal by the Makah Indian Tribe to resume whaling.\textsuperscript{120} The plaintiffs pointed to two agency agreements with the Makah: (1) a 1996 agreement in which NOAA, on behalf of the United States, promised to make a formal request to the International Whaling Commission (IWC), and (2) a 1997 agreement, made four days before the issuance of the final EA, binding the United States to pursue the whaling quota at the IWC on behalf of the Makah.\textsuperscript{121} The Ninth Circuit recognized the incentive for NOAA/NMFS to issue a FONSI; the agencies would have been required to prepare an EIS upon a finding of significant environmental impact, which may ultimately have led to a breach of the Makah contract.\textsuperscript{122} The court noted that even though the EA and FONSI in \textit{Metcalf} were not facially flawed, “[i]t [was] highly likely that because of the Federal Defendants’ prior written commitment . . . and concrete efforts . . . the EA was slanted in favor of finding that the . . . proposal would not significantly affect the environment.”\textsuperscript{123} Relying on evidence of the agreement, the court held that the agencies violated NEPA by making “an irreversible and irretrievable commitment of resources” before taking a hard look at the potential environmental effects of the proposed action.\textsuperscript{124}

2. The Tenth Circuit’s Broad Scope: \textit{Davis v. Mineta}

The plaintiffs in \textit{Davis v. Mineta} refuted the validity of a FONSI issued by the DOT and the Federal Highway Administration (FHWA) for

\textsuperscript{119} Id. at 207.
\textsuperscript{120} 214 F.3d at 1140.
\textsuperscript{121} Id. at 1143–44.
\textsuperscript{122} Id. at 1144.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 1145.
the proposed construction of a highway in Salt Lake City, Utah. The plaintiffs introduced an addendum to the Engineering Services Agreement—between Sandy City, where the project was partially located, and the consultant preparing the EA—which included a contractual obligation to prepare a FONSI and have it approved, signed, and distributed by the FHWA. The Tenth Circuit held that such contractually-based prejudgments diminished the deference afforded to agency determinations and consequently found that the FONSI was arbitrary and capricious, thus violating NEPA.


In Lee v. U.S. Air Force, the plaintiffs challenged the U.S. Air Force’s (USAF) FONSI for a plan to station thirty German training aircrafts at an aircraft base. The plaintiffs, ranchers and livestock associations located in the surrounding area, argued that an agreement between the United States and Germany contractually bound the USAF to approve the plan and constituted predetermination. The Tenth Circuit examined the contract and found that not only was the contract signed after the FONSI was issued, but the contract only stipulated that the United States accept a beddown of twelve German aircrafts and would not go into effect unless the USAF approved the action under NEPA’s requirements. Plaintiffs, however, also sought to admit a real estate appraiser’s affidavit that was not included in the administrative record. The court examined the affidavit and ultimately decided not to admit it because it failed to demonstrate any gaps in the agency’s analysis. Having examined the record and the affidavit, the court found that the USAF had not predetermined the outcome of the impact analysis and upheld the FONSI.

125 302 F.3d at 1109–10.
126 Id. at 1109, 1112. The court also considered extra-record evidence, including a memorandum from defendant’s law firm criticizing the Environmental Assessment’s treatment of alternatives, as well as agency meeting minutes. Id. at 1112–13.
127 Id. at 1122.
128 354 F.3d at 1233.
129 Id. at 1233, 1240.
130 Id. at 1240.
131 Id. at 1242.
132 Id.
133 Id. at 1240, 1246.
4. The Tenth Circuit’s Recent View: *Forest Guardians v. U.S. Fish and Wildlife Service*

The plaintiff in *Forest Guardians v. U.S. Fish and Wildlife Service*, an environmental group, brought an action challenging the Fish and Wildlife Service’s (FWS) FONSI for a proposed 1539(j) rule under the Endangered Species Act—a rule which sought to reintroduce a captive-bred experimental population of endangered falcons in New Mexico. The plaintiff relied on evidence such as intra-agency comments on the draft rule, agendas and minutes from meetings between the FWS and The Peregrine Fund (an advocate for the reintroduction of the falcon), e-mail correspondence, and a grant agreement between the FWS and The Peregrine Fund to challenge the FONSI. The Tenth Circuit reviewed the evidence and concluded that it did not support a finding of pre-determination based on the concretely defined “irreversible and irretrievable commitment” standard, because the comments and correspondence simply showed internal disagreement and, at most, a preferred alternative. Furthermore, the court concluded that the grant agreement was not a binding contract, because it simply provided expansion of the grant conditioned upon promulgation of another rule that called for the reintroduction of the Falcon population, a result that was undetermined because the rule was not yet approved. Consequently, the court upheld the FONSI, finding that the FWS did not predetermine the outcome and therefore did not act arbitrarily or capriciously.

C. Circuit Split: Following Narrowly Behind the Fourth Circuit or Broadly Behind the Tenth Circuit

The Fourth and Seventh Circuits employ a narrow scope of evidentiary review in determining whether an agency has predetermined the outcome of an EIS or EA, allowing consideration of only the impact statement itself. The Ninth and Tenth Circuits reject this narrow approach.

---

134 Section 1539(j) allows the Secretary to, *inter alia*, “authorize the release (and the related transportation) of any population . . . of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.” 16 U.S.C. § 1539(j) (2006).

135 611 F.3d at 695.

136 *Id.* at 695, 716.

137 *Id.* at 718.

138 *Id.* at 718–19.

139 *Id.* at 719.

140 Nat’l Audubon, 422 F.3d at 198–99; Cronin v. U.S. Dep’t of Agric., 919 F.2d 439, 443–44 (7th Cir. 1990).
proach, however, and allow review of materials outside of the impact statement in order to enable a more rigorous and open-minded examination.\textsuperscript{141} Although both the Fourth and Tenth Circuits recognize the general exceptions to the record rule, the Tenth Circuit has advocated for the adoption of the NEPA exception—recognizing the significant risk behind the allegation that an EIS or EA has not been properly prepared.\textsuperscript{142} The Fourth Circuit, in \textit{National Audubon}, explicitly recognized exceptions to the record rule\textsuperscript{143} but declined to apply the Tenth Circuit’s approach employing the NEPA exception without imposing the burdens of the general exceptions set out in \textit{Citizens to Preserve Overton Park v. Volpe}.\textsuperscript{144}

\section*{IV. Keeping NEPA on Track Necessitates Going off the Record}

The lack of a uniform evidentiary standard among the circuit courts in reviewing whether an agency predetermined the outcome of its impact analysis, and therefore engaged in arbitrary or capricious decision making, necessitates clearly delineated standards for courts to employ.\textsuperscript{145} Although the Fourth Circuit has raised doubts as to the propriety of extra-record judicial inquiry by citing the risks of examining subjective impartiality,\textsuperscript{146} the Tenth Circuit has compellingly refuted these dangers.\textsuperscript{147} Absent these hazards, the need for a rigorous examination of agency decisions\textsuperscript{148} and the interest in preventing sunk costs\textsuperscript{149} and environmental degradation favors the admissibility of extra-record evidence in judicial review of agency predetermination claims.

\subsection*{A. Subjective Impartiality}

Avoidance of the examination of subjective impartiality is an accepted tenet of the NEPA review process; however, the Fourth Circuit’s warnings are misplaced.\textsuperscript{150} In \textit{National Audubon Society v. Department of the

\begin{footnotesize}
\textsuperscript{141} \textit{Forest Guardians}, 611 F.3d at 716–17; see \textit{Metcalf}, 214 F.3d at 1143–44.
\textsuperscript{142} \textit{See Forest Guardians}, 611 F.3d at 716–17; French, \textit{supra} note 87, at 952.
\textsuperscript{143} \textit{Nat’l Audubon}, 422 F.3d at 188 n.4.
\textsuperscript{144} \textit{See Forest Guardians}, 611 F.3d at 716–17; \textit{Nat’l Audubon}, 422 F.3d at 198–99; \textit{Overton Park}, 401 U.S. at 420.
\textsuperscript{145} \textit{See Forest Guardians v. U.S. Fish & Wildlife Serv.}, 611 F.3d 692, 716 (10th Cir. 2010); \textit{Nat’l Audubon Soc’y v. Dep’t of the Navy}, 422 F.3d 174, 198–99 (4th Cir. 2005).
\textsuperscript{146} \textit{See infra} notes 150–158 and accompanying text.
\textsuperscript{147} \textit{See infra} notes 159–167 and accompanying text.
\textsuperscript{148} \textit{See infra} notes 168–185 and accompanying text.
\textsuperscript{149} \textit{See infra} notes 186–197 and accompanying text.
\textsuperscript{150} \textit{See Forest Guardians}, 611 F.3d at 712, 716–17.
\end{footnotesize}
Navy, the court warned that examining subjective intent under NEPA could open a Pandora’s Box and should be avoided.\textsuperscript{151} The court was wary of restricting “the open exchange of information within an agency, inhibit[ing] frank deliberations, and reduc[ing] the incentive to memorialize ideas in written form.”\textsuperscript{152} These hypothetical restrictions on agency freedom arguably result from the agency’s fear that anything found in writing could be used for purposes of discerning predetermination.\textsuperscript{153} The court also argued that such an inquiry could restrict an agency’s capacity to change its mind or redirect its efforts.\textsuperscript{154} Furthermore, the court questioned the efficacy of such inquiries, as most agencies consist of a multitude of actors with different levels of responsibilities, thus making a determination of subjective intent highly speculative.\textsuperscript{155}

Although judicial psychoanalysis of subjective agency intent is undesirable, courts should not disregard the reality that agencies can be shown to have predetermined outcomes in numerous ways, many of which exist outside of the formal analysis itself.\textsuperscript{156} The allowance of preferred alternatives and deference to an agency’s subjective intent should not preclude courts from discerning whether an agency has predetermined the outcome of an environmental impact analysis and consequently violated its statutory duty.\textsuperscript{157} By categorizing much of the evidence of predetermination as being within the subjective license of agencies, the Fourth Circuit precludes the review of large amounts of information relevant to impact analysis challenges.\textsuperscript{158}

B. Refuting the Dangers of Expansive Review

The Fourth Circuit suggests that the narrow application of the record rule is necessary to avoid significant dangers associated with extra-record review; however, the proper application of judicial review protects against these risks.\textsuperscript{159} The Tenth Circuit refuted the dangers warned of in \textit{National Audubon}, asserting that extending its review beyond the NEPA analysis would not have detrimental effects because the

\textsuperscript{151} 422 F.3d at 198–99.
\textsuperscript{152} Id.
\textsuperscript{153} See id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} See Forest Guardians, 611 F.3d at 717.
\textsuperscript{157} See id. at 717–18.
\textsuperscript{158} See id.; Nat’l Audubon, 422 F.3d at 198–99.
\textsuperscript{159} See Forest Guardians, 611 F.3d at 717–18; Nat’l Audubon, 422 F.3d at 198–99.
Evidence in NEPA Predetermination Cases

Evidence considered must meet the rigorous standard of establishing that an agency has made “an irreversible and irretrievable commitment.” This standard requires that such a commitment be based upon a particular environmental outcome, as it would therefore cause any subsequent environmental analysis to be “biased and flawed.” This ensures that employees need not worry about memorializing debates and discussions unless such communications could be characterized as binding the agency to a course of conduct. This argument assuages the Fourth Circuit’s concern that intra-agency freedom will be unduly restricted, as agency employees can feel free to write anything down that does not embody an impermissible commitment of resources.

Similarly, the characterization of extra-record review as subjective is misguided because only objective evidence of conduct violative of NEPA’s mandates would impact the court’s decision. This judicial restraint is illustrated in Lee v. U.S. Air Force, where the court examined but refused to admit an extra-record affidavit that did not prove agency predetermination because it failed to demonstrate any gaps in the agency’s analysis. Similarly, the court in Forest Guardians v. U.S. Fish and Wildlife Service also concluded that due to the very high standard for predetermination, it must restrict itself to considering only relevant voices within the agency, namely those who could effectuate such an irreversible and irretrievable commitment of resources. Due to the limited number of agency officials with this power and the high level of commitment required to bind an agency to a course of conduct, the Fourth Circuit’s concerns regarding the speculative nature of the inquiry are further quelled.

160 Forest Guardians, 611 F.3d at 717–18; Nat’l Audubon, 422 F.3d at 198–99.
161 Forest Guardians, 611 F.3d at 717.
162 Id. at 717–18.
163 See id.
164 See id. at 716–18; Lee v. U.S. Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004).
165 Lee, 354 F.3d at 1242.
166 611 F.3d at 717–18. The court stated:

The relevant voices must be those who would be situated by virtue of their positions to effectuate an irreversible and irretrievable commitment of the agency regarding the matter at hand. Accordingly, the stray comments of a low-level scientist or two—no matter how vigorously expressed—would be unlikely to render fatally infirm the otherwise unbiased environmental analysis of an entire agency.

167 See id.
C. Ensuring Rigorous Decision Making

Broad evidentiary review is necessary to ensure rigorous analysis of agency behavior, especially with regard to claims of predetermination. In justifying its rejection of the Fourth Circuit’s application of the record rule, the Tenth Circuit asserted that the narrow approach in National Audubon prevents a sufficiently rigorous analysis of agency decision making. In general terms, the court claims that such a limited evidentiary approach “could fail to detect predetermination in cases where the agency has irreversibly and irrevocably committed itself to a course of action, but where the bias is not obvious from the face of the environmental analysis itself.” This is a concern where agencies have violated section 1502.2(g) of NEPA and used the Environmental Impact Statement to justify decisions that have been predetermined prior to the completion of the impact analysis. Courts adopting the narrow approach may contend that “[w]here an agency has merely engaged in post hoc rationalization, there will be evidence of this in its failure to comprehensively investigate the environmental impact of its actions and acknowledge their consequences.” It is unlikely, however, that an agency would complete its analysis with noticeable deficiencies. When coupled with the reality that agencies often adopt a favored course of action during an impact analysis, the availability of evidence external to the EIS takes on added importance to ensure that no irreversible commitment has been made prior to the Record of Decision. The Tenth Circuit rightly doubts the wisdom of disregarding evidence necessary to ensure that an agency only reaches a decision after carefully considering the environmental impacts of several alternatives. In order to expose premature commitments of resources and an agency’s violation of statutory duties under NEPA, review of evidence outside the scope of the impact statement is often necessary.

This view is supported by the Ninth Circuit’s analysis in Metcalf v. Daley, where the only evidence of predetermination was in written agreements made prior to the finding of no significant impact (FON-
SI). Had the Ninth Circuit in Metcalf utilized the narrow evidentiary approach, the court would have been unwilling to consider the agreements because they were not included in the Agency’s Environmental Assessment (EA). Thus, without any evidence of irreversible and irretrievable commitment on the face of the analysis, the FONSI would have been upheld and NEPA’s purpose and protections would have been defeated. The court noted that even though the EA and FONSI in Metcalf were not facially flawed, it was highly likely, due to the Agency’s prior written commitment for a proposed course of action and subsequent concrete efforts, that the EA was “slanted in favor” of finding that the proposal would have significant effects on the environment.

The Tenth Circuit, in Davis v. Mineta, also provides strong support for the expansive evidentiary approach to predetermination review. The most probative evidence pointing to predetermination by the Federal Highway Administration (FHWA) was the existence of an addendum to an agreement between the parties as well as extra-record memorandum and meeting minutes, but this evidentiary material would not have been considered under strict application of the record rule by the Fourth Circuit. The Tenth Circuit, however, having allowed the evidence, was able to consider the clear evidence of prejudgment and enjoin the FHWA from proceeding with its proposal. By employing a more realistic and limited interpretation of subjectivity while maintaining a high standard of relevance, the court ensured a rigorous analysis of the decision-making process without endangering agency autonomy or judicial deference. The protection of both NEPA’s purpose and agency discretion suggests that this judicial approach should guide courts in their review of agency impact analyses.

D. Prevention of Sunk Costs

The prevention of agency predetermination through rigorous judicial review is imperative in order to deter sunk costs. The sunk-costs

177 214 F.3d 1135, 1143–44 (9th Cir. 2000).
178 See id.
179 See id.
180 See id. at 1144.
181 See 302 F.3d at 1112.
182 See id.
183 See id. at 1112, 1126.
184 See Forest Guardians, 611 F.3d at 716–17; Davis, 302 F.3d at 1112.
185 See Forest Guardians, 611 F.3d at 716–18.
186 See Kopf, supra note 23, at 400.
strategy is used by project proponents to essentially bypass NEPA requirements by committing significant resources to a project prior to fulfilling procedural requirements such as the EA.\textsuperscript{187} Although not always rising to the level of sunk costs incurred in \textit{Citizens to Preserve Overton Park v. Volpe}, where the DOT began condemning homes and making other significant investments prior to seeking the approval required under the Endangered Species Act,\textsuperscript{188} irreversible and irretreivable commitments of resources can put courts, agencies, and, most importantly, the environment at an impasse.\textsuperscript{189} These commitments can take the form of monetary expenditures, environmental harm, or even the breakdown of contractual negotiations or international relationships.\textsuperscript{190} In cases like \textit{Metcalf v. Daley}, where an agency has engaged in prior agreements that hinge on favorable results of the NEPA environmental analysis, the agency often has much to lose should a court find predetermination.\textsuperscript{191} The National Marine Fisheries Service’s (NMFS) FONSI was essentially a foregone conclusion based on prior agreements with the Makah tribe, and therefore put the agency and court in the difficult position of upholding NEPA and protecting the whale population or damaging the relationship with the Makah and potentially the IWC.\textsuperscript{192} Although \textit{Metcalf} provides an atypical example of sunk costs, in that monetary loss was not at issue, it is a poignant indicator of the need for deterrence of the sunk-cost strategy.\textsuperscript{193}

Although CEQ regulations promulgated pursuant to NEPA include the express prohibition of irreversible and irretreivable commitments of resources in an effort to combat such costs, the judicial enforcement mechanism is the only preventative tool for this risk.\textsuperscript{194} The Tenth Circuit’s broad evidentiary approach provides a stronger deterrent to sunk costs, as it puts agencies on notice that they cannot hide impermissible commitments of resources from the courts simply by ex-

\textsuperscript{187} \textit{See id.}
\textsuperscript{188} Zygmunt J.B. Plater et al., \textit{Environmental Law and Policy: Nature, Law, and Society} 233–34 (4th ed. 2010); see 401 U.S. 402, 406–08 (1971). Section 7(d) of the ESA states that the “[f]ederal agency and the [applicant] shall not make any irreversible or irretreivable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [endangered species protections].” 16 U.S.C. § 1536(d) (2006).
\textsuperscript{189} \textit{See Kopf, supra} note 23, at 393–94.
\textsuperscript{190} \textit{See, e.g.}, \textit{Metcalf}, 214 F.3d at 1144; Plater et al., \textit{supra} note 188, at 233–34.
\textsuperscript{191} \textit{See Metcalf}, 214 F.3d at 1144.
\textsuperscript{192} \textit{See id.}
\textsuperscript{193} \textit{See id.}
\textsuperscript{194} \textit{See 40 C.F.R.} § 1502.2(f) (2010); Cross, \textit{supra} note 54, § 1.21.
cluding them from the administrative record. If fully constrained by the record rule, courts would often be helpless to combat the biased decision making resulting from premature investment in a course of action, and would therefore be unable to enforce NEPA’s protection of the environment. Without the Tenth Circuit’s expansive approach, agencies such as the NMFS in Metcalf could invest in a course of action that leads to a predetermined outcome of the environmental assessment and potentially the adoption of a less favorable alternative.

Conclusion

The environmental impact analyses undertaken by government agencies must be a rigorous and comprehensive report on the effects and alternatives of proposed actions to enable the agency and the public to make an informed decision regarding the proposal. Although NEPA and the CEQ created the statutory and regulatory framework necessary to guide agencies in this pursuit, there is no guarantee that the agencies will comply with these requirements. Thus, effective guidance is needed to ensure that agencies are taking the requisite hard look at environmental consequences of their proposals and not simply justifying predetermined outcomes in their impact statements. The task of reviewing these analyses, and therefore the successful enforcement of NEPA, lies with the courts. In the absence of guidance from NEPA and the CEQ courts have adopted different approaches, not all of which are adequate in rooting out predetermination.

The Tenth Circuit has utilized a comprehensive and effective approach to judicial review of agency impact statements by allowing for the examination of relevant extra-record evidence, including materials separate from the impact report itself. The standards for predetermination, namely an agency’s irreversible and irretrievable commitment to an outcome prior to the completion of a final impact statement, provide intrinsic safeguards against unfavorable restriction of agency autonomy. This broad evidentiary approach enables courts to engage in a rigorous examination of the impact analysis without detrimentally affecting the agency’s analytical process. Furthermore, courts can more

195 See Forest Guardians, 611 F.3d at 716–18.
196 See id.; Kopf, supra note 23, at 394, 400.
197 See Forest Guardians, 611 F.3d at 716–18; Metcalf, 214 F.3d at 1143–44.
198 See supra notes 95–144 and accompanying text.
199 See supra notes 145–197 and accompanying text.
200 See supra notes 159–167 and accompanying text.
201 See supra notes 168–185 and accompanying text.
effectively combat sunk costs by being better equipped to identify impermissible commitments of resources. For these reasons, courts should universally adopt the broad scope of judicial review to ensure that NEPA’s goals and the environment itself are adequately protected.

See supra notes 186–197 and accompanying text.
“PIGS WILL FLY”: PROTECTING THE LOS ANGELES RIVER BY DECLARING NAVIGABILITY

Susan Harris*

Abstract: In 2010, the Environmental Protection Agency (EPA) declared the Los Angeles River “navigable” for purposes of enforcing Clean Water Act (CWA) protections, which could limit destruction of the river’s tributaries and wetlands and expand recreational opportunities for the city. The EPA’s declaration was criticized by some as regulatory overreach—“like declaring that pigs will fly”—because the Los Angeles River does not fit within traditional notions of navigability. Others have attempted to remove navigability language from the CWA, suggesting that it is not the appropriate test for environmental protection. After examining the history of the Los Angeles River and providing a background on CWA jurisprudence, this Note argues that the EPA’s case by case approach to declaring navigability is an effective way to uphold the goals of the CWA while expanding CWA protection for the Los Angeles River and other urban and western rivers.

Introduction

Today, most of the Los Angeles River looks like a large gutter, a storm drain surrounded by concrete.1 Those residents who are aware that their city has a river know it not as a natural feature of their urban landscape but as the gritty scene of car chases in films such as Grease and Terminator 2.2 In the 1930s, though, the willow-covered banks of the Los

---

Angeles River stood in for the jungle habitat in the movie *Tarzan*. The river’s transformation, caused by a confluence of high water demand and flood control efforts, has been aided and abetted in recent years by a lack of federal protection for water quality. Because the Clean Water Act (CWA) only applies to “navigable” waters, an unfavorable decision by the Army Corps of Engineers concerning the river’s navigability made CWA protections inapplicable to the Los Angeles River.

In response, community activists have fought to prove that the Los Angeles River is in fact a real river, worthy of protection. Conan O’Brien, as host of *The Tonight Show*, joined the controversy when he and sidekick Andy Richter went canoeing in the Los Angeles River. More seriously, a group of kayakers made a fifty-one mile, three-day journey down the length of the Los Angeles River in 2008 to lend support to the notion that the river is navigable. The regatta included Heather Wylie, a biologist for the Army Corps of Engineers, who commented, “I picked up a paddle to make a point about protecting the integrity of our waters.”

On July 9, 2010, Environmental Protection Agency (EPA) Administrator Lisa Jackson finally declared the Los Angeles River navigable, enabling the EPA to enforce CWA protections for the river. Jackson’s navigability declaration was embraced by some, who noted that the declaration would be instrumental to limiting destruction of the Los Angeles River’s tributaries and wetlands, as well as expanding recreational

---

8 Zach Behrens, *supra* note 6; Zach Behrens, *Kayaking the LA River, Day 3: Marsh Park to Long Beach*, LAIST (July 28, 2008), http://laist.com/2008/07/28/kayaking_the_la_river_day_3_marsh_p.php. Photographs of these kayakers were included in the EPA’s case study determining the navigability of the L.A. River. EPA, SPECIAL CASE EVALUATION REGARDING STATUS OF THE LOS ANGELES RIVER, CALIFORNIA, AS A TRADITIONAL NAVIGABLE WATER 23–26 (July 1, 2010) [hereinafter EPA EVALUATION].
opportunities for the city. Others, however, criticized the declaration as regulatory overreaching. Daniel Riesel, an environmental attorney who represents developers and agricultural interests on CWA issues, said, “[w]hether it is or was a navigable body of water is a fact. [Jack-son’s] declaration doesn’t change that fact. It’s like her saying ‘I’m going to declare that pigs will fly.’ You can, but it doesn’t change the fact.”

Part I of this Note explains the history of the Los Angeles River and its transformation from an eighteenth-century oasis to a modern-day concrete channel. Part II provides the necessary background of CWA jurisprudence, including recent interpretations of “navigability.” Part III discusses the constitutionality and political feasibility of efforts to strike language concerning navigability from the CWA. Finally, Part IV demonstrates that a case by case approach to declarations of navigability is an effective way to uphold the goals of the CWA, and to expand CWA protection for the Los Angeles and other western rivers that may not appear navigable under a traditional understanding of the word. Contrary to the skepticism of Riesel and others, if the Los Angeles River is a pig who can’t fly, this navigability declaration will at least put it in the cockpit.

I. THE LOS ANGELES RIVER: PAST, PRESENT, FUTURE

A. A River Transformed

Geographer Blake Gumprecht stated that “[t]he Cuyahoga River in Cleveland may have once been so polluted that it caught fire, and the Chicago River was so filthy that long ago its flow was reversed to keep it from contaminating Lake Michigan, but at least those rivers, even at their worst, looked like rivers.” In Los Angeles, though, one politician campaigned on the promise to paint the bed of the river blue.

Nevertheless, areas surrounding the Los Angeles River were once a center of wine production, where orange groves irrigated with river water produced fruit to be shipped back east. Wild roses and grapes grew along the edge of the river; amid stands of sycamore, cottonwood,
oak, alder, willow, berries, and grass. The two-foot long trout could be caught in the river as late as 1940. The transformation of the river from this idyllic state into the “gigantic concrete gutter” it is today occurred primarily for two reasons—first, Los Angeles’s growing population’s increasing demand for water, and second, the necessity for flood control to protect the city.

1. Demand for Water

Before European settlement, the Los Angeles River supported a rich diversity of plant and animal life, as well as one of the largest concentrations of native peoples in North America, the Gabrieleños. In the mid-eighteenth century the Spanish government planned to establish a presidio, or military fort, as well as a mission in what is now California. One member of the expedition party, Father Juan Crespí, kept a diary of the scouted locations and referred to what is now present-day Los Angeles as “this pleasing spot among the trees on this pleasant river.” An agricultural village was founded there by the Spanish to provide food to the missions and presidios.

By 1850, Los Angeles was under U.S. control but remained a small town. At that time the city’s population was only 1694, and continued as a settlement based around agriculture, surrounded by vineyards, corn, pasture, vegetable gardens, and fruit orchards. Los Angeles County was, in fact, the top winemaking county in the nation in 1850—Secretary of State William H. Seward, the negotiator of the Alaska Purchase, declared in 1869 that the vineyards in Los Angeles were the best in the world.

18 Gumprecht, supra note 1, at 5. “For California grizzly bears, the river was an all-you-can-eat [smorgasbord] of steelhead trout . . . . The carnivorous ursines who once foraged here were big as bulls, with claws like steak-knives and a roar like an earthquake.” Morrison, supra note 17, at 33–34.
19 See Gumprecht, supra note 1, at 6; Quinlan, supra note 2.
20 Gumprecht, supra note 1, at 26. “If these Indians called themselves anything . . . it was probably Tongva. To the Spanish, they were all wards of the San Gabriel Mission, and so Gabrieleños they became.” Morrison, supra note 17, at 37.
21 Gumprecht, supra note 1, at 35.
22 Id. at 36, 38.
23 Id. at 41.
24 Id. at 56.
25 Id. at 56–57.
The 1876 completion of the transcontinental railroad link to Los Angeles, however, spurred dramatic population growth, exponentially increasing the demand for water.\(^27\) This was perhaps ironic, as the lush image of Los Angeles as a kind of Californian Eden, made possible by the river oasis, drew the very newcomers who would quickly destroy the river.\(^28\) Between 1902 and 1906, the population of Los Angeles increased from 128,000 to 240,000.\(^29\) As a result of the increasing demand for water, the flow of the river near downtown Los Angeles was reduced to a trickle—at times the entire surface flow of the Los Angeles River was diverted for domestic use.\(^30\) In 1904, for example, the entire surface and subsurface flow of the river were tapped in order to meet Los Angeles’s water demands.\(^31\)

2. Flood Control Projects

As depleted as the Los Angeles River was during dry times, the risk of flooding during the rainy season further defined the Los Angeles River of today.\(^32\) There existed “twinned fears . . . of drought and flood, of too little water and of too much.”\(^33\) Because of the historically low flow of the river during the dry season—even prior to the increased water demand that would threaten the river—the Los Angeles River lacked a defined channel.\(^34\) This meant that the river varied widely in its route to the sea, and, during rains, might break from its path and cut a new course.\(^35\) During the last half of the nineteenth century, significant floods occurred in Los Angeles County an average of once every four-and-a-half years.\(^36\) The editor of the Daily and Weekly Herald, John M. Baldwin, experienced such a flood in 1884, when the mansion he had built for himself on the banks of the river, complete with a private golf course, was carried to sea.\(^37\)

\(^{27}\) Gumprecht, supra note 1, at 83.
\(^{28}\) See id. at 81.
\(^{29}\) Ted Elrick et al., Los Angeles River 9 (2007).
\(^{30}\) Gumprecht, supra note 1, at 3, 96.
\(^{31}\) Id. at 97.
\(^{32}\) Id. at 3.
\(^{33}\) Morrison, supra note 17, at 22.
\(^{34}\) See Gumprecht, supra note 1, at 3, 12.
\(^{35}\) Id. at 9, 12.
\(^{36}\) Id. at 144.
\(^{37}\) Morrison, supra note 17, at 20. The author suggests that the “mercurial” nature of the river, which prevented the investment of wealth at its shores, had the effect of marginalizing the river from early on. Id.
While it is natural for a river to shift course during floods, this became an obvious problem for Los Angeles as the population near the river’s banks increased. Not only did Los Angeles’s increase in population magnify the dangers of flooding, it also increased the likelihood of flooding. The railroad’s trestle bridges, on which Los Angeles’s new citizens arrived, obstructed the free flow of water in the river. Farmers’ plowing removed natural grasses and increased erosion, irrigation channels weakened riverbanks, and willows and cottonwood lining the river and anchoring its banks were cut down.

After floods in 1914, development of a county-wide flood control system commenced; two years later, another deluge forced residents in the area to use small boats for transportation. Woody Guthrie wrote a song memorializing the Los Angeles flood on New Year’s Day in 1934, in which flood waters and associated debris killed at least forty-nine people. The final and most damaging flood in Los Angeles history occurred in March of 1938, throwing people to their deaths when a bridge in North Hollywood collapsed. When it was over, 688 people were confirmed dead, property damage reached a current value of nearly one billion dollars, and Lucille Ball had to rescue her wire-haired terrier from four feet of water in her basement. The only flood controls that held were those constructed of reinforced concrete. In response, Los Angeles turned to the federal government and the Army Corps of Engineers for help.

Over the course of twenty years, the Army Corps of Engineers poured two million cubic yards of concrete along the river. By 1960, Los Angeles was the owner of “a fifty-one-mile storm drain that is still flatteringly called the Los Angeles River.” These flood control projects have come to visually define the Los Angeles River, which can be pre-

38 Gumprecht, supra note 1, at 148.
39 Id. at 150.
40 Id. at 151.
41 Id.
42 Morrison, supra note 17, at 73.
43 Gumprecht, supra note 1, at 183.
44 Id. at 203–04; Woody Guthrie, Los Angeles New Years Flood, on LIBRARY OF CONGRESS RECORDINGS (Elektra Records 1964) (“Our highways were blockaded/Our bridges all washed down/Our houses wrecked and scattered/As the flood came a-rumblin’ down”).
45 Gumprecht, supra note 1, at 216.
46 Elrick, supra note 29, at 27.
47 Gumprecht, supra note 1, at 220.
48 Elrick, supra note 29, at 27; Gumprecht, supra note 1, at 221.
49 Morrison, supra note 17, at 74.
50 Gumprecht, supra note 1, at 173.
ceived today as nothing but “runoff inside broad expanses of graffiti-covered concrete.” In this new state, the river slipped from public consciousness:

No one speaks of “the Los Angeles” as one speaks of “the Thames” or “the Nile.”

No one gives directions using the river. People say they live north of some boulevard, or west of some freeway, but the river . . . occupies no point on the civic compass. Say “the river” in Los Angeles, and you get only blank looks.

B. The Promises and Perils of Urban and Western Rivers

In the arid West, ecologically important river systems have differing levels of water throughout the year, and at times may not contain any water at all. The western character of the Los Angeles River, with its seasonal differences in flow, combined with a growing population dependent on its waters, led to its lack of a defined river channel. Swelling in one season and shrinking in the next, western rivers like the Los Angeles River are different from other rivers. Moreover, western rivers have an additional propensity to run dry as they are tapped for irrigation and drinking supplies.

Meanwhile, the Los Angeles River’s urban setting, which necessitated flood control projects to define the river and protect the city’s population, also posed its own hazards. The Los Angeles River has been said to symbolize all the ills of America’s urban rivers, including water quantity problems, habitat loss, channelization, and inadequate substrate. An 1899 letter-writer to the Los Angeles Times, for example, referred to the river as “the natural and proper outlet for the sewage of Los Angeles city”—today, eight thousand tons of trash must be skimmed annually from the river’s mouth.

51 See Elrick, supra note 29, at 7.
52 Morrison, supra note 17, at 20.
53 Quinlan, supra note 2.
54 See Gumprecht, supra note 1, at 3, 97.
55 See Morrison, supra note 17, at 33.
56 Quinlan, supra note 2.
57 See Gumprecht, supra note 1, at 3, 244–45.
58 Id. at 245 (quoting a statement by the late CBS-TV commentator Charles Kuralt).
60 Morrison, supra note 17, at 54.
1. Success Stories

Other rivers (urban, western, and both) have recovered from their plights—the Chicago River is a tremendous success story of an urban river.\textsuperscript{61} Since the implementation of a project to reduce discharges of raw sewage into the river, the number of fish species living there has quadrupled.\textsuperscript{62} Protection of urban rivers can create “urban nature” where open spaces are otherwise rare.\textsuperscript{63} Denver has transformed areas along the South Platte into a greenway, with hiking and biking trails, parks, and boat chutes.\textsuperscript{64} In San Jose, California, the Army Corps of Engineers and local government agencies built Guadalupe River Park to provide flood protection and create a ten-mile network of trails.\textsuperscript{65}

Improvements for urban and western rivers need not be undertaken solely for environmental or aesthetic reasons.\textsuperscript{66} It is important to note that water pollution regulation has produced significant economic benefits for the United States.\textsuperscript{67} Those benefits can come in many forms, including increased recreational spending, boons to commercial fish and shellfish industries, or the use of clean water to irrigate farmlands.\textsuperscript{68} San Antonio’s “Paseo del Rio,” or “River Walk,” became the center of its tourism industry.\textsuperscript{69} Detroit and Cleveland each based their plans for urban renewal at least in part on riverfront development.\textsuperscript{70} Indeed, as the 1998 Clean Water Action Plan recognized, “[i]mprovements have resulted in economic gains on even the most infamous of polluted waters.”\textsuperscript{71}

2. Revitalization Efforts in Los Angeles

As early as the 1930s, Frederick Law Olmsted, Jr. proposed a system of parkways to abut the Los Angeles River—similar to Frederick Law Olmsted, Sr.’s “Emerald Necklace” for Boston—though the recom-

\textsuperscript{61} Gumprecht, supra note 1, at 257.
\textsuperscript{62} Id.
\textsuperscript{64} Gumprecht, supra note 1, at 257.
\textsuperscript{65} Id.
\textsuperscript{66} See id. at 258.
\textsuperscript{68} Id.
\textsuperscript{69} Gumprecht, supra note 1, at 258.
\textsuperscript{70} Id.
\textsuperscript{71} Craig, supra note 67, at 2.
mendment was ignored. In 1986, a group called the Friends of the Los Angeles River was formed; today it is a preeminent environmental organization in Southern California, advocating for efforts to turn the Los Angeles River into a greenway and opposing proposals that would degrade the river. Throughout the ensuing decade, Friends of the Los Angeles River and other environmental groups promoted awareness of the river as a natural resource, thus putting pressure on Los Angeles County and the Army Corps of Engineers.

Although a proposal was made in 1989 to use the river as a truck route and automobile expressway, it only had the effect of galvanizing the river’s supporters. For example, bonds were issued to develop the Los Angeles River Center and Gardens, parks and trails were created by the nonprofit organization NorthEast Trees, and the city of Los Angeles created a master plan for beautifying blighted areas along the river. Thus, some progress has already been made, though nearly all of the improvements have been outside of the banks of the river itself.

C. The Navigability Declaration

1. Making the Call

In March of 2008, the Army Corps of Engineers responded to a property owner’s request for a determination of jurisdiction, and found that fewer than two miles of the Los Angeles River would be considered “traditionally navigable water.” This finding reflected the upper limit of tidal influence on the river. In making such a limited determination of navigability, the Army Corps of Engineers noted that the only documented boating in the Los Angeles River was in “small canoe-type craft” in an unlined area of the Sepulveda Basin. It found that no organized boating or concession was associated with that activity, which it called “technically illegal.” Subsequently, in June of 2008, it also de-
clared two miles of the river in the Sepulveda Basin “traditionally navigable.” Thus, according to the Army Corps of Engineers, only an approximately four-mile stretch of the fifty-one mile length of the Los Angeles River was navigable, implying that most of the river was not a river at all.

In the summer of 2010, however, EPA Administrator Jackson overruled the decision of the Army Corps of Engineers. From Chatsworth to Long Beach, the entire Los Angeles River was declared navigable, and therefore protected by the CWA. In making that determination, the EPA looked beyond whether the river’s depth and flow could support navigation and considered factors such as recreational and commercial opportunities, public access, susceptibility to restoration, and the presence of ongoing restoration and educational projects.

The EPA found that the river was historically susceptible to navigation by Native Americans during years and seasons where there was sufficient surface flow. The EPA also found that the river is currently navigable by small recreational watercraft, such as canoes and kayaks, even during the dry weather months from April to October. The EPA’s navigability determination specifically relied on the reports of the kayakers who traveled the river in 2008, noting that over ninety percent of the river was navigable by kayaks in low-flow conditions. Analysis of water flows and depths further supported this conclusion. The EPA also recognized that the river currently supports boating and non-boating recreational uses available to the interstate public, with parking and trail access adjacent to interstate highways. In addition, the City of Los Angeles has a thirty-year plan in place to expand boating and water recreation on the river.

---

82 EPA Evaluation, supra note 8, at 3.
83 Beckman, supra note 5; Behrens, supra note 6.
84 Quinlan, supra note 2.
85 Sahagun, supra note 74.
87 EPA Evaluation, supra note 8, at 35.
88 Id.
89 Id. at 23, 35.
90 Id. at 35.
91 Id.
92 Id.
2. Impact of Declaring Navigability

In the case of the Los Angeles River, the EPA’s declaration of navigability may have a significant impact on the course of the river’s future. Extending CWA protections to the Los Angeles River could expand recreational opportunities and limit destruction of the river’s tributaries and wetlands. With regard to the river’s tributaries, the navigability declaration will not stop every attempt at alteration, but it will impose “an extra layer of pollution limits, subjecting development plans in the creek beds and floodplains to more lengthy and costly review processes.” The EPA’s declaration could be considered a reflection of the city’s beginning to value nature in its urban center.

Moreover, the impact of the EPA’s navigability declaration for Los Angeles could extend beyond that particular watershed. The decision could be taken as a signal for how other urban and western rivers will be viewed. Many other rivers flow seasonally and are currently constrained by concrete-lined channels. Navigability declarations are pending for other rivers; in Arizona, for example, the EPA has said they are reviewing the navigability of the Santa Cruz River.

II. Regulating a River

The current framework of federal water quality legislation requires that a river be “navigable” to receive protection, though that requirement is hotly debated. “Navigability” is subject to interpretation by courts, which must attempt to follow the muddy legal rules handed down by the Supreme Court on the issue.

94 Quinlan, supra note 2.
95 Mernit, supra note 63.
96 Id.
97 See Quinlan, supra note 2.
98 See id.
100 Quinlan, supra note 2.
102 See id.
A. History and Purpose of the CWA

Federal water quality legislation first debuted under the guise of regulating water transportation and commerce as the Rivers and Harbors Act of 1899 (RHA). Federal water quality legislation first debuted under the guise of regulating water transportation and commerce as the Rivers and Harbors Act of 1899 (RHA). Section 13 of the RHA, known as the Refuse Act, established the authority of the United States to prevent pollution of its waters, though its intention was to preserve navigation. Thus, the “navigability” requirement first arose in the RHA, which only encompassed waters that were or could be made navigable.

The Federal Water Pollution Control Act (FWPCA) was the first federal statute to explicitly regulate water quality. It represented a shift in focus from protecting navigability of the nation’s waters to protecting the nation’s environment. It provided loans to state and local governments for the construction of publicly-owned treatment works and sewage treatment facilities. In 1972 and 1977, amendments to the FWPCA transformed it into what is now known as the CWA. Indeed, the states’ unwillingness to control pollution in the nation’s waterways motivated Congress to pass the CWA.

The CWA enacted comprehensive federal standards and permitting programs, and established the EPA and the Army Corps of Engineers as permitting and enforcement agencies. The stated objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Thus, the CWA set as a national goal the attainment of water quality that would provide for “the

---


105 Craig, supra note 67, at 10–12; see 33 U.S.C. § 403.


109 Id. at 9.


propagation of fish, shellfish, and wildlife” and “recreation in and on the water”\textsuperscript{113}—the “fishable/swimmable” goal.\textsuperscript{114} The CWA does provide, however, that it is the policy of Congress to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . .”\textsuperscript{115}

Specifically, the CWA sought to eliminate the discharge of pollutants into navigable waters.\textsuperscript{116} The “discharge of a pollutant[s]” includes “any addition of any pollutant to navigable waters from any point source,” and the definition of “pollutant” includes “dredged spoil, solid waste, incinerator residue, sewage, garbage . . . chemical wastes, biological materials, radioactive materials” and so forth.\textsuperscript{117} Most discharges into a navigable waterway require a permit, and obtaining such a permit can be a lengthy and difficult process involving government agencies as well as the public.\textsuperscript{118} The CWA imposes civil and criminal liability on a broad range of industrial and commercial activities.\textsuperscript{119}

In 1978, a U.S. Senator authored a piece entitled “The Meaning of the 1977 Clean Water Act.”\textsuperscript{120} In it, the Senator referenced the importance of stopping pollution and restoring the quality of the environment: “We live today in what an engineer might call a closed system. Some of our resources, once used, cannot be replaced. Others of our resources are renewable, but finite. No one is likely to invent more clean water, more clean air, more arable land.”\textsuperscript{121} The EPA’s publication of this piece reflects at least part of the intellectual background and political context in which the CWA emerged.\textsuperscript{122}

\textsuperscript{113} Id. § 1251(a)(2).
\textsuperscript{114} Craig, supra note 67, at 9.
\textsuperscript{115} 33 U.S.C. § 1251(b).
\textsuperscript{116} Id. § 1251(a)(1).
\textsuperscript{117} Id. § 1362(6), (12)(A).
\textsuperscript{118} Id. § 1342; Sedina L. Banks, What’s Coming Down the River—How EPA’s Designation of the Los Angeles River as a “Navigable Waterway” May Impact Future Development, GREENBERG BLAWG (July 9, 2010), http://environmentallawblog.greenbergglusker.com/2010/07/whats_coming_down_the_river_ho.html.
\textsuperscript{121} Id.
\textsuperscript{122} See id.
B. The “Navigability” Limitation on Federal Water Quality Regulation

Many legal challenges to the CWA revolve around the question of what water is covered by the statute. The CWA itself uses the term “navigable waters,” but defines the term only as “the waters of the United States, including the territorial seas.” CWA conference committee notes indicate that “waters of the United States,” and thus “navigable waters,” were to be given the “broadest possible constitutional interpretation.” Although the CWA’s language on navigability was borrowed from the RHA, it has been argued that the two Acts had very different purposes—the former, to protect against obstructions in navigation, and the latter, to protect the quality of the nation’s waters.

Current federal regulations broadly define waters of the United States to include “intrastate lakes, rivers, streams . . . prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.” This includes any such waters “[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes . . . .” The Army Corps of Engineers, in the first instance, normally determines which waters are protected by the CWA, and both Corps and EPA regulations have historically taken a broad view of “navigability.”

In a sense, the CWA’s reference to navigability is a touchstone for grounding the Act in Congress’s constitutional authority. The Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .” Congress’s authority to legislate under the commerce clause exists in three scenarios: 1) the use of channels of interstate commerce, 2) instrumentalities of interstate commerce or persons and things in

---

123 Craig, supra note 67, at 117.
125 Id. § 1362(7).
128 40 C.F.R. § 230.3(s)(3) (2010).
129 Id. § 230.3(s)(3)(i).
130 Beckman, supra note 5.
131 Craig, supra note 67, at 118.
132 Id. at 5.
133 U.S. Const. art. I, § 8.
interstate commerce, or 3) activities having substantial relation to interstate commerce.\textsuperscript{134}

Here, traditional navigable waters fit into the first scenario, channels of interstate commerce.\textsuperscript{135} As a practical matter, prohibiting pollution of the nation’s navigable waters prevents injuries to these channels of interstate commerce—\textsuperscript{136}injuries like the ignition of Ohio’s Cuyahoga River, which may have been an impetus for enactment of the CWA.\textsuperscript{137} It has been argued that the legislative history of the CWA indicates Congress’s awareness that increased commercial activity was tied to increased water pollution.\textsuperscript{138}

Waters that are not traditionally navigable, however, may still fall into the third scenario of commerce clause regulation.\textsuperscript{139} Even isolated intrastate waters can have a substantial relation to interstate commerce, either through interstate recreation or by filtering pollutants and thereby reducing pollution in downstream waters that are themselves channels of interstate commerce.\textsuperscript{140}

C. Recent Interpretations of Navigability

1. A Broad View of Navigability in Riverside Bayview

In the 1985 case United States v. Riverside Bayview Homes, the Supreme Court suggested that the CWA’s definition of the word “navigable” as “the waters of the United States” made the term of “limited import.”\textsuperscript{141} The Court held that it was reasonable for the Army Corps of Engineers to interpret the term “waters” to include “wetlands” because of the “evident breadth of congressional concern for protection of water quality and aquatic ecosystems . . . .”\textsuperscript{142} The Court thus deferred to the agency’s determination that wetlands adjacent to traditionally navigable waters could be regulated under the CWA, noting “the breadth of federal regulatory authority contemplated by the Act itself,” the technical expertise offered by the Army Corps of Engineers and the EPA, as

\textsuperscript{135} Craig, supra note 67, at 143.
\textsuperscript{136} Id. at 144.
\textsuperscript{137} Redder, supra note 103, at 296.
\textsuperscript{138} Craig, supra note 67, at 146.
\textsuperscript{139} Id. at 147.
\textsuperscript{140} See id. at 147–48.
\textsuperscript{141} 474 U.S. 121, 133 (1985).
\textsuperscript{142} Id.
well as the difficulties in defining precise boundaries for which waters are “regulable.”\textsuperscript{143}

2. The More Restrictive View of SWANCC

In 2001, the Court reconsidered which waters were included in the CWA in \textit{Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers}.\textsuperscript{144} In \textit{SWANCC}, the Court found that the Migratory Bird Rule was not fairly supported by the CWA.\textsuperscript{145} Under the Rule, the Army Corps of Engineers announced that its CWA jurisdiction extended to intrastate waters that provided habitat for migratory birds.\textsuperscript{146} Before \textit{SWANCC} reached the Supreme Court, the Seventh Circuit upheld the Migratory Bird Rule, finding that the CWA reaches as many waters as the commerce clause allows, noting that millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds.\textsuperscript{147}

In its decision in \textit{SWANCC}, the Supreme Court backed away from its more expansive interpretation of the CWA in \textit{Riverside Homes}.\textsuperscript{148} \textit{SWANCC} demonstrated the tension between achieving a proper state-federal balance and maintaining congressional intent with respect to the definition of navigability in the CWA.\textsuperscript{149} Whereas it was “one thing to give a word limited effect,” the Court held, it was “quite another to give it no effect whatever.”\textsuperscript{150} Rather, the Court stated that Congress’s use of “navigable” in the statute “ha[d] at least the import of showing us what Congress had in mind as its authority for enacting the CWA—its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”\textsuperscript{151} Read broadly, the Court’s holding in \textit{SWANCC} might eliminate federal jurisdiction over isolated, non-navigable intrastate waters.\textsuperscript{152}

\begin{flushleft}
\textsuperscript{143} Id. at 134.
\textsuperscript{144} 531 U.S. at 159.
\textsuperscript{145} Id. at 167.
\textsuperscript{146} Keith, \textit{supra} note 110, at 586.
\textsuperscript{147} \textit{SWANCC}, 531 U.S. at 166.
\textsuperscript{148} \textit{Craig}, \textit{supra} note 67, at 126.
\textsuperscript{149} Id. at 130–31.
\textsuperscript{150} \textit{SWANCC}, 531 U.S. at 172.
\textsuperscript{151} Id.
\textsuperscript{152} \textit{Craig}, \textit{supra} note 67, at 127.
\end{flushleft}
3. The Divided Decision in *Rapanos*

In 2006, the Supreme Court once again addressed the navigability issue in *Rapanos v. United States.* This case addressed the issue of jurisdiction over wetlands adjacent to tributaries of traditionally navigable waters, and produced a 4-1-4 split on the Court.

The *Rapanos* plurality emphasized the CWA’s use of the “traditional phrase” of “navigable waters.” The Court held that the term “navigable waters” under the CWA includes only “relatively permanent, standing, or flowing bodies of water,” and does not include channels through which waters flow only “intermittent[ly] or ephemeral[ly].” Taking a derisive tone for a broader application of the CWA, the Court referenced a scene from the film *Casablanca* “which portrays most vividly the absurdity of finding the desert filled with water[ ]”:

“Captain Renault [Claude Rains]: ‘What in heaven’s name brought you to Casablanca?’

‘Rick [Humphrey Bogart]: ‘My health. I came to Casablanca for the waters.’

‘Captain Renault: ‘The waters? What waters? We’re in the desert.’

‘Rick: ‘I was misinformed.’”

Justice Stevens’ dissent attacked the plurality for an approach that “endangers the quality of waters which Congress sought to protect . . . .” Justice Stevens would have preferred to maintain the deferential standard set out in *Riverside Bayview.*

The concurrence, written by Justice Kennedy, advocated a case by case approach to determining navigability, in which wetlands with a “significant nexus” to traditional navigable waters would be included. He strongly criticized the plurality’s imposition of a requirement of permanent standing water or continuous flow for a finding of navigability. Justice Kennedy drew on the western United States as an exam-

---

153 547 U.S. at 729.
154  Id. at 718, 729.
155  Id. at 734.
156  Id. at 732–34.
157  See id. at 727 n.2 (quoting Save Our Sonoran Desert, Inc. v. Flowers, 408 F.3d 1113, 1117 (9th Cir. 2005)).
158  Id. at 806 (Stevens, J., dissenting).
159  *Rapanos*, 547 U.S. at 809 (Stevens, J., dissenting).
160  Id. at 782 (Kennedy, J., concurring).
161  Id. at 769.
ple, suggesting that irregular flows of rivers located there would not fit into the majority’s definition of navigability, but are not “too insignificant to be of concern in a statute focused on ‘waters’ . . . .”162 Justice Kennedy also took issue with the dissent for reading out the navigability requirement entirely.163 He argued that the dissent’s approach would permit federal regulation “whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters.”164

Under Justice Kennedy’s concurrence, CWA jurisdiction over wetlands depends on the “existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”165 This nexus is to be assessed according to the goals and purposes of the CWA.166 Justice Kennedy would not require a wetland to have a surface connection with a permanent, flowing body of water, as the majority preferred; rather, he would require a significant nexus with a navigable water—that the wetlands be “integral parts of the aquatic environment.”167 In effect, he strikes a balance between rigid rules and generous deference.168

Justice Kennedy would not have judicial interpretation part with the CWA’s ties to navigability, though his definition of the term would lie somewhere in between permanent, flowing bodies of water and remote ditches and drains.169 Implicitly, Justice Kennedy’s analysis could be used for determining traditional navigable waters as well.170

4. The Navigability Test After *Rapanos*

Given the plurality in *Rapanos*, circuit courts have disagreed regarding whether Justice Kennedy’s opinion controls.171 Implementing agencies and the lower courts are free to apply the standard articulated either by Justice Scalia’s plurality or Justice Kennedy’s concurrence,
though it is possible for a lone concurring opinion to become the controlling rule of law.\textsuperscript{172}

In 2007, the Ninth Circuit adopted Justice Kennedy’s concurrence as the controlling opinion in \textit{Northern California River Watch v. City of Healdsburg}.\textsuperscript{173} The court found that a pond had a significant nexus to navigable waters “not only because the Pond waters seep into the navigable Russian River, but also because they significantly affect the physical, biological, and chemical integrity of the [r]iver.”\textsuperscript{174} In that case, the navigability of the Russian River was not disputed.\textsuperscript{175} In \textit{Northern California River Watch v. Wilcox}, however, the Ninth Circuit noted that it had not “foreclose[d] the argument that [CWA] jurisdiction may also be established under the plurality’s standard.”\textsuperscript{176}

III. Amending the Act

The concern underlying efforts to amend the CWA is the need for clear guidance for implementing agencies.\textsuperscript{177} Those in favor of amending the CWA, thereby “refitting the ship,” point to congressional revision as a stable and workable solution.\textsuperscript{178} Perhaps unsurprisingly, amendment is favored by those who prefer to expand the scope of the CWA.\textsuperscript{179} Both \textit{Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers} and \textit{Rapanos v. United States} were decisions of statutory, rather than constitutional, interpretation.\textsuperscript{180} Thus, Congress retains the ability to amend the CWA to strike language about navigability and clarify that federal jurisdiction extends to the limits of the commerce clause.\textsuperscript{181}

A. Independent Commerce Clause Basis

The CWA’s reference to navigability has been called a “red herring.”\textsuperscript{182} While the debate over navigability attracts attention by courts

\textsuperscript{172} Redder, \textit{supra} note 106 at 319, 343 (citing Regents of Univ. of Cal. v. Bakke, 436 U.S. 265 (1978) and Branzburg v. Hayes, 408 U.S. 665 (1972)).

\textsuperscript{173} 496 F.3d 993, 995 (9th Cir. 2007).

\textsuperscript{174} Id.

\textsuperscript{175} Id. at 996.

\textsuperscript{176} 633 F. 3d 766, 769 (9th Cir. 2011).

\textsuperscript{177} See Beckman, \textit{supra} note 5.

\textsuperscript{178} Keith, \textit{supra} note 110, at 607.

\textsuperscript{179} See Quinlan, \textit{supra} note 101.

\textsuperscript{180} Craig, \textit{supra} note 67, at 140.

\textsuperscript{181} See id.

\textsuperscript{182} Id. at 130 (quoting United States v. Gerke Excavating, 412 F.3d 804, 807 (7th Cir. 2005)).
and agencies, it may have no special constitutional significance. Some have argued that the jurisdictional, geographical implication of “navigable waters” is in fact unnecessary to the CWA. “Navigability” in the Rivers and Harbors Act (RHA) described waters that could be used for travel or trade, which Congress would have had the power to regulate under the commerce clause. The CWA borrowed the RHA’s terminology. By 1972, Congress’s power to regulate navigation under the commerce clause was firmly established.

The legislative history of the CWA suggests that it should be given the broadest possible constitutional interpretation, which likely means something more than traditional jurisdiction over traditional navigable waterways. Rather, an amended CWA could constitutionally apply to non-navigable waters so long as it regulates an economic activity having a substantial relation to interstate commerce. The CWA could therefore function on an independent commerce clause basis.

The Endangered Species Act (ESA) is an example of a statute that operates on an independent commerce clause basis. Particular geography does not limit the ESA in the way that navigability of water limits the CWA. A violation of the ESA by the illegal taking of an endangered species may occur anywhere. The takings provision of the ESA is consistently upheld by courts that engage in the doctrine of cumulative effects aggregation in order to link intrastate species preservation and interstate commerce. In Gibbs v. Babbitt, for instance, the Fourth Circuit considered a U.S. Fish and Wildlife Service regulation on the taking of red wolves on private lands, holding that such a regulation was a valid exercise of federal power under the commerce clause because the regulated activity substantially affected interstate commerce.

183 See id.
184 See, e.g., Keith, supra note 110, at 568 (recommending that Congress dispense with the unnecessary geographical jurisdictional link).
185 Craig, supra note 67, at 117, 143.
186 Morrison, supra note 127.
188 See id.
190 Keith, supra note 110, at 569.
191 Id.
192 Id. at 612.
193 Id.
194 Id. at 611–12.
195 214 F.3d 483, 486–87 (4th Cir. 2000).
Similarly, on an independent commerce clause basis, Congress could regulate any local instance of a commercial activity that has a substantial effect on interstate commerce through the CWA.\textsuperscript{196} The CWA may operate constitutionally within the bounds of Congress’s commerce clause power without any reference to navigability.\textsuperscript{197} Thus the debate over removing the statutory language of navigability persists not on constitutional but on political grounds.\textsuperscript{198}

B. Stalled Amendment Efforts

In response to the EPA declaration that the Los Angeles River is navigable, a senior attorney with the National Resources Defense Council (NRDC) commented, “[a]ll of this is just a case study in how messed up the law has become . . . . What it really does is underscore the need to fix the problem.”\textsuperscript{199} Another NRDC attorney wrote that this decision represented “how much in need of clarification the Clean Water Act is,” suggesting that an amendment would be a “more sensible way to oversee something . . . than expecting [the] EPA to look over the shoulder of the Army Corps and ensure that its analyses don’t give short shrift to western rivers.”\textsuperscript{200}

Efforts to remove navigability from the CWA are underway, though they have repeatedly failed because of opposition from agricultural lobbyists and other industry opponents.\textsuperscript{201} Most recently, a member of the U.S. House of Representative proposed legislation to drop the word “navigable” from the CWA in order to expand its jurisdiction to all U.S. waters.\textsuperscript{202} The proposal is the fifth in a series of House attempts to eliminate the CWA’s language about navigability.\textsuperscript{203} If the amendment were to pass, the CWA would secure protection for all rivers, streams, and wetlands, regardless of their size.\textsuperscript{204} Despite including exemptions for wastewater treatment systems and prior converted croplands, this bill appears to be stalled.\textsuperscript{205} Some of the debate over amending the CWA persists on economic grounds, with opponents concerned about in-

\textsuperscript{196}See Keith, supra note 110, at 613.
\textsuperscript{197}Id. at 569.
\textsuperscript{198}See Quinlan, supra note 101.
\textsuperscript{199}Quinlan, supra note 2.
\textsuperscript{200}Beckman, supra note 5.
\textsuperscript{201}Quinlan, supra note 2.
\textsuperscript{202}America’s Commitment to Clean Water Act, H.R. 5088, 111th Cong. (2010).
\textsuperscript{203}Quinlan, supra note 101.
\textsuperscript{204}Id.
\textsuperscript{205}Id.; Quinlan, supra note 2.
creasing costs on businesses in a faltering economy. Some parties also dispute the question of what the CWA is meant to protect and how broadly Congress intended for it to apply. The experience of these five amendment attempts indicate that, at least for the time being, removing navigability language from the CWA is not politically feasible.

IV. CASE BY CASE NAVIGABILITY DECLARATIONS AS AN EFFECTIVE AND DESIRABLE ALTERNATIVE TO AMENDING THE CLEAN WATER ACT

A. PITFALLS OF AMENDING THE CLEAN WATER ACT

When the EPA, constrained by its case by case system, declared navigability for the Los Angeles River, environmentalists greeted the decision as a positive development that did not go far enough. The EPA and the Army Corps of Engineers can declare navigability for a particular river or wetland, but they cannot apply CWA protection on an independent commerce clause basis without a navigability analysis until Congress amends the CWA. Beyond the political impracticality of amending the CWA to eliminate the navigability requirement, there would be negative consequences to such an amendment.

1. Eliminating “Navigability” Could Broaden the Scope of the CWA Beyond Congress’s Intent

While eliminating navigability from the CWA might clarify jurisprudence on the issue, it is not clear that the geographic, jurisdictional element of the CWA is present only as a basis for constitutional authority. As the Supreme Court held in United States v. Riverside Bayview Homes, Inc., “it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of ‘waters’ . . . .” Rather than solely protecting navigability, Congress intended the CWA to protect the environmental

206 Quinlan, supra note 101.
207 Id.
208 See id.
209 See Beckman, supra note 5.
210 See Keith, supra note 110, at 616.
211 See supra notes 199–208 and accompanying text.
212 See United States v. Rapanos, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring); Keith, supra note 110, at 616.
quality of the nation’s waters from degradation. Although the CWA protects the quality of the nation’s waters, if there were no limitation beyond the commerce clause, the EPA could regulate all waters—every transient mud puddle—that could somehow have a substantial effect on interstate commerce.

In *Rapanos v. United States*, Justice Kennedy criticized Justice Stevens’ dissent for reading out the requirement of navigability, which he considers a “central requirement” of the CWA. According to Justice Kennedy, Justice Stevens’ dissent would have allowed federal regulation “whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.” Amending the CWA by eliminating navigability would be more than a judicial “reading out” of that requirement; it would be an explicit codification of Justice Kennedy’s fear. Water over which federal jurisdiction could not be asserted by case by case determinations of navigability could still be regulated pursuant to an amended CWA.

2. Eliminating “Navigability” Could Result in the Exclusion of Waters Covered or Potentially Covered by Navigability Declarations

Conversely, eliminating navigability from the CWA and relying on commerce clause authority might leave some waterways, which could otherwise be included on the basis of a navigability analysis, excluded from CWA jurisdiction. In *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, Justice Stevens’ dissent in support of the Migratory Bird Rule relied in part on the fact that the causal connection between the destruction of the wetlands and the decline in commercial activity associated with migratory birds was not “attenuated.” The destruction of wetlands had a substantial effect on interstate commerce that was direct and concrete. In *Gibbs v. Babbitt*, the Fourth Circuit held that the relationship between red wolf takings and interstate commerce was direct because “with no red wolves, there will

---

215 See *Rapanos*, 547 U.S. at 733–34.
216 Id. at 778 (Kennedy, J., concurring).
217 Id.
218 See id.
219 See id.
222 Id.
be no red wolf related tourism, no scientific research, and no commercial trade in pelts.” The court did not have to “pile inference upon inference” to find there would be a substantial effect on interstate commerce.

At first blush, removing the navigability language from the CWA might seem to ensure that a waterway like the Los Angeles River would be protected; a river perceived as a “concrete ditch” would seem to have a better chance of protection under a legislative scheme that would not consider its navigability in fact. Yet on an independent commerce clause basis, CWA protections could only apply to the Los Angeles River only if there were direct, particular harms to commercial activities like recreation and transport. Given its current condition, however, the Los Angeles River is not frequently used for recreation or transport. Public access to the Los Angeles River is not officially sanctioned, and is explicitly prohibited at some locations.

A finding that an activity violated the CWA would have to be predicated on a court’s reasoning that the activity had a substantial effect on interstate commerce, but the relationship between the current activity and interstate commerce might be only “attenuated” because of the state of the river. Thus, a finding of substantial effects on interstate commerce might have to be based on assumptions about how the river could be used in ways that would affect interstate commerce in the future. For example, commercial activities such as dumping pollutants in the Los Angeles River could harm the potential for future recreation. Because of the possibility of interstate tourists engaging in recreation on the river, that harm might have a substantial effect on inter-

223 214 F.3d 483, 492 (4th Cir. 2000).
224 Id. (citing Lopez, 514 U.S. 549). In Lopez, the Supreme Court considered whether firearms possession in a local school zone substantially affected interstate commerce. 514 U.S. at 567. The Court held that a finding in favor of the government would require piling inference upon inference, such as to “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” Id.
225 See Quinlan, supra note 2.
226 See Gibbs, 214 F.3d at 492.
227 See Behrens, supra note 6. The fact that it is news when a group of kayakers enjoy the river points to a general lack of river-related recreation. See id.
228 EPA Evaluation, supra note 8, at 30.
229 Cf. Gibbs, 214 F.3d at 492 (describing where red wolf takings “implicate[d] a variety of commercial activities”).
230 See, e.g., EPA Evaluation, supra note 8, at 30 (noting that “it is likely that a restored Los Angeles River will attract interstate and international visitation and commerce”).
231 See id.; Sahagun, supra note 74 (explaining that the Army Corps of Engineers and the Los Angeles County Department of Public Works do not normally allow voyages on the Los Angeles River because of “safety and water-quality concerns”).
state commerce.232 Alternatively, a court could find that damage to the river could reduce its ability to filter pollutants and therefore increase pollution downstream in the Pacific.233 The recreation, shipping, and transportation that might be thereby impacted could have a substantial effect on interstate commerce.234 For example, Justice Kennedy noted in *Rapanos* that nutrient-rich runoff from the Mississippi River created a hypoxic (oxygen depleted) “dead zone” in the Gulf of Mexico “the size of Massachusetts and New Jersey.”235

Regardless, predicating the application of the CWA on interstate commerce alone could require a court to inexcusably “pile inference upon inference” or leave the Los Angeles River and others like it unprotected.236 Absent CWA protection, pollution limits would not be enforced, adjacent tributaries and wetlands would be threatened, and recreational opportunities would not be expanded.237 The use of a commerce-based test would therefore be an ineffective approach to protect the Los Angeles River and other urban and western rivers.238

B. Benefits of Case by Case Navigability Declarations

1. Case by Case Navigability Declarations Are Not Examples of Regulatory Overreaching

The case by case approach that the EPA currently employs is ultimately an application of Justice Kennedy’s *Rapanos* concurrence, and therefore strikes an appropriate balance between the plain language of the CWA and its purposes.239 A case by case determination continues to give the term “navigability” meaning, while acknowledging Congress’s intent to create a comprehensive regulatory scheme.240

Justice Kennedy used the Los Angeles River as an example in his *Rapanos* concurrence, citing it as a river which, because it “ordinarily carries only a trickle of water and often looks more like a dry roadway

---

233 See Craig, *supra* note 67, at 147–48; Mernit, *supra* note 63 (mentioning that cattails in a tributary of the L.A. River “consume nitrogen from fertilizer runoff bound for the ocean”).
235 547 U.S. at 777 (Kennedy, J., concurring).
236 See Lopez, 514 U.S. at 567.
237 See *supra* notes 93–100 and accompanying text.
238 See Lopez, 514 U.S. at 567; *supra* notes 93–100 and accompanying text.
239 See 547 U.S. at 779–82 (Kennedy, J., concurring); Redder, *supra* note 103, at 353.
240 Redder, *supra* note 103, at 353.
than a river,” only might satisfy the plurality’s test of navigability.\textsuperscript{241} While the plurality in \textit{Rapanos} implied that “navigability” requires permanent standing water or continuous flow, urban and western rivers do not fit that mold of traditional navigability.\textsuperscript{242} Justice Kennedy’s substantial nexus test would allow for wetlands or waters that “significantly affect the chemical, physical, and biological integrity of other covered waters” to be considered navigable.\textsuperscript{243} While Justice Kennedy refuses to ignore the navigability language from the statute, he disregards the definition of the plurality, allowing for the possibility of a broader definition of navigability.\textsuperscript{244} The EPA’s declaration of navigability for the Los Angeles River was permissible under Justice Kennedy’s concurrence.\textsuperscript{245} Ultimately, Justice Kennedy’s test “retains the opportunity for the Corps and other agencies, such as the EPA, to issue their own interpretation . . . for purposes of regulation.”\textsuperscript{246} Instead of solely relying on the presence of standing water or continuous flow, the EPA relied on factors such as the river’s flow and depth, history of navigation by watercraft, current commercial and recreational uses of the river, and plans for future development and use of the river which may affect its potential for commercial navigation in declaring that the Los Angeles River was a traditional navigable water.\textsuperscript{247} Under Justice Kennedy’s significant nexus test, the EPA presumably could have determined that the Los Angeles River had a “significant nexus” to the Pacific.\textsuperscript{248} While Justice Scalia feared the implementation of the CWA by the “enlightened despot[s]” of the implementing agencies, these very agency officials are better equipped than courts to employ their own scientific knowledge and make their own interpretations.\textsuperscript{249} The EPA, as an implementing agency with technological expertise, is better-suited to determine the extent to which a river can be considered naviga-

\textsuperscript{241} \textit{Rapanos}, 547 U.S. at 769 (Kennedy, J., concurring).
\textsuperscript{242} See id.
\textsuperscript{243} See id. at 780.
\textsuperscript{244} See id. at 769, 778.
\textsuperscript{245} See N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007) (adopting Justice Kennedy’s “substantial nexus” test for the Ninth Circuit, which includes Los Angeles).
\textsuperscript{246} See Mollerup, \textit{supra} note 168, at 534.
\textsuperscript{247} See EPA EVALUATION, \textit{supra} note 8, at 5.
\textsuperscript{248} See \textit{Rapanos}, 547 U.S. at 780 (Kennedy, J., concurring). Such a “significant nexus” finding might require more inferences, however, and therefore be more tenuous than the EPA’s declaration of navigability in this case. See \textit{supra} notes 220–238 and accompanying text.
\textsuperscript{249} \textit{Rapanos}, 547 U.S. at 721; see Mollerup, \textit{supra} note 168, at 535.
ble.\textsuperscript{250} Taking a case by case approach and utilizing multiple factors, the EPA can assess whether a river is navigable and thus whether CWA protections are warranted.\textsuperscript{251}

2. Case by Case Navigability Declarations Can Expand CWA Protection for Urban and Western Rivers

One commentator suggests that the EPA’s declaration that the Los Angeles River is navigable may be less a statement of fact than it is a reflection of the agency’s underlying objective—to fold the Los Angeles River under the umbrella of protection provided by the CWA.\textsuperscript{252} Certainly, the Los Angeles River may not appear traditionally navigable in the way that other rivers might.\textsuperscript{253} Although the Los Angeles River may not meet the \textit{Rapanos} plurality’s test of a permanent, continuously flowing body of water, it nevertheless falls closer to that end of the navigability spectrum than it does to the remote and insubstantial ditches that Justice Kennedy would disregard.\textsuperscript{254} As EPA Administrator Jackson announced in making the navigability determination for the Los Angeles River, “[this declaration] means that we recognize that this is water. Not only is this water, it needs to be thought of as part of our ecological system that services us.”\textsuperscript{255}

The EPA’s implicit application of Justice Kennedy’s \textit{Rapanos} concurrence has the potential to expand CWA protection for urban and western rivers.\textsuperscript{256} Given their unique characteristics, urban and western rivers like the Los Angeles River may have trouble meeting narrow definitions of traditional navigability.\textsuperscript{257} Given their unique challenges, however, establishing CWA protection for these rivers is all the more critical.\textsuperscript{258} A case by case approach to determining navigability can utilize the skills of the implementing agency to bring these waters appropriately within the scope of federal regulation and protection.\textsuperscript{259}

\begin{itemize}
\item \textsuperscript{250} See Mollerup, \textit{supra} note 168, at 535.
\item \textsuperscript{251} See generally EPA \textit{Evaluation}, \textit{supra} note 8 (utilizing such factors as flow and depth, history of navigation, current commercial and recreation uses, and plans for future development and use).
\item \textsuperscript{252} Quinlan, \textit{supra} note 2.
\item \textsuperscript{253} See \textit{id}.
\item \textsuperscript{254} See \textit{Rapanos}, 547 U.S. at 769, 778 (Kennedy, J., concurring).
\item \textsuperscript{255} Peterson, \textit{supra} note 99.
\item \textsuperscript{256} See Quinlan, \textit{supra} note 2.
\item \textsuperscript{257} See \textit{supra} notes 123–140 and accompanying text.
\item \textsuperscript{258} See \textit{supra} notes 123–140 and accompanying text.
\item \textsuperscript{259} See \textit{Rapanos}, 547 U.S. at 779 (Kennedy, J., concurring); Mollerup, \textit{supra} note 168, at 535.
\end{itemize}
Conclusion

The EPA’s navigability declaration for the Los Angeles River may at first glance seem to be as artificial as declaring that pigs will fly. However, strapping the wings onto a pig might be enough to cause it to fly. The Los Angeles River has a powerful history, and given the appropriate federal protections, its beauty as well as its prominent role in Los Angeles life could be recaptured. For other urban and western rivers, which may not fit into a strict mold of traditional navigability, case by case declarations can expand federal clean water protection while remaining true to the purposes of the CWA. The EPA’s case by case determinations of navigability avoid the potential over- and under-inclusiveness of an amended CWA with no navigability component. Using a case by case approach, agencies have the freedom to consider multiple relevant factors to uphold the intent of the CWA in protecting the nation’s waters.

Thus, as impossible as it would have seemed to a Gabrieleño that the Los Angeles River would someday be transformed to its present state, and as improbable as it may be to a layman that a concrete-lined storm drain is a traditionally navigable waterway, somewhere in the sky, flying over the future of the Los Angeles River, is a pig.

260 See Quinlan, supra note 2; supra notes 14–52 and accompanying text.
261 See supra notes 252–259 and accompanying text.
262 See supra notes 14–100 and accompanying text.
263 See supra notes 61–71, 252–259 and accompanying text.
264 See supra notes 209–238 and accompanying text.
265 See supra notes 239–259 and accompanying text.
266 See supra notes 14–52, 252–259 and accompanying text.
NECESSARILY HYPOCRITICAL: THE LEGAL VIABILITY OF EPA’S REGULATION OF STATIONARY SOURCE GREENHOUSE GAS EMISSIONS UNDER THE CLEAN AIR ACT

NATHAN D. RICCARDI*

Abstract: The Supreme Court’s ruling in Massachusetts v. EPA made clear that greenhouse gases fall within the realm of air pollutants the Clean Air Act was designed to regulate. The Court’s decision sparked a chain reaction forcing the EPA to regulate greenhouse gases under different provisions of the Act. The EPA’s decision to regulate drew fierce criticism, especially from industries that would be forced to reduce emissions. Opponents argue that greenhouse gases are not traditional pollutants and therefore the drafters of the Clean Air Act did not intend them to be regulated. Furthermore, they argue that the EPA over-stepped its authority in “tailoring” a new rule to incorporate greenhouse gases more appropriately into the Act’s framework. This Note defends the EPA’s decision to regulate greenhouse gases, as well as its Tailoring Rule. In light of the Clean Air Act’s explicit language and legislative intent, the EPA was not only legally justified in implements its decision, but it had no other choice.

INTRODUCTION

Since the landmark Supreme Court decision in Massachusetts v. EPA, federal regulation of greenhouse gases (GHGs) has become one of the most controversial environmental issues of the 21st century.¹ Rather than inspiring unified action, this controversy has led to legislative indecision in an attempt to devise a solution to global warming.² The United States has refused to sign the Kyoto Protocol,³ and the potential

---

* Articles Editor, Boston College Environmental Affairs Law Review, 2011–12.
2 See Farrell, supra note 1.
3 Massachusetts v. EPA, 549 U.S. at 509.
for enactment of federal legislation specifically tailored to address GHGs has been clouded by doubt.\(^4\)

The Clean Air Act (CAA) was not meant to address GHGs when it was drafted.\(^5\) In fact, climate change-related pollutants do not fit easily into the structure contemplated by the Act.\(^6\) The *Massachusetts v. EPA* decision, however, was the first in a series of developments that establishes the CAA as the preeminent statute in the climate change battle.\(^7\) The Court’s decision all but mandated the Environmental Protection Agency (EPA) to find that GHGs “may reasonably be anticipated to endanger public health or welfare,” and to regulate the pollutants under several provisions of the Act.\(^8\)

Despite its flexibility, the CAA, if literally applied to GHGs, threatened to seize regulatory control of millions of U.S. businesses.\(^9\) The EPA itself noted that such application would paralyze permitting authorities and render the statute unworkable.\(^10\) Thus, to avoid this disaster, the EPA effectively rewrote the provision of the CAA that would regulate GHGs and lead to such absurd results, invoking judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*\(^11\)

Many commentators, industrialists, and state governments have taken issue not only with the *Massachusetts v. EPA* decision and the applicability of the CAA to GHGs, but also with the EPA’s implementation of the Act.\(^12\) This Note argues, however, that given the Court’s decision in *Massachusetts v. EPA*, the mandatory and interdependent triggering rules in the statute, and the flexible, forward-looking, and precautionary nature of the CAA, the EPA was not only within its legal authority to enact such regulation but it was practically forced to do so.\(^13\)

---


\(^{5}\) See *Massachusetts v. EPA*, 549 U.S. at 532.

\(^{6}\) John Copeland Nagle, *Climate Exceptionalism*, 40 ENVTL. L. 53, 55 (2010). “Unlike most air pollutants, CO\(_2\) occurs naturally in the atmosphere, is actually necessary for human life, is not toxic when breathed . . . and harms people and the environment indirectly by facilitating the greenhouse effect that has begun to change the world’s climates.” *Id*.

\(^{7}\) See infra notes 29–49 and accompanying text.

\(^{8}\) See id.

\(^{9}\) See Allen & Lewis, supra note 4, at 923–24.

\(^{10}\) See infra notes 126–154 and accompanying text.

\(^{11}\) See infra notes 126–168 and accompanying text.

\(^{12}\) See infra notes 169–183 and accompanying text.

\(^{13}\) See infra notes 184–254 and accompanying text.
Part I of this Note outlines the basic legal framework of the CAA, as well as how the Court’s decision in Massachusetts v. EPA impacts that regulatory framework with respect to GHGs. Part II presents the potentially explosive applicability of the CAA to GHGs in a post-Massachusetts v. EPA world. Part III delineates the EPA’s regulatory response to the Massachusetts v. EPA decision and the subsequent applicability of the CAA to GHGs. Part IV presents the legal challenges that have arisen in the wake of the EPA’s actions. Part V defends the EPA’s actions, drawing on the text and legislative history of the CAA, as well as judicial precedent.

I. LEGAL FRAMEWORK

A. Overview of the Clean Air Act

The CAA is a comprehensive federal statute regulating pollutant emissions from various sources.\(^{14}\) A forward-looking and precautionary statute, the CAA seeks to regulate pollutant emissions in order to reduce levels of air pollution to certain health-based standards nationwide.\(^{15}\)

In its central provision, the CAA calls for the Administrator of the EPA to identify and list air pollutants that “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”\(^{16}\) The EPA must then set National Ambient Air Quality Standards (NAAQS)\(^{17}\) at a level that provides an “adequate margin of safety” that is necessary to protect public health.\(^{18}\) States must then attempt to achieve the NAAQS promulgated by the EPA for each air pollutant through the adoption of a State Implementation Plan, which the EPA may either approve or reject based on certain criteria.\(^{19}\)

---


\(^{17}\) Id. § 7409(a)–(b). NAAQS are health-based, ambient air quality standards that denote an acceptable amount of certain pollutants in the air for each air pollutant. Id. The EPA is authorized to set both primary and secondary NAAQS—the former at a level necessary to protect public health and the latter at a level necessary to protect public welfare. Id. The secondary NAAQS are less relevant to the analysis in this Note.

\(^{18}\) Id. § 7409(a)–(b).

\(^{19}\) Id. § 7410(a), (c). A State Implementation Plan (SIP) is a regulatory plan, promulgated by each state and approved by the EPA, that provides a comprehensive legal frame-
der the Act. To facilitate the maintenance of NAAQS, the CAA also contains provisions for review of new and modified sources to ensure that these sources employ advanced technology. New or modified major sources must obtain permits prior to construction and must meet certain requirements.

The Act’s Prevention of Significant Deterioration (PSD) Program is a subset of the CAA’s preconstruction permitting scheme that applies in areas of the country with air quality clean enough to meet the NAAQS for each pollutant (attainment areas), or in areas that are unclassifiable. The purpose of the PSD Program is to prevent the deterioration of air quality in these regions of the country that would otherwise not be regulated because they meet the NAAQS. The provision applies to all new or modified facilities that have the potential to emit at least 250 tons per year of any air pollutant.

Finally, Title II of the CAA contains a provision that regulates automobile emissions. Specifically, Title II provides that the EPA shall promulgate regulations and “standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator’s] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.” It is this provision that brought the regulation of greenhouse gases (GHGs) before the United States Supreme Court.

work through which the state intends to meet the requirements of the Act. See id. § 7410(a). If the EPA does not approve a state’s SIP, or if a state refuses to participate, the EPA will issue a federal implementation plan on the state’s behalf. Id. § 7410(c).


21 42 U.S.C. §§ 7502(c), 7503 (applicable in “nonattainment” areas), 7470–7479 (applicable in “attainment” or “unclassifiable” areas).

22 See id. §§ 7501–7503 (for “nonattainment” preconstruction permitting definitions and requirements), 7470–7479 (for “attainment” or “unclassifiable” preconstruction permitting definitions and requirements).

23 See id. §§ 7470–7479.

24 See id. § 7470.

25 Id. §§ 7475, 7479.

26 See id. § 7521.


28 See Massachusetts v. EPA, 549 U.S. at 505.
B. The CAA’s Applicability to GHGs: Massachusetts v. EPA and the EPA’s Endangerment Finding

Until recently, the CAA was thought to apply only to emissions that conjure up traditional ideas of pollution—chemicals that are directly hazardous to human health.29 Throughout the late 20th century, however, an awareness emerged that pollution could lead to problems other than direct effects to human health.30 With a landmark decision by the United States Supreme Court in 2007, the traditional framework of pollution regulation was about to change.31

1. Historical Background: The Climate Change Debate

At the time Congress passed the CAA in 1970, the science behind human-generated global warming was just underway.32 In fact, there was very little attention paid to the issue during the debates surrounding passage of the Act.33 In the late 1970s, the awareness of global warming and its risks gained momentum.34 In response to an Act passed by Congress,35 President Carter placed the task of investigating the scientific implications of man-induced climate change with the National Research Council (NRC).36 The NRC found that carbon dioxide generates climate change and that “[a] wait-and-see policy may mean waiting until it is too late.”37

Later, the Intergovernmental Panel on Climate Change published a comprehensive report on the issue that echoed the NRC Report linking human-generated GHG emissions to global warming.38 The growing international recognition of global warming spurred an international meeting in Kyoto, Japan in 1997.39 Representatives from various nations drafted a protocol setting mandatory targets for GHG emissions

---

30 See Massachusetts v. EPA, 549 U.S. at 507–09.
31 See id. at 528 (holding that the CAA authorizes the regulation of GHGs).
32 Id. at 507.
33 Id. at 507 n.8.
34 Id. at 507.
35 15 U.S.C. §§ 2902, 2904 (2006). The National Climate Program Act requires the President to “establish a national climate program that will assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications.” Id.
36 Massachusetts v. EPA, 549 U.S. at 507–08.
37 Id. at 508.
38 Id. at 508–09.
39 Id. at 509.
reductions in industrialized nations, which the United States refused to sign.\textsuperscript{40}

2. \textit{Ethyl Corp. v. EPA}: The Evolution of a Statute

As the political environment evolved to encompass new discoveries regarding climate change, the CAA itself was being interpreted more expansively by courts.\textsuperscript{41} In November 1973, the EPA published final regulations concluding that lead in gasoline endangers\textsuperscript{42} public health and thus should be regulated under the CAA.\textsuperscript{43} Industry groups challenged the final rule on the ground that there was not sufficient concrete evidence to prove that lead additives in gasoline endanger public health, and thus the rulemaking was found to be arbitrary and capricious.\textsuperscript{44}

Nevertheless in 1979, the D.C. Circuit upheld the rulemaking in \textit{Ethyl Corp. v. EPA}, holding that because the CAA is a precautionary and preventative statute, it is the EPA’s responsibility to regulate and prevent harm, even if that harm is not certain or is based on incomplete evidence.\textsuperscript{45}

Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect.\textsuperscript{46}

Instead, the CAA and “common sense demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.”\textsuperscript{47}

\textsuperscript{40} Id.
\textsuperscript{41} See Ethyl Corp. v. EPA, 541 F.2d 1, 25, 28 (D.C. Cir. 1976) (holding that regulation under the CAA must be proactive and anticipate possible but uncertain harms).
\textsuperscript{42} Massachusetts v. EPA, 549 U.S. 497, 506 n.7 (2007). At the time of the rulemaking, section 202(a)(1) of the 1970 CAA required the EPA to determine whether the pollutant “endangers” public health or welfare. \textit{Id}. This language was later amended in 1977 to “may reasonably be anticipated to endanger.” \textit{Id}. The implications of this modification are important to this Note and are discussed further below.
\textsuperscript{43} Ethyl Corp., 541 F.2d at 10.
\textsuperscript{44} Id. at 11.
\textsuperscript{45} Id. at 7, 28–29.
\textsuperscript{46} Id. at 28.
\textsuperscript{47} Id. at 25.
The holding in *Ethyl Corp.* was later codified in the CAA by the drafters of the 1990 Amendments.48 The drafters amended the language of section 202(a)(1) from “endangers” to “may reasonably be anticipated to endanger” to afford the EPA more discretion to protect public health and welfare in the face of scientific uncertainty.49

3. The Commencement of Legal Action in the United States

Although the CAA evolved to encompass pollutants not originally anticipated by the Act,50 the EPA had not yet attempted to regulate GHGs.51 The growing international sentiment that humans were causing a potentially catastrophic environmental problem, coupled with U.S. inaction to prevent such a problem, spurred a group of private organizations to file a rulemaking petition with the EPA.52 The petition asked that the EPA regulate GHG emission from new motor vehicles under section 202 of the CAA.53 In support of their request, the petitioners noted that two successive general counsels recognized the EPA’s authority to regulate GHGs under the Act.54 However, a new administration occupied the White House by the time the EPA responded to the petition—after more than 50,000 public comments and another scientific report from the NRC.55

The EPA, now under the George W. Bush administration,56 denied the petition in September 2003.57 The EPA concluded that, upon examination of the text, history of the statute, and recent court decisions, contrary to statements of prior general counsels the CAA did not give the EPA authority to regulate global climate change.58 Therefore,

48 See *Massachusetts v. EPA*, 549 U.S. at 506 n.7.
49 See id.
50 See *Ethyl Corp.*, 541 F.2d at 28–29.
51 See *Massachusetts v. EPA*, 549 U.S. at 505.
52 See id. at 510.
53 See id.
54 See id. at 510–11.
55 Id. at 510–11; see William J. Clinton, WHITE HOUSE, http://www.whitehouse.gov/about/presidents/williamjclinton (last visited Jan. 19, 2012) (the Clinton Administration governed in 1999, when the petition was filed); George W. Bush, WHITE HOUSE, http://www.whitehouse.gov/about/presidents/georgewbush (last visited Jan. 19, 2012) (President George W. Bush entered the White House in January 2001, and his administration governed when the petition was denied in 2003).
56 See *George W. Bush, White House*, supra note 55.
58 Id. at 52,925.
GHGs could not be considered air pollutants under the Act.\textsuperscript{59} The EPA gave two reasons why Congress meant for GHGs to be excluded from regulation under the CAA: (1) Congress was aware of the problem when it passed the 1990 CAA amendments, and yet did not establish standards for GHG regulation, and (2) that it had addressed the GHG problem through other legislative acts.\textsuperscript{60} In describing the EPA’s decision in \textit{Massachusetts v. EPA}, the Court stated, “in essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it.”\textsuperscript{61} Furthermore, the EPA noted that even if it possessed authority to regulate GHGs under the Act, given the uncertainty surrounding GHG science and the President’s allegedly comprehensive alternative approach to addressing the problem, the appropriate approach would not be regulation.\textsuperscript{62}

Soon after, private organizations, now joined by intervening states and local governments, challenged the EPA’s decision in the D.C. Circuit.\textsuperscript{63} Finding that the EPA properly exercised its authority under section 202 of the CAA, the D.C. Circuit upheld the EPA’s ruling.\textsuperscript{64} Noting that the Act gave the EPA Administrator the ability to use judgment in making an endangerment finding, the court concluded that such judgment included the consideration of external factors such as scientific uncertainty and policy judgments.\textsuperscript{65} On June 26, 2006, the United States Supreme Court granted certiorari to review the D.C. Circuit’s ruling.\textsuperscript{66}

4. \textit{Massachusetts v. EPA}: The First Spark in a Chain Reaction

In \textit{Massachusetts v. EPA}, the United States Supreme Court issued an authoritative judicial statement that GHGs do fall under the CAA’s regulatory framework.\textsuperscript{67} In a controversial decision, the Court ruled that GHGs are air pollutants under the meaning of section 202 of the CAA, forcing the EPA to reconsider its previous decision not to issue an en-

\begin{footnotesize}
\footnote{59 Id.}
\footnote{60 Id. at 52,926–28.}
\footnote{61 549 U.S. 497, 512 (2007).}
\footnote{62 See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,929–31.}
\footnote{63 See generally Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005).}
\footnote{64 Id. at 58.}
\footnote{65 Id.}
\footnote{66 Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), \textit{cert. granted}, 548 U.S. 903 (U.S. June 26, 2006) (No. 05-1120).}
\footnote{67 See 549 U.S. at 528–29.}
\end{footnotesize}
dangerment finding.\textsuperscript{68} The Court’s reasoning amounted, very simply, to a strict interpretation of the statutory text.\textsuperscript{69} Because the text of section 202 requires the Administrator to prescribe standards to regulate the emission of any air pollutant that “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,” and the Act’s sweepingly broad definition of air pollutant, the Court found that there is no doubt that GHGs are were controlled under the CAA.\textsuperscript{70}

Furthermore, although the EPA argued that the Act allows the Administrator to use personal judgment in issuing an endangerment finding, the Court found that this judgment extends only to a determination of whether an air pollutant “may reasonably be anticipated to endanger public health or welfare.”\textsuperscript{71} In other words, the CAA, according to the Court, provides the EPA with no discretion to consider factors external to the statutory text when making the decision to regulate.\textsuperscript{72}

Accordingly, the Court gave the EPA three options on how to proceed: “(1) issue a finding that GHG-related air pollution ‘may reasonably be anticipated to endanger public health or welfare,’ (2) issue a finding of no endangerment, or (3) provide a ‘reasonable explanation’ for why the agency cannot or will not exercise its discretion to make such a determination.”\textsuperscript{73} Noting the mandatory nature of the language in the statute, the Court concluded that if the EPA were to issue an endangerment finding under the terms of the Act, it must regulate GHG emissions from automobiles.\textsuperscript{74}

5. The Endangerment Finding

In response to the \textit{Massachusetts v. EPA} decision, after “careful consideration of the full weight of scientific evidence and a thorough review of numerous public comments,” the Administrator of the EPA issued an endangerment finding on December 15, 2009.\textsuperscript{75}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{68} See id. An “endangerment finding” is the common term for a finding that an air pollutant may reasonably be anticipated to endanger public health or welfare under the terms of the Act. See id. at 534.
\item \textsuperscript{69} See id. at 528–29.
\item \textsuperscript{70} See id.
\item \textsuperscript{71} Id. at 532–33.
\item \textsuperscript{72} See id.
\item \textsuperscript{73} Allen & Lewis, supra note 4, at 921.
\item \textsuperscript{74} \textit{Massachusetts v. EPA}, 549 U.S. at 533.
\item \textsuperscript{75} Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009).
\end{itemize}
\end{footnotesize}
ministrator found the body of scientific evidence at the time compellingly supported a finding of endangerment.\textsuperscript{76}

The EPA defined the relevant air pollutant as an aggregate “mix of six long-lived and directly-emitted greenhouse gases,”\textsuperscript{77} that taken together endanger human health by changing Earth’s climate.\textsuperscript{78} Specifically, the Administrator found that GHGs present a risk via “changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens.”\textsuperscript{79} Furthermore, the EPA found that automobile emissions of this air pollutant contribute to the air pollution that endangers human health and welfare.\textsuperscript{80} Therefore, according to the words of the statute, the EPA was now required to regulate GHGs.\textsuperscript{81}

\textbf{II. Chain Reaction: The Non-Discretionary Nature of Regulation Under the CAA}

The Court explained in \textit{Massachusetts v. EPA} that an endangerment finding would not result in drastic changes to the current regulatory system, but would only result in a slight regulation of new motor vehicle emissions standards tempered by a consideration of costs.\textsuperscript{82} Scholars have noted, citing consequences regulating greenhouse gas emissions (GHGs) under the CAA, that the Court’s reassurances seem misinformed.\textsuperscript{83} They forewarn, that “[t]he CAA is a highly interconnected statute.”\textsuperscript{84} As a result, the EPA’s endangerment finding has the potential to set off a “regulatory chain reaction” under different sections of the CAA.\textsuperscript{85}

\textsuperscript{76} Id. at 66,497.
\textsuperscript{77} Id. The six GHGs are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 66,499.
\textsuperscript{82} See 549 U.S. 497, 531 (2007).
\textsuperscript{83} See Allen & Lewis, supra note 4, at 922–23.
\textsuperscript{84} Id. at 922.
\textsuperscript{85} See id. at 923; Nathan Richardson, \textit{Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron Set the EPA Free?}, 29 STAN. ENVTL. L.J. 283, 288 (2010).
A. National Ambient Air Quality Standards

The CAA requires the EPA to issue National Ambient Air Quality Standards (NAAQS) for an air pollutant within twelve months of its listing for regulation. The EPA must list a pollutant for regulation if: (1) the pollutant will “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare,” (2) the pollutant’s existence in the air “results from numerous or diverse mobile or stationary sources,” and (3) the EPA intends to provide air quality standards under section 108 of the CAA.

The EPA’s endangerment finding manifests that criteria (1) and (2) are satisfied. First, the very fact of the endangerment finding implies that, in the EPA Administrator’s judgment, GHG emissions from mobile sources cause or contribute to air pollution that is reasonably anticipated to endanger public health and welfare. Satisfying the second prong, the EPA notes that GHGs are emitted by far more numerous and varied sources than are other pollutants regulated under the Act.

Commentators note, however, that the third criterion appears to provide the EPA with discretion regarding whether to issue a NAAQS for any air pollutant, even if an endangerment finding has already been issued. In other words, read literally, the word “plans” seems to imply that the EPA Administrator has complete discretion regarding whether to list a pollutant, regardless of its dangerousness or ubiquity. When looking at the structure and legislative history of the CAA, however, a scholar contends that this result was not intended. For example, Title I of the CAA is centered upon a series of deadlines and mandatory EPA duties enforceable by citizen suits.

---

86 42 U.S.C. §§ 7408(a), 7409(a). Section 7408(a) requires the EPA to issue quality criteria for each pollutant for which an endangerment finding has been issued. Id. § 7408(a). Section 7409(a) requires the EPA to issue NAAQS for each pollutant for which quality criteria have been issued. Id. § 7409(a).

87 Id. § 7408(a)(1)(A).

88 Id. § 7408(a)(1)(B).

89 Id. § 7408(a)(1)(C).


91 Id. at 66,497.

92 Id. at 66,543.

93 See 42 U.S.C. § 7408(a)(1)(C); McCubbin, supra note 20, at 451; Richardson, supra note 85, at 300–01.

94 See 42 U.S.C. § 7408(a)(1)(C); McCubbin, supra note 20, at 451; Richardson, supra note 85, at 300–01.

95 See McCubbin, supra note 20, at 450–51.

96 Id.
choose whether to proceed with the air quality criteria for a particular pollutant, then the whole series of apparently mandatory obligations becomes unhinged." \(^{97}\)

In fact, it was not long after the passage of the CAA that the Second Circuit argued this same position in their decision in *Natural Resources Defense Council, Inc. v. Train* in 1976. \(^{98}\) In that case, in which the EPA believed that it had discretion not to issue a NAAQS for lead under section 108, the Second Circuit disagreed. \(^{99}\)

The structure of the Clean Air Act as amended in 1970, its legislative history, and the judicial gloss placed upon the Act leave no room for an interpretation which makes the issuance of air quality standards for lead under § 108 discretionary. The Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging. Once the conditions of §§ 108(a)(1)(A) and (B) have been met, the listing of lead and the issuance of air quality standards for lead become mandatory. \(^{100}\)

Thus, because the GHG endangerment finding satisfied the first and second prongs of section 108 of the Act, many legal analysts have argued that the EPA now has a mandatory obligation to list GHGs as a criteria pollutant and promulgate a NAAQS. \(^{101}\) Nevertheless, the EPA has not taken any action toward this end, essentially ignoring the Second Circuit’s opinion and retaining the discretion—that the court seemed to foreclose—not to list GHGs. \(^{102}\)

**B. Regulation Under the PSD Preconstruction Permitting Program**

In addition to arguably requiring the EPA to establish a NAAQS for GHGs, \(^{103}\) the endangerment finding and subsequent regulation of mobile source emissions also triggers the application of the CAA’s Prevention of Significant Deterioration (PSD) Program to GHGs. \(^{104}\) The PSD Program requires new major sources and proposed modifications to existing major sources of air pollutants to obtain a permit prior to

---

\(^{97}\) Id. at 451.

\(^{98}\) See 545 F.2d 320, 324, 328 (2d Cir. 1976).

\(^{99}\) See id. at 324, 328.

\(^{100}\) Id. at 328.

\(^{101}\) See McCubbin, *supra* note 20, at 452.

\(^{102}\) See Richardson, *supra* note 85, at 300–01.

\(^{103}\) See McCubbin, *supra* note 20, at 452.

\(^{104}\) Allen & Lewis, *supra* note 4, at 923.
construction.\textsuperscript{105} For PSD purposes, the CAA defines “major emitting facility”\textsuperscript{106} as (1) a source in a specifically enumerated source category that is capable of emitting 100 tons per year (tpy) of any air pollutant or (2) any other facility that is capable of emitting 250 tpy of any air pollutant.\textsuperscript{107}

Historically, there was some debate about the definition of “major emitting facility,” and thus to which sources the PSD Program applied.\textsuperscript{108} In 1978, after the EPA promulgated regulations implementing the PSD Program under the 1977 Amendments to the CAA, the regulations were challenged in court.\textsuperscript{109} In its interpretation of the applicability of the PSD provisions to certain sources of air pollution, the D.C. Circuit in \textit{Alabama Power Co. v. Costle} noted that the PSD Program applies very broadly.\textsuperscript{110} The term “any air pollutant,” according to the court, meant any pollutant that is otherwise regulated under the Act, even those pollutants for which NAAQS have not been established.\textsuperscript{111} The court held that the PSD Program was not meant to apply only to a limited class of defined pollutants, but to all facilities that had the potential to emit large quantities of any harmful substances that “befoul our nation’s air.”\textsuperscript{112} Thus, citing the broad applicability of the PSD provisions outlined in \textit{Alabama Power}, scholars have noted that once GHGs are regulated under the Title II mobile source program, they also become regulated under the PSD Program.\textsuperscript{113}

Unlike the promulgation of a NAAQS for GHGs,\textsuperscript{114} the Obama administration has chosen not to ignore the triggering of PSD applicability, and has issued a rule applying PSD provisions to GHG emitters under the CAA.\textsuperscript{115} This rule, which the EPA refers to as the Tailoring Rule, is the focus of this Note.\textsuperscript{116}
C. Practical Implications of the Chain Reaction

The applicability of various provisions of the CAA to GHGs has the potential to affect millions of sources across the United States.\textsuperscript{117} Specifically, and most relevant to this Note, the PSD provision of the CAA requires preconstruction permits for major stationary sources of any air pollutant in excess of 250 tpy.\textsuperscript{118} Currently, only large industrial factories (and some small manufacturers) are subject to the PSD requirements because they are the only sources large enough to emit more than 250 tpy of the currently regulated pollutants.\textsuperscript{119} Unlike the pollutants currently subject to regulation under the Act, however, GHGs are emitted in large quantities not only by industrial facilities, but also by small commercial structures.\textsuperscript{120} Therefore, if the PSD provision were to become applicable to GHGs under the current text of the Act, approximately 1.2 million buildings and facilities across the country would become subject to the PSD preconstruction review process and permitting requirements (according to the U.S. Chamber of Commerce).\textsuperscript{121}

This potential increase presents significant problems, as the PSD preconstruction review process is expensive.\textsuperscript{122} First, firms must comply with PSD requirements by implementing best available control technology to reduce emissions according to industry best practices.\textsuperscript{123} Furthermore, each source must undergo a lengthy permitting process with the local agency to ensure its compliance with the PSD requirements.\textsuperscript{124} EPA has estimated that each permit costs the regulated source an average of over $125,000 and requires the EPA (or the state environmental agency) to invest over 300 hours and $20,000.\textsuperscript{125}

\begin{flushleft}
\textsuperscript{117} Allen & Lewis, \textit{supra} note 4, at 923–24.
\textsuperscript{118} 42 U.S.C. §§ 7475(a), 7479(1) (2006).
\textsuperscript{119} Allen & Lewis, \textit{supra} note 4, at 923.
\textsuperscript{120} \textit{Id.} at 923–24.
\textsuperscript{121} \textit{Id.} This includes “office buildings, hotels, large retail stores, enclosed shopping malls, small manufacturing firms, and commercial kitchens.” \textit{Id.}
\textsuperscript{122} \textit{See} \textit{id.} at 924.
\textsuperscript{123} 42 U.S.C. § 7475(a) (4); Allen & Lewis, \textit{supra} note 4, at 924.
\textsuperscript{124} Allen & Lewis, \textit{supra} note 4, at 924.
\textsuperscript{125} \textit{Id.}
\end{flushleft}
III. The Regulatory Response: The Chain Reaction Generates Absurd Results

A. Advance Notice of Proposed Rulemaking

In the first official EPA response to the Massachusetts v. EPA decision, the EPA, under the outgoing George W. Bush administration, issued an advance notice of proposed rulemaking (ANPR), which noted the far-reaching implications of the Court’s ruling and solicited comments regarding the prospect of regulating greenhouse gases (GHGs) under the CAA. The EPA expressly noted the likelihood that the applicability of the Act to mobile sources would also trigger applicability of other CAA provisions to small stationary sources. Specifically, the EPA noted in the ANPR the high likelihood that, if the EPA were to issue an endangerment finding, it would immediately trigger PSD requirements for sources with the potential to emit more than 250 tons per year (tpy) of GHGs. Noting the harmful effects that regulating GHGs under these provisions would have on the American economy, the EPA in 2008 aligned itself emphatically against the idea.

[T]he Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations.

B. The Tailoring Rule and the Absurd Results Canon

1. The Tailoring Rule

The Obama administration did not take the concerns raised by the Bush administration in the ANPR lightly. In fact, the Obama administration echoed these concerns even more strongly, noting that “[i]f PSD . . . requirements apply at the applicability levels provided under

---

127 Id. at 44,355.
128 Id. at 44,367.
129 See id. at 44,355.
130 Id.
the CAA, State permitting authorities would be paralyzed by permit applications in numbers that are orders of magnitude greater than their current administrative resources could accommodate.”\textsuperscript{132} The EPA noted, as it did under its predecessor regime, that the number of sources regulated under the PSD Program would be astronomically high and overwhelm administrative resources.\textsuperscript{133} Specifically, the EPA estimated that per-year PSD permit applications would increase from 280 to approximately 41,000, a 140-fold increase.\textsuperscript{134}

Rather than denounce the CAA as an outdated and improper mode of regulating GHGs,\textsuperscript{135} however, on October 27, 2009, the EPA published a proposed rule that would alter and delay the applicability of the PSD Program for certain GHG emitters.\textsuperscript{136} To address the difficulties noted above, the proposed tailoring rule advocated a phasing approach to the application of the PSD Program to GHGs.\textsuperscript{137}

During Step I, beginning on January 2, 2011, no sources will be subject to regulation—and thus, subject to PSD permitting—based solely on GHG emissions.\textsuperscript{138} Instead, only sources that already require PSD permits based on their potential to emit non-GHG pollutants—so called “anyway sources”\textsuperscript{139}—must meet PSD permitting for GHGs.\textsuperscript{140} Furthermore, Step I only applies if the newly constructed facility will have the potential to emit at least 75,000 tpy of GHGs (or a modified facility, where the modification results in at least a 75,000 tpy emissions increase), measured in carbon dioxide equivalents (CO$_{2e}$).\textsuperscript{141}

The second step, which begins on July 1, 2011, accounts for GHG emissions standing alone when determining whether a source must apply for a PSD permit.\textsuperscript{142} In addition, after this date, a new source will be subject to PSD permitting requirements if it has the potential to emit 100,000 tpy of CO$_{2e}$ (or modification projects that increase potential

\textsuperscript{132} Id. (emphasis added).
\textsuperscript{133} Id. at 55,294.
\textsuperscript{134} Id. at 55,301.
\textsuperscript{137} Id.
\textsuperscript{138} See 40 C.F.R. § 52.21(b)(49)(iv) (2010).
\textsuperscript{140} See 40 C.F.R. § 52.21(b)(49)(iv).
\textsuperscript{141} Id. Note that CO$_{2e}$ are measured based on the global warming potential of each greenhouse gas. Id. § 52.21(b)(49)(ii).
\textsuperscript{142} Id. § 52.21(b)(49)(v).
GHG emissions by 75,000 tpy CO\textsubscript{2e} for an existing 100,000 tpy CO\textsubscript{2e}-emitting source).\textsuperscript{143} This is a significant relaxation of the normal statutory threshold of 250 tpy of any air pollutant.\textsuperscript{144}

Finally, the EPA noted in the Tailoring Rule that it would issue a supplemental notice of proposed rulemaking sometime in 2011 to address the potential applicability of the PSD provisions to smaller sources.\textsuperscript{145} The EPA will complete this rulemaking by July 2012 and it will go into effect in July 2013.\textsuperscript{146} The Agency made clear, however, that PSD regulations would not apply to sources with the potential to emit less than 50,000 tpy of CO\textsubscript{2e} until at least April 2016.\textsuperscript{147}

According to the EPA, this new, phased approach will not only significantly alleviate the financial burdens of the new rule (both on EPA and on regulated sources), but also will not comprise the overall goal of reducing GHG emissions.\textsuperscript{148} That is, even after the second step, only about 550 new sources—as opposed to tens of thousands\textsuperscript{149}—will come under regulation,\textsuperscript{150} while eighty-six percent of GHG emissions that would be reduced under a facial application will still be reduced under a tailored application of the statute.\textsuperscript{151}

2. Absurd Results: The Legal Basis for Rule

The key question that arises from the Tailoring Rule is, given the statutory language that defines a major stationary source as a factory with the potential to emit 250 tpy of any air pollutant subject to regulation under CAA,\textsuperscript{152} from where does the EPA derive the authority to rewrite this definition for the purpose of regulating GHGs? The answer, according to the EPA, comes from both agency discretion established in

\begin{itemize}
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} See 42 U.S.C. § 7479(1) (2006); 40 C.F.R. § 52.21(b) (49) (v).
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} 40 C.F.R. § 52.22(b) (2) (iii); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.
  \item \textsuperscript{149} See supra note 134 and accompanying text.
  \item \textsuperscript{150} Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,540, tbl.V1.
  \item \textsuperscript{151} See id. at 31,571.
  \item \textsuperscript{152} See supra notes 100–117 and accompanying text.
\end{itemize}
the wake of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*\(^{153}\) as well as the absurd results doctrine.\(^{154}\)

a. Chevron: *Agency Discretion in the Face of Legislative Silence*

The United States Supreme Court’s ruling in *Chevron* governs the level of review that courts exercise over agency legislative interpretation.\(^{155}\) The case lays out a two-part test for when agency interpretations are valid under the enabling legislation: (1) if Congress’s intent is clear, the agency (and the court when reviewing the agency’s decision) must give effect to that unambiguous intent, or (2) if Congress has not addressed the issue, however, or if its intent is ambiguous, then the agency may employ a permissible interpretation of the statute.\(^{156}\)

The Court further noted that Congress may delegate authority on a particular issue to an agency in implicit rather than explicit terms, and, in such cases, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”\(^{157}\) Finally, the Court observed a long judicial history of according considerable weight and deference to agency interpretations of the statutes it has been trusted to administer.\(^{158}\)

b. *Absurd Results*

By applying *Chevron* deference to the Tailoring Rule, the EPA invokes the absurd results doctrine to provide a legal justification for its decision to override the text of the statute and tailor the PSD Program to encompass GHGs.\(^{159}\) According to the clear text of the Act, the PSD provisions are applicable to any new or modified major source that emits more than 250 tpy of any air pollutant.\(^{160}\) Thus, under a traditional *Chevron* analysis, Congress did not afford discretion in its interpretation of the PSD applicability threshold because the statute was un-

---


\(^{155}\) Richardson, *supra* note 85, at 307.

\(^{156}\) *Chevron*, 467 U.S. at 842–43.

\(^{157}\) *Id.* at 843–44.

\(^{158}\) *Id.* at 844.


ambiguous.\textsuperscript{161} As commentators have noted, “there is nothing ambiguous about the 250 tpy standard already established under the Clean Air Act.”\textsuperscript{162} So how does the absurd results doctrine inject ambiguity into clear legislative text?

The absurd results doctrine, according to the EPA, stands for the proposition that “where a literal reading of a statutory term would lead to absurd results, the term simply has no meaning . . . and is the proper subject of construction by EPA and the courts.”\textsuperscript{163} In other words, if applying the literal meaning of legislation would produce a result that is senseless and is inconsistent with congressional intent, then “the literal meaning . . . should not be considered.”\textsuperscript{164} In such a case, the agency should proceed under the second prong of the \textit{Chevron} analysis—as if Congress had not addressed the issue or had done so ambiguously—applying a reasonable construction of the Act to the issue at hand.\textsuperscript{165}

The EPA feels that the CAA’s literal application to GHGs would be absurd, given the consequences.\textsuperscript{166} Specifically, the EPA posits that the agency structure would be so backlogged that it would be impossible to implement an effective permitting program.\textsuperscript{167} Thus, the EPA argues that it is free under \textit{Chevron} to implement its own interpretation of the Act—namely, to change the PSD applicability threshold from 250 tpy to 100,000 tpy—provided it acts reasonably in light of congressional intent.\textsuperscript{168}

IV. \textsc{Legal Challenges to EPA Action}

On September 15, 2010, after the EPA published its final Tailoring Rule, a group of industry representatives (the movants)—led by the Coalition for Responsible Regulation—filed a motion seeking to stay the implementation of the EPA rules.\textsuperscript{169} The movants, in a brief in support of their motion to stay, made two primary arguments that are important to this Note’s analysis. First, the movants argued that the en-

\textsuperscript{161} See \textit{Chevron}, 467 U.S. at 842–43.
\textsuperscript{162} Allen & Lewis, \textit{supra} note 4, at 931.
\textsuperscript{163} EPA’s Resp. to Mots. to Stay, \textit{supra} note 148, at 61 (internal quotation omitted).
\textsuperscript{165} See \textit{id}.
\textsuperscript{166} See \textit{id}.
\textsuperscript{167} See \textit{id}.
\textsuperscript{168} See \textit{id} at 31,516–17.
dangerment finding is not legally valid under the CAA. Second, the movants argued that the Tailoring Rule is without legal authority and is “[an] illegal solution[] to a legal problem of EPA’s own creation.”

A. Challenge to the Endangerment Finding

First, the movants argued that the EPA illegally sub-delegated their authority to outside agencies to conduct the scientific analysis underpinning the endangerment finding. Specifically, they contended that section 202(a) of the CAA requires the EPA Administrator to issue an endangerment finding when, in the Administrator’s judgment, the pollutants may reasonably be anticipated to endanger public health or welfare. In issuing the endangerment finding, however, the EPA primarily relied on outside studies by the Intergovernmental Panel on Climate Change (IPCC) to form the basis of its scientific analysis. Thus, according to the movants in this case, the EPA Administrator did not exercise the Administrator’s own judgment, and thus the EPA’s issuance of the endangerment finding was outside the grant of authority in the statute.

B. Challenge to the Tailoring Rule

The movants also challenged the Tailoring Rule, contending that the EPA’s invocation of the absurd results doctrine is an arbitrary and capricious answer to a problem it created through an initial misreading of the CAA. Specifically, the movants argued that the PSD provisions in the CAA were meant only to apply to the criteria pollutants already defined in 1977, the time of passage, and not to future criteria pollutants or any other emissions. They asserted that the correct interpretation of the language “each pollutant subject to regulation under this chapter” contained in the Prevention of Significant Deterioration (PSD) provisions is a present-tense interpretation applicable only to pollutants contemplated by the 1977 Act. Thus, under their reading of the statute, regulation of greenhouse gases (GHGs) from vehicle

170 *Id.* at 23–24.

171 *Id.* at 47–56.

172 *Id.* at 24–29.

173 *Id.* at 24–25.

174 *Id.*


176 *Id.* at 48–49.

177 *See id.* at 49–50.

178 *Id.* at 50.
emissions would not trigger the applicability of the PSD provisions at all.\textsuperscript{179} Such a reading would render the invocation of the absurd results doctrine unnecessary.\textsuperscript{180}

In other words, the movants argued that the EPA created the absurd results themselves by refusing to follow the unambiguous reading of the statute.\textsuperscript{181} The movants further argued that by applying the PSD provisions to GHGs—an act that they were without authority to do—the EPA unlawfully created the absurd result that, as the EPA claimed, gave it authority to ignore the plain text of the Act.\textsuperscript{182} “EPA cannot create its own administrative necessity by ignoring one provision of the Act, and then solve that manufactured necessity by ignoring another.”\textsuperscript{183}

V. Absurd Results? Not So Absurd After All

The movants’ arguments in \textit{Coalition for Responsible Regulation v. EPA}, presents strong challenges to the legal authority underlying EPA’s Tailoring Rule.\textsuperscript{184} The Court’s decision in \textit{Massachusetts v. EPA}, however, set in motion a mandatory chain of greenhouse gas (GHG) regulation under the CAA, which, given the congressional intent behind the Act and the EPA’s role in implementing it, make the EPA’s actions both legally justified and mandatory.\textsuperscript{185}

A. The Endangerment Finding and Applicability of the PSD Provisions Were Mandated by Massachusetts v. EPA and Legislative Intent

First, the movants argued that the EPA was not legally authorized to issue an endangerment finding.\textsuperscript{186} This argument, however, is foreclosed by the legislative history of the Act, by the Act’s broad language, and by long-standing precedent, including \textit{Massachusetts v. EPA}.\textsuperscript{187}

1. The Evolution of a Flexible Statute

The precedent and legislative history surrounding the CAA urges a forward-looking, precautionary, and flexible approach to its applica-

\begin{itemize}
  \item \textsuperscript{179} \textit{See id.}
  \item \textsuperscript{180} \textit{Id.} at 53–54.
  \item \textsuperscript{181} \textit{See Mot. for Stay, supra} note 169, at 53–54.
  \item \textsuperscript{182} \textit{Id.} at 48–54.
  \item \textsuperscript{183} \textit{Id.} at 53.
  \item \textsuperscript{184} \textit{See id.} at 47–56.
  \item \textsuperscript{185} \textit{See supra} notes 66–125 and accompanying text.
  \item \textsuperscript{186} \textit{Mot. for Stay, supra} note 169, at 23–35.
  \item \textsuperscript{187} \textit{See discussion infra} notes 188–212 and accompanying text.
\end{itemize}
tion. First, in *Ethyl Corporation v. EPA*, the D.C. Circuit noted that the language of CAA and related judicial interpretations manifests its precautionary nature and provides the EPA with discretion—and, in fact, a mandate—to regulate to “precede, and, optimally, prevent, the perceived threat.” The court further noted that in the case of precautionary statutes such as the CAA, and where scientific evidence is uncertain and cutting-edge, the EPA need not provide “rigorous step-by-step proof of cause and effect,” but instead must only make a reasonable judgment based on the available science that the pollutant will endanger public health or welfare.

The legislative history of the CAA confirms the D.C. Circuit’s analysis. In 1977, Congress amended the CAA to codify the court’s holding in *Ethyl*. Specifically, Congress amended endangerment language in the Act, changing “which endangers” to “which may reasonably be anticipated to endanger” to solidify the EPA’s broad discretion when regulating under such a forward-looking, precautionary statute.

2. The Mandate of *Massachusetts v. EPA*

The Court in *Massachusetts v. EPA* clearly stated that the EPA must take action toward regulating GHGs under the CAA or provide a statutory justification for not doing so. Specifically, the Court mandated that the EPA take one of three courses of action: (1) issue an endangerment finding; (2) “issue a finding of no endangerment;” or (3) provide a “reasonable explanation” for its decision not to act. Although the EPA ultimately chose the first option, based on the Court’s opinion and the language of the Act, it was more a requirement than choice.

First, the language of the statute, when considered in light of judicial precedent, ensures that option two is not viable. As is clear from case law, the EPA has broad authority and, in fact, a mandate to regulate preventatively in the face of uncertain science. Also, the language of the Act clearly establishes that weather and climate effects are

---

188 See supra notes 41–49 and accompanying text.
189 See *541 F.2d* 1, 13 (D.C. Cir. 1976).
190 Id. at 28.
192 See *id*.
193 See *id*.
194 See *id*. at 532–33.
195 Id. at 533; Allen & Lewis, supra note 4, at 921.
196 See 42 U.S.C. § 7408(a) (2006); *Ethyl Corp.*, 541 F.2d at 13, 28
197 See *Ethyl Corp.*, 541 F.2d at 13, 28.
included in the possible harms to public welfare that may be considered in an endangerment finding.\textsuperscript{198}

Second, the Supreme Court’s explanation of the extent of the EPA’s judgment in whether or not to act effectively removes the viability of the third option.\textsuperscript{199} The Court noted that “the use of the word ‘judgment’ is not a roving license to ignore the statutory text.”\textsuperscript{200} Instead, the only discretion that the EPA possesses is whether GHG emissions “cause[], or contribute[] to, air pollution which may reasonably be anticipated to endanger public health or welfare.”\textsuperscript{201}

Furthermore, the Court makes clear that declining to regulate for external reasons, such as political circumstances or scientific uncertainty, are not valid uses of the EPA’s discretion.\textsuperscript{202} The only question, the Court notes, is “whether sufficient information exists to make an endangerment finding.”\textsuperscript{203} Given the circumstances surrounding the case, this question could only be answered in the affirmative.\textsuperscript{204} Thus, the EPA may not simply decline to consider the issue of climate change under the Act.\textsuperscript{205}

3. The Appropriateness of the Endangerment Finding

Finally, contrary to the movants’ arguments in \textit{Coalition for Responsible Regulation v. EPA}, the EPA acted appropriately in relying on IPCC research regarding climate change and did not impermissibly subdelegate its authority to the IPCC.\textsuperscript{206} Although an agency may not simply rubber stamp the research and reports of an external entity, it may utilize these reports in forming its own opinion.\textsuperscript{207}

The agency did not blindly approve the scientific articles on which it based the endangerment finding.\textsuperscript{208} Instead, it conducted an in-depth analysis of the IPCC findings, considering the foundation, con-

\textsuperscript{198} 42 U.S.C. § 7602(h).
\textsuperscript{199} \textit{Massachusetts v. EPA}, 549 U.S. at 532–33.
\textsuperscript{200} Id. at 533.
\textsuperscript{201} See id. at 532–33.
\textsuperscript{202} See id. at 533–34.
\textsuperscript{203} See id. at 534.
\textsuperscript{204} See supra notes 188–193 and accompanying text.
\textsuperscript{205} See \textit{Massachusetts v. EPA}, 549 U.S. at 534.
\textsuperscript{207} See \textit{U.S. Telecom Ass’n v. FCC}, 359 F.3d 554, 568 (D.C. Cir. 2004).
\textsuperscript{208} EPA’s Resp. to Mots. to Stay, supra note 148, at 30–31.
sensus, and trends of the scientific information, and reexamined these findings in light of public comment.209

Furthermore, as the D.C. Circuit noted in *Ethyl*, the EPA has a duty to regulate in a preventative manner under the CAA when faced with cutting-edge issues and uncertain science.210 Therefore, even if the EPA itself could not find conclusive evidence of human-generated climate change, it still retained the responsibility to regulate in a reasonable manner to prevent the possibility of harm.211 Furthermore, as the EPA noted in the endangerment finding, the science was far from uncertain—rather, the evidence that GHGs endangered human health and welfare was compelling.212

**B. The Tailoring Rule Is a Permissible Interpretation of the CAA and a Permissible Application of the Absurd Results Doctrine**

Opponents of the Tailoring Rule claim that it is without authority under the Act and could have been avoided by a different construction of the statute.213 The Court’s decision in *Massachusetts v. EPA*, however, and the regulatory cascade that followed made clear that there was no alternative construction.214 Furthermore, judicial deference to agency interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* provides strong legal support for the Tailoring Rule.215

1. PSD Applicability to GHGs Was Mandatory

The movants argued that the text of the Act was meant to apply only to pollutants subject to regulation at the time the PSD provisions were passed in 1977.216 The D.C. Circuit in *Alabama Power Co. v. Costle*, however, held that the terms of the PSD provisions apply “extremely broadly” to sources that emit more than a certain threshold of “any air pollutant.”217 In fact, the court found that the provisions apply to major

209 *Id*.; see Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,523–36.
210 *Ethyl Corp.*, 541 F.2d at 13, 28.
211 See *id*.
212 Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,497.
213 See *Mot. for Stay, supra* note 169, at 48–54.
214 See discussion *infra* notes 216–228 and accompanying text.
215 See discussion *infra* notes 229–240 and accompanying text.
216 *Mot. for Stay, supra* note 169, at 49–50. The only pollutants subject to regulation at the time of passage were two criteria pollutants—sulfur dioxide and particulate matter. *Id*.
217 636 F.2d 323, 352 & n.60 (D.C. Cir. 1979).
emitting facilities for each pollutant that is regulated under any section of the CAA.218

Indeed, since the decision in Alabama Power, the EPA’s regulations have applied the provisions of the Act quite broadly—to any pollutant properly subject to regulation.219 The EPA further defines “subject to regulation” as “subject to . . . a provision in the Clean Air Act . . . that requires actual control of the quantity of emissions of that pollutant.”220 In other words, the regulations promulgated under the PSD provisions, reflecting judicial precedent, have made clear that the phrase “any air pollutant” broadly encompass any pollutant that is subject to actual control under any provision of the CAA.221 This is clearly not limited to criteria pollutants or pollutants that were subject to regulation at the time of the 1977 enactment.222

Therefore, as soon as the EPA passed rules governing the emission of GHGs for vehicle tailpipe emissions under section 202(a), GHGs became subject to actual control for the purposes of the PSD provision.223 At that time, according to the clear regulatory language and longstanding practice, GHGs were also covered under the PSD provision of the CAA.224 Thus, the movants’ contention that the EPA’s invocation of the absurd results doctrine was based on a misreading of the PSD provisions of the Act was, itself, based on a misreading of the Act.225 Movants argue:

[i]t makes no sense to conclude that a pollutant regulated for one purpose (tailpipe standards), from one category of sources (cars), under one title of the statute (Title II), based on one set of findings (under Section 202(a)), automatically must be regulated for an entirely different purpose (permitting programs), under a totally different regulatory scheme (Titles I and V),

218 Id.
219 See 40 C.F.R. § 52.21(b) (50) (2010). The provisions of the Act apply to any “major stationary source,” which is analogous to the definition of “major emitting facility” in the text of the Act itself. 40 C.F.R. §§ 52.21(a)(2)(i), (b) (1) (i) (b); see 42 U.S.C. § 7479(1) (2006). The EPA defines the term “major stationary source” as any source that has the potential to emit 250 tpy or more of any “regulated NSR pollutant.” 40 C.F.R. § 52.21(b) (1) (i) (b). It then goes on to define “regulated NSR pollutant” as any pollutant that is “otherwise . . . subject to regulation under this act.” Id. § 52.21(b) (50) (iv).
220 Id. § 52.21 (b) (49).
221 Id.; see Alabama Power, 636 F.2d at 352 & n.60.
222 See 40 C.F.R. § 52.21(b) (49).
223 See id.
224 See supra note 219 and accompanying text.
225 See Mot. for Stay, supra note 169, at 49–51; supra note 216 and accompanying text.
when emitted from a wholly separate category of sources (sta-
tionary).\textsuperscript{226}

The very opposite is true.\textsuperscript{227} The movants’ argument that the Tailoring Rule could have been avoided by a different construction of the Act is flawed because there was no other possible construction of the CAA—the applicability of the PSD provisions to GHGs was mandatory.\textsuperscript{228}

2. The Absurd Results Doctrine Is Consistent with \textit{Chevron} and Its Invocation Is Entitled to Deference

In their brief, the movants claimed that the EPA’s invocation of the absurd results doctrine was outside of its authority because the language of the statute is clear.\textsuperscript{229} According to this line of reasoning, the movants argued, the court should uphold the unambiguous nature of the statute.\textsuperscript{230} Some legal commentators have echoed this argument, noting that the EPA possesses discretion in interpreting the statute only when the text of the statute does not address an issue or does so ambiguously.\textsuperscript{231} “[T]here is nothing ambiguous,” these scholars argue, “about the 250 tpy standard already established under the Clean Air Act.”\textsuperscript{232}

A closer reading of \textit{Chevron}, however, manifests the flaw in this logic.\textsuperscript{233} \textit{Chevron} stood for the proposition that agencies enjoy wide discretion when the congressional intent is not clear from the statutory text.\textsuperscript{234} Thus, simply because the text of the legislation is clear on its face, it does not necessarily follow that congressional intent is clear when applying that text to a problem that Congress could never have anticipated.\textsuperscript{235} To understand congressional intent, one must look past the text of the statute and to its objectives and other policy considerations.”\textsuperscript{236}

\textsuperscript{226} Motion for Stay, \textit{supra} note 169, at 54–55.
\textsuperscript{227} \textit{See supra} note 219 and accompanying text.
\textsuperscript{228} \textit{See supra} note 219 and accompanying text.
\textsuperscript{229} \textit{See Mot. for Stay, supra} note 169, at 47.
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} Allen & Lewis, \textit{supra} note 4, at 930–31.
\textsuperscript{232} \textit{Id.} at 931.
\textsuperscript{234} \textit{Id.} (emphasis added).
\textsuperscript{235} \textit{See id.}
\textsuperscript{236} Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1067–68 (D.C. Cir. 1998) (quoting Pi-
lot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).
This is precisely what motivated EPA’s drafting of the Tailoring Rule. Rather than focus on the clear words of the statute—the 250 tpy threshold for PSD applicability—the EPA realized that these words would not represent congressional intent when applied to GHGs. The PSD Program was not meant to apply to small sources of air pollutants, but instead, only to the truly large emitters that presented the potential to generate serious harm to the nation’s pristine air quality regions. Thus, an approach that exempted smaller sources, but still applied the program to larger sources was reasonable—and arguably necessary—to uphold congressional intent.

3. Absurd but Necessary: The EPA’s Actions Were the Only Legally Permissible Means to Uphold Congressional Intent

Not only did Chevron provide a legal justification for the EPA’s action, but the context surrounding the decision made clear that invocation of the Chevron doctrine was the only legally justifiable option. On the one hand, the EPA could not ignore the Court’s clear instruction to act, the compelling evidence that GHGs endanger human health and welfare, and the regulatory cascade that such a finding generated. On the other hand, the EPA could not apply the clear language of the PSD provision to GHGs because such action would override congressional intent.

Clear precedent interpreting the CAA, its legislative history, and the Supreme Court’s decision in Massachusetts v. EPA all reinforce the conclusion that the CAA is a flexible, precautionary statute and the EPA’s mandate was to regulate in a preventative manner so as to anticipate future harms. Furthermore, the Court stated that the fact that

238 See id.
239 Alabama Power, 636 F.2d at 353.
242 See discussion supra notes 184–228 and accompanying text.
244 See supra notes 188–193 and accompanying text.
Congress did not contemplate PSD applicability to GHGs does not bear at all upon whether it was intended to address them.\textsuperscript{245}

While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.\textsuperscript{246}

Thus, the EPA faced three important considerations with respect to the CAA’s application to GHGs: (1) the regulation of motor vehicle emissions mandated PSD applicability to GHGs;\textsuperscript{247} (2) Congress clearly did not intend the PSD Program to be applicable to small sources, such as the ones that would emit 250 tpy of GHGs;\textsuperscript{248} and (3) Congress clearly did intend for the EPA to have discretion to apply the CAA to novel circumstances and regulate preventatively to anticipate future harms.\textsuperscript{249}

In the face of these three truths, the EPA’s only legally viable choice was to tailor the PSD threshold—applying the PSD Program to GHGs, as was legally mandated, while exempting smaller sources that Congress clearly did not intend to include.\textsuperscript{250}

When viewed from this angle, criticism of the EPA’s action is turned on its head. Assertions that “Congress did not intend to apply PSD . . . to small entities, did not intend for those programs to crash under their own weight, and did not intend for PSD to stifle economic growth” actually supports the EPA’s tailoring of the PSD applicability thresholds.\textsuperscript{251} It is precisely because Congress did not intend the PSD provisions to apply to small entities that congressional intent with respect to GHGs is unclear.\textsuperscript{252} Thus, under \textit{Chevron}, the EPA is well within its legal authority to employ an interpretation that is reasonable.\textsuperscript{253} Moreover, the EPA must do so because the alternative would apply the PSD provisions of the CAA to millions of small sources, which would

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{245} \textit{Massachusetts v. EPA}, 549 U.S. at 532.
  \item \textsuperscript{246} \textit{Id}.
  \item \textsuperscript{247} See supra notes 213–228 and accompanying text.
  \item \textsuperscript{248} See supra notes 237–240 and accompanying text.
  \item \textsuperscript{249} See supra notes 188–193 and accompanying text.
  \item \textsuperscript{250} See supra notes 184–240 and accompanying text.
  \item \textsuperscript{251} See Allen & Lewis, supra note 4, at 933.
  \item \textsuperscript{253} See \textit{Chevron}, 467 U.S. at 843; \textit{supra} notes 238–240 and accompanying text.
\end{itemize}
\end{footnotesize}
paralyze businesses and permitting authorities and clearly undermine the intent of Congress.\textsuperscript{254}

**Conclusion**

The landmark Supreme Court decision in *Massachusetts v. EPA* drastically changed the way the CAA dealt with GHGs.\textsuperscript{255} The Court itself, however, could never have anticipated or intended the regulatory consequences that its ruling generated.\textsuperscript{256} The Court’s holding mandated the EPA’s endangerment finding, which in turn mandated the promulgation of a rule regulating GHG emissions from vehicles, which in turn sparked the applicability of the CAA’s PSD Program to stationary source GHG emitters.\textsuperscript{257}

The EPA faced a perilous choice. On the one hand, it could employ a literal application of the PSD Program—requiring any new source with the potential to emit more than 250 tpy of GHGs to apply for a PSD permit before construction—paralyzing permitting authorities and potentially destroying the U.S. economy.\textsuperscript{258} On the other hand, the EPA could choose not to regulate GHGs under the PSD provision of the Act.\textsuperscript{259} Both decisions, if implemented, would violate the congressional intent underlying the CAA.\textsuperscript{260}

Thus, the EPA chose neither.\textsuperscript{261} Instead, it tailored the PSD applicability threshold from 250 tpy to 100,000 tpy, drastically rewriting the provision to specially account for GHGs.\textsuperscript{262} While at first glance this appears to be an abuse of agency discretion, on closer examination, the EPA’s action seems consistent with the principles enumerated in *Chevron*.\textsuperscript{263} Furthermore, it seems to be a well-reasoned decision, which furthers the EPA’s long-established preventative role in implementing the CAA.\textsuperscript{264}

\textsuperscript{254} See supra notes 237–240 and accompanying text.
\textsuperscript{255} See supra notes 67–125 and accompanying text.
\textsuperscript{256} See supra notes 82–85 and accompanying text.
\textsuperscript{257} See supra notes 241–254 and accompanying text.
\textsuperscript{258} See supra notes 117–125 and accompanying text.
\textsuperscript{259} See supra notes 103–116 and accompanying text.
\textsuperscript{260} See supra notes 241–254 and accompanying text.
\textsuperscript{261} See supra notes 241–254 and accompanying text.
\textsuperscript{262} See supra notes 131–168 and accompanying text.
\textsuperscript{263} See supra notes 213–254 and accompanying text.
\textsuperscript{264} See supra notes 186–193 and accompanying text.