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SAFEGUARDING WATER QUALITY IN FEDERAL LICENSING DECISIONS: CALIFORNIA'S RESPONSE TO RECENT CONSTRAINTS ON CLEAN WATER ACT SECTION 401 CERTIFICATION AUTHORITY

KRISTIN PEER[1] *AND STACY GILLESPIE*[2]

I. INTRODUCTION

Pursuant to Clean Water Act section 401, state water quality certification authority to regulate federally-licensed energy projects has been relatively well settled for decades. Long-standing precedents from the U.S. Supreme Court, other federal courts, the U.S. Environmental Protection Agency ("U.S. EPA"), and implementation of certification authority by the states, have repeatedly reinforced the cooperative federalism principle of the Clean Water Act: state section 401 certification authority is essential to preserve the states' ability to address a wide

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range of pollution problems caused by federally-permitted energy facilities.

In recent years, however, state section 401 certification authority has come under siege in the courts, by the Federal Energy Regulatory Commission ("FERC"), and through federal rule changes.

Commencing in 2019 with *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* ("*Hoopa Valley*"), the U.S. Court of Appeals for the District of Columbia found that the states of California and Oregon had waived their authority to issue water quality certifications for a large hydroelectric project on the Klamath River by failing to act within one year—despite the applicant's timely "withdrawal-and-resubmission" of its 401 certification requests.[3] In doing so, the court upended a common practice used by certification applicants nationwide to avoid a premature denial or waiver owing to the one-year statutory deadline within which states must act.[4]

The case has had wide-reaching effects. FERC has applied *Hoopa Valley* broadly and, in many instances, expanded its holding, resulting in multiple states, including California, having their authority to issue water quality certifications and impose conditions on federally-licensed energy projects deemed waived by FERC. The practical effect of these waiver decisions is that states may have lost their sole regulatory tool to protect water quality from impacts of these energy projects for as much as 40 to 50 years.

Further restricting state authority to assure impacts from FERC-licensed facilities comply with pertinent water quality requirements, in 2019, the Trump Administration's U.S. EPA finalized a new Clean Water Act Section 401 Certification Rule ("Certification Rule"), radically narrowing the scope of state certification authority and placing new procedural limitations on that authority.

This Article examines the interrelationship of the Federal Power Act and the Clean Water Act with respect to states' duties to protect water quality. It then explores how section 401 is being redefined by the *Hoopa Valley* decision and U.S. EPA's Certification Rule, and discusses the State of California's response to those recent events. Ultimately, it remains to be seen whether the numerous legal challenges currently underway to test the legality of the federal agency actions will succeed in

[3] Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n (*Hoopa Valley*), 913 F.3d 1099, 1105 (D.C. Cir. 2019). This paper will use "Fed. Energy Regul. Comm'n and "FERC" interchangeably to provide the commonly accepted case names in citations.

[4] 33 U.S.C. § 1341(a)(1).

re-aligning the states' ability to regulate water quality within their borders.[5]

II. The Federal Power Act and Clean Water Act Interrelationships

The scope of state water quality certification authority under Clean Water Act section 401 can best be understood by reviewing the interrelationships of the Federal Power Act and the Clean Water Act and the way in which courts have construed those authorities.

A. The Federal Power Act

Congress exercised its Commerce Clause authority over development of the nation's water resources through the Federal Power Act, to be administered by the Federal Power Commission, FERC's predecessor agency.[6] The Federal Power Act manifests its congressional intent for "a broad federal role in the development and licensing of hydroelectric power."[7] For example, section 4(e) of the Act authorizes FERC to issue licenses for any hydroelectric project "necessary or convenient [. . .] for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction" to regulate commerce.[8] "These sources of constitutional authority are all applied in the Federal Power Act to the development of the navigable waters of the United States" and "leaves to the states their traditional jurisdiction subject to the admittedly superior right" vested with FERC through the Act.[9] The Federal Power Act's wide preemptive reach informs the scope of state section 401 authority under the Clean Water Act.[10]

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[5] The analysis in this Article is current through March 14, 2021 and does not reflect factual or legal developments beyond that date.

[6] First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n (*First Iowa*), 328 U.S. 152, 171-72 (1946).

[7] California v. Fed. Energy Regul. Comm'n (*Rock Creek*), 495 U.S. 490, 496 (1990).

[8] 16 U.S.C. § 797(e).

[9] *First Iowa*, 328 U.S. at 171-72 (1946).

[10] The doctrine of preemption is derived from the Supremacy Clause of the United States Constitution (art. VI., cl. 2) which states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

B. The Clean Water Act

The Water Pollution Control Act of 1972, as amended,[11] commonly known as the Clean Water Act, is a comprehensive federal statutory scheme governing water pollution impacting the nation's surface waters. It is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[12] It was also enacted to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife."[13] Those ambitious goals are achieved through a cooperative federalism model whereby distinct roles are established for the federal and state governments.[14]

With respect to the regulatory programs established by the Clean Water Act, U.S. EPA, among other responsibilities, issues technology-based effluent guidelines that establish discharge standards for certain pollutants based on treatment or pretreatment technologies.[15] For example, U.S. EPA is required to set standards for new point sources,[16] for toxic discharges,[17] and to establish pretreatment standards.[18] U.S. EPA also publishes the national priorities list of toxic pollutants.[19] And U.S. EPA develops national water quality criteria recommendations for pollutants in surface waters for the protection of aquatic life and human health.[20] Those criteria provide guidance for states to use to establish water quality standards for controlling discharges of pollutants.[21]

Under the Clean Water Act, states are required to establish water quality standards.[22] Water quality standards consist of designated uses of a waterbody,[23] numeric or narrative water quality criteria,[24] and antidegradation requirements to protect existing uses and high quality wa-

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[11] 33 U.S.C. §§ 1251-1388.

[12] 33 U.S.C. § 1251(a).

[13] 33 U.S.C. § 1251(a)(2).

[14] Am. Farm Bureau Fed'n v. U.S. EPA, 792 F.3d 281, 287 (3rd. Cir., 2015).

[15] 33 U.S.C. §§ 1314, 1316, 1317.

[16] 33 U.S.C. § 1316(b)(1)(B).

[17] 33 U.S.C. § 1317(a)(2).

[18] 33 U.S.C. § 1317(b).

[19] 33 U.S.C. § 1317(a).

[20] 33 U.S.C. § 1314(a).

[21] 33 U.S.C. § 1314(a)(3), (7).

[22] 33 U.S.C. § 1313(b). U.S. EPA also has authority to establish water quality standards for a state under certain conditions. 33 U.S.C. § 1313(b).

[23] "Designated uses," must include, among others, recreation and protection and propagation of fish (commonly referred to as the Act's "fishable and swimmable" goals). 33 U.S.C. § 1251(a); *see* 40 CFR § 131.3(f) (defining "designated uses"). In California, designated uses are called "beneficial uses" and water quality criteria are called "water quality objectives." *See generally*, Cal. Wat. Code § 13050(f), (h) (describing beneficial uses and defining water quality objectives).

[24] *See* 40 CFR § 131.3(b) (defining criteria as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of

ters.[25] Water quality standards serve as the backstop to the federally established technology-based limitations by indicating whether additional control requirements are needed to achieve the goals of the Act.

Each state is also required to develop a nonpoint source management program which identifies categories of nonpoint sources that add significant pollution to navigable waters and develop best management practices that will be undertaken to reduce the pollutant loadings.[26]

Consistent with its role as the agency in California authorized to exercise power delegated to it under the Clean Water Act,[27] the State Water Resources Control Board ("State Water Board") administers the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), which establishes a comprehensive statutory program for water quality control.[28] California's nine Regional Water Quality Control Boards have primary responsibility for the adoption of water quality control plans for all waters within their respective regions.[29] Water quality control plans consist of the designation of the beneficial uses to be protected, water quality objectives, and a program of implementation to achieve water quality objectives.[30] The State Water Board may also adopt water quality control plans for waters for which water quality standards are required by the Clean Water Act.[31] The beneficial uses together with the water quality objectives contained in the water quality control plans constitute state water quality standards. In waters where water quality standards are not met, the Clean Water Act requires states to develop total maximum daily loads (TMDLs) of pollutants and levels necessary to ensure the water quality standards can be achieved and maintained.[32] TMDLs are one strategy to attain water quality objectives (with seasonal variations and a margin of safety).[33]

The Clean Water Act envisions and retains the robust role of the states to implement the Act to correspond with their traditional jurisdic-

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water that supports a particular use. When criteria are met, water quality will generally protect the designated use.").

[25] 40 CFR § 131.12; *see* U.S.C. §§ 1312(a) (expressing a principal goal of the Clean Water Act to "maintain" the water quality of the nation's waters), 1313(d)(4)(B) (antidegradation requirements must be satisfied before taking certain actions, including revising effluent limitations and water quality standards).

[26] 33 U.S.C. § 1329.

[27] CAL. WATER CODE § 13160.

[28] CAL. WATER CODE, Div. 7, §§ 13000-16104.

[29] CAL. WATER CODE §§ 13240, 13260, 13263.

[30] CAL. WATER CODE § 13050(j)(1)-(3).

[31] CAL. WATER CODE § 13170.

[32] 33 U.S.C. §§ 1313(d).

[33] 33 U.S.C. § 1313(d)(1); 40 CFR §§ 130.7(b)(1) and (c)(1); CAL. WATER CODE § 13242 (requires a program of implementation to achieve objectives).

tion over land and water resources within their borders.[34] It adds that "[e]xcept as expressly provided" in this Act, nothing shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters" of such states.[35]

C. The Federal Power Act Does Not Preempt State Authority in Several Limited Circumstances

While Congress gave broad and exclusive grant of authority to FERC over hydroelectric projects through the Federal Power Act—there is no preemptive effect where Congress intends the state to have concurrent or exclusive regulatory authority. Of the limited circumstances in which the Federal Power Act does not preempt state authority,[36] this Article briefly touches on the subjects that remain under the jurisdiction of states (recognized by section 27 of the Federal Power Act) and more extensively discusses the powers Congress vested to states in other federal law—Clean Water Act section 401.

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[34] *See* 33 U.S.C. § 1251(b) (expressly providing that the Clean Water Act seeks to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .").

[35] 33 U.S.C. § 1370.

[36] The major circumstances in which the Federal Power Act does not preempt state regulatory authority over hydroelectric projects include: Circumstances where other federal laws apply, including Clean Water Act sections 401 and 404, the state may regulate federally licensed FERC facilities in accordance with that authority. The Federal Power Act section 27 preserves limited state water right authority over FERC-licensed projects. State authority over consumptive use or other non-hydroelectric power use rights, such as irrigation or municipal use rights is also explicitly saved by section 27 of the Federal Power Act. County of Amador v. El Dorado Cty. Water Agency, 76 Cal. App. 4th 931 (1999); Corrected State Water Resources Control Board Order WR 2008-0014 at p. 31. State regulation of rates and services is expressly preserved under section 20 of the Federal Power Act. 16 U.S.C. § 812. State law actions for money damages are preserved under section 10(c) of the FPA. 16 U.S.C. § 803(c). Additionally, under the self-governance exception to preemption, states retain authority over state agencies and political subdivisions as owners or operators of FERC licensed hydroelectric facilities. *See* Friends of the Eel River v. N. Coast R.R. Auth., 3 Cal. 5th 677, 723-75 (2017), *cert. denied* (2018) (finding that there is no encroachment of the federal regulatory domain by a state law that is otherwise not inconsistent with the federal regulation when applied to a state entity); Corrected State Water Resources Control Board Order WR 2008-0014 at p. 31. States also have their full authority over hydroelectric projects that are not subject to FERC licensing, including federal facilities and federally authorized projects, which are exempt from regulation under the Federal Power Act. *See* Uncompahqre Valley Water Users Ass'n v. Fed. Energy Regul. Comm'n*,* 785 F.2d 269, 274-75 (10th Cir. 1986) (holding a specific statute authorizing the Secretary of the Interior to contract with entities for the development and sale of surplus water necessary for irrigation takes precedence over the general grant of authority in the Federal Power Act which would otherwise control).

1. Federal Power Act Section 27 Preserves Limited State Water Right Authority over FERC-Licensed Projects

While the Federal Power Act grants exclusive licensing power to FERC, Section 27 of the Federal Power Act expressly *saves* to the states certain water rights authority.[37] The reserved authority is limited to "state authority over the control, appropriation and use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."[38] The United States Supreme Court has unequivocally construed the language in the aforementioned savings clause as limited to preserving to the states' exclusive authority over application of property rights in water.[39]

In *First Iowa*, the Supreme Court held that the hydroelectric power project applicant was not required to obtain a permit for the same project under state law, as mandated by state law, because that law was not among the subjects saved to states in section 27.[40] The Court narrowly construed the phrase "or other uses" as "confined to rights *of the same nature* as those relating to the use of water in irrigation or for municipal purposes."[41] The Court viewed the phrase "or any vested right acquired therein" as underscoring the nature of the rights saved for the states as those related to propriety rights.[42]

In *Rock Creek*,[43] the Supreme Court rejected the State Water Board's argument that the minimum instream flow requirement established under state water rights authority is related to the category of subjects preserved to states under section 27 "to the control, appropriation, use, or distribution of water used [. . .] for [. . .] other uses."[44] Applying

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[37] Section 27 provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821.

[38] 16 U.S.C. § 821.

[39] First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n (*First Iowa*), 328 U.S. 152, 175-76 (1946); California v. Fed. Energy Regul. Comm'n (Rock Creek), 495 U.S. 490, 506 (1990).

[40] *First Iowa*, 328 U.S. at 182. The Court rejected the state's argument that the language in Section 9(b) of the FPA (16 U.S.C. § 802(b)) "to engage locally in the business of developing, transmitting and distributing power," recognized dual control over permitting power projects. The Court held that the state law requirements to obtain a permit for a hydroelectric power project conflict with those of the Federal Power Act; requiring compliance with the state law would subvert the comprehensive purpose of the Federal Power Act Congress intended to vest in the predecessor of FERC and were, therefore, superseded. *Id*. at 178-82.

[41] *First Iowa*, 328 U.S. at 175-76 (emphasis added).

[42] *Id*.

[43] California v. Fed. Energy Regul. Comm'n (*Rock Creek*), 495 U.S. 490 (1990).

[44] *Id*. at 497-98.

First Iowa's limited reading of section 27, the Court held that California's instream flow requirements were not "saved" to the states because they have nothing to do with "proprietary rights" or "rights of the same nature as those relating to the use of water in irrigation or for municipal purposes."[45]

Because Congress has granted to FERC the exclusive regulatory authority over licensing of hydroelectric projects, the extent of state authority over single purpose FERC-licensed projects is limited under the Federal Power Act to that which was expressly reserved to the states—proprietary water rights.[46] To be clear, that means that for single-purpose hydroelectric projects, the State Water Board is prohibited from utilizing its Porter-Cologne Act authority or its water rights authority to administer water quality control or protect environmental quality under section 27.[47]

2. *Clean Water Act Section 401 Authorizes State Water Quality Certification Authority Over FERC-Licensed Projects*

While the Federal Power Act generally preempts state law over FERC-licensed, single-purpose hydroelectric projects, it does not preempt application of other federal laws. Pursuant to authority provided by other federal statutes, the states may regulate federally licensed FERC facilities in accordance with that authority.[48]

The Clean Water Act gives states,[49] in section 401, authority to grant, grant with conditions, deny, or waive water quality certifications before a federal license or permit is issued for activities that could result

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[45] *Id.* at 498 (quoting *First Iowa*, 328 U.S. 152, at 176). The Court held that FERC had the exclusive authority to set minimum flows to remain in the bypassed section of the stream necessary to protect fish and the more stringent flows contained in the water right permit issued by the State Water Board pursuant to state law were invalid, reasoning that any other interpretation would give states veto power over FERC's licensing powers under the Act. *Id.* at 506-07.

[46] *Id.* at 494-98.

[47] Karuk Tribe of Northern California v. California Reg'l Water Quality Control Bd., 183 Cal. App. 4th 330 (2010). *See supra* note 37, identifying circumstances where preemption does not apply.

[48] *See* PUD No. 1 v. Washington Dept. of Ecology (*PUD No. 1*), 511 U.S. 700 (1994); *see also* Monongahela Power Co. v. Marsh, 809 F.2d 41 (1987) (FERC licensed facilities are subject to permitting requirements under section 404 of the Clean Water Act); 33 U.S.C. § 1344(b) (authorizing states to issue 404 permits for some waters of the United States).

[49] The certification authorities under Clean Water Act section 401 are states, authorized Indian tribes, or U.S. EPA depending on the entity that has jurisdiction over waters of the United States in the location of the discharge. 33 U.S.C. § 1341(a)(1). Pursuant to section 518(e) of the Clean Water Act, U.S. EPA is authorized to treat Indian Tribes as a state for many purposes of the Act, including section 401. 33 U.S.C. § 1377(e). This Article's reference to "states" includes reference to authorized Indian tribes.

in a discharge to the waters of the United States within their borders.[50] If a state grants certification with conditions, those conditions become conditions of the federal permit or license.[51] If the state denies certification, the federal agency cannot issue the permit or license.[52] A state's decision on how to exercise those options depends on its determination of whether the FERC-licensed activity that may result in a discharge will be consistent with pertinent provisions of the Clean Water Act governing the water quality standards, effluent limitations, new source performance standards, and toxic pollutant restrictions, and "pertinent requirements of state law."[53]

Thus, and central to this Article, although the Federal Power Act generally preempts states from administering state water quality control authority over FERC-licensed projects, the Clean Water Act authorizes states to certify that a proposed FERC-licensed project will comply with the Clean Water Act requirements and with any other pertinent requirement of state law.[54] Any provisions necessary to assure compliance with those requirements must become conditions of any FERC license issued.[55] FERC cannot reject or modify a state's conditions of certifica-

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[50] 33 U.S.C. § 1341(a)(1). The major federal permits and licenses subject to a state's certification authority include Clean Water Act section 402 permits (where U.S. EPA administers the permitting program in non-delegated states), Clean Water Act section 404 permits and Rivers and Harbors Act Sections 9 and 10 permits issued by the U.S. Army Corps of Engineers, and hydropower and natural pipelines licenses issued by FERC.

[51] 33 U.S.C. § 1341(d).

[52] *Id.* § 1341(a)(1).

[53] The relevant text in section 401(a)(1) is:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates [. . .] that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). Those provisions to which section 401 refers are, respectively, Clean Water Act sections 301 (effluent limitations for point sources), 302 (water quality related effluent limitations), 303 (water quality standards and implementation plans), 306 (national standards of performance for new sources), and 307 (toxic and pretreatment effluent standards). The statutory provisions that have the most relevance to this Article are sections 301 and 303.

Section 401(d) further provides:

> [A]ny certification [. . .] shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant [. . .] will comply with any applicable effluent limitations and other limitations, under sections 1311 or 1312 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition [of the Federal license or permit].

33 U.S.C. § 1341(d).

[54] 33 U.S.C. § 1341(d).

[55] 33 U.S.C. § 1341(d).

tion.[56] Section 401 certification authority is, therefore, a significant tool that allows a state to protect its water quality from the impacts of FERC-licensed projects.

In enacting the Clean Water Act, Congress "sought to expand federal oversight of projects affecting water quality while also reinforcing the role of states as the prime bulwark in the effort to abate water pollution."[57] The water quality certification authority granted to states is "one of the primary mechanisms" through which states may exercise this authority to protect water quality.[58] In California, the State Water Board is the designated state agency authorized to exercise power delegated to states by the Clean Water Act.[59] Thus, the State Water Board is the only state entity with the authority to attach mandatory conditions to a FERC license. Other state agencies, like the California Department of Fish and Wildlife, can only provide FERC with recommendations.[60] Accordingly, the State Water Board has the vital role of protecting water quality resources from impacts of FERC-licensed projects for all Californians.

Importantly, under the Clean Water Act a state can waive its certification authority if it "fails or refuses to act on a request for certification within a reasonable amount of time (which shall not exceed one year)" after receipt of a request for a water quality certification.[61] The waiver provision was intended to protect applicants from having their ability to obtain a federal license frustrated by "sheer inactivity" of a state.[62] But Congress did not appear to consider the circumstances where such a passage of time was outside of the state's reasonable control, like a state's need for additional information from the applicant to perform its certification review, to accommodate settlement negotiations, or because of delays requested by or caused by an applicant. Additionally, the state water

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[56] Am. Rivers Inc. v. FERC, 129 F.3d 99 (2d Cir. 1997).

[57] Alcoa Power, Inc. v. FERC, 643 F.3d 963, 971; *see also* Keating v. FERC, 927 F.2d 616, 622 (1991) (Congress "plainly intended an integration of both state and federal authority").

[58] Keating v. FERC, 927 F.2d at 622.

[59] CAL. WAT. CODE, § 13160.

[60] California v. FERC, 495 U.S. 490, 495 (1990).

[61] 33 U.S.C. § 1341(a)(1); 18 C.F.R. § 4.34(b)(5)(iii).

[62] The language now found in section 401 was originally section 21(b) of the Federal Water Pollution Act, through an amendment made by the Water Quality Improvement Act of 1970. Pub. L. No. 91–224, 84 Stat. 91, § 103 (Apr. 3, 1970). As stated in the Conference Report:

> In order to insure that sheer inactivity by the State . . . will not frustrate the federal application, a requirement . . . is contained in the conference substitute that if within a reasonable period, which cannot exceed one year, after it has received a request to certify, the State . . . fails or refuses to act on the request for certification, then the certification requirement is waived. If a State refuses to give certification, the courts of that State are the forum in which the applicant must challenge that refusal if the applicant chooses to do so.

Conf. Rep. No 91-940, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 2712, 2741.

quality certification authority was enacted by Congress around the same time that the California Legislature adopted the California Environmental Quality Act ("CEQA") and other states were adopting new environmental review laws.[63] Accordingly, when Congress suggested a state's certification should not take longer than one year, it likely did not consider the time it may take to comply with state environmental laws, because most of those laws were either very recently passed or not yet on the books.[64] As discussed below, in California, the time needed to comply with CEQA requirements alone makes compliance with the one-year timeframe in the Clean Water Act extremely difficult, if not impossible.

III. In California, Complex Projects and Required State Environmental Review Processes Make It Difficult to Complete a Section 401 Certification Within One Year

In California, federally-licensed energy projects requiring water quality certifications are usually hydroelectric projects.[65] Hydroelectric projects have dammed many major rivers in the state and include significant features that impact downstream water quality and fish populations, including electrical generation pumps, cooling and conveyance components and hatcheries designed to mitigate for the impacts to fisheries from the projects.[66] Anadromous fish species, such as salmon and steelhead trout, may be blocked or hindered in their upstream and downstream migration due to the barriers presented by the projects.[67] Reservoirs and other water impoundments can also alter the natural streamflow affecting migration triggers.[68] All of these projects' elements

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[63] Cal. Pub. Res. Code, Div. 13, §§ 21000-21189.70.10.

[64] Indeed, California was the first state in the nation to pass an environmental quality act, signed by Governor Ronald Reagan in 1970 (*See id.*).

[65] FERC, Complete list of active licenses (Jan 15, 2021), https://www.ferc.gov/sites/default/files/2021-01/ActiveLicense_01.15.2021.xlsx.

[66] § 37:3. Electric Consumers Protection Act and the environmental effects of hydropower projects, 4 Pub. Nat. Res. L. § 37:3 (2d ed.) (Explaining that "a hydroelectric project is typically composed of several components: a dam to impound a waterway, a channel to conduct the water to a turbine, a powerhouse to create energy (which includes a turbine to convert water energy into mechanical energy and a generator to convert mechanical energy into electrical energy), and a conduit to return the water to the waterway from which it was diverted. Each of these components can adversely affect fish and wildlife habitat. Dams, for example, can inundate fish spawning grounds, change water temperatures, increase pollutants, disrupt downstream gravel recruitment, and reduce oxygen availability.").

[67] Murray D. Feldman, *National Wildlife Federation v. FERC and Washington State Department of Fisheries v. FERC: Federal Energy Regulatory Commission Ignores Ninth Circuit Rebuke on Hydropower Permitting*, 15 Ecology L.Q. 319, 323 (1988).

[68] *Id*.

can have significant impacts on water quality and therefore must be carefully analyzed before the State Water Board issues a certification.[69]

In analyzing a section 401 certification application for a hydropower project, the State Water Board assesses the nature of the proposed discharges, identifies conditions needed to protect water quality and determines whether additional studies are needed to analyze the effects of the discharges.[70] Significantly, as mentioned above, the State Water Board must also comply with CEQA before any certification is issued.[71] Until recent changes in state law (explained more below), the State Water Board was required to complete its CEQA analysis *before* it could issue a certification.[72] Due to most projects' complexity and significance of environmental impacts, CEQA review is almost always a lengthy and expensive process.

Complicating matters even further, frequently the project applicants are public water districts that have principal responsibility for carrying out and approving the project as a whole, meaning they are the CEQA "lead agency"—the only agency that can complete the CEQA review.[73] As the lead agency, the public water agency applicants control when and how the environmental review gets done. The State Water Board has jurisdiction over only part of the project; it is the "responsible agency" under CEQA, and has the ability to help inform the environmental review process by providing comments on the areas within its jurisdiction, but it does not and cannot control the scope or timing of the environmental review.[74]

Prior to 2020, the practical impact of this CEQA dynamic was that it was extremely difficult, if not impossible, to complete water quality certifications for hydroelectric projects within the one-year timeframe. For years, consistent with well-established practice sanctioned by FERC, to avert a premature denial of an application, a project applicant would voluntarily withdraw its application before one year lapsed and then resubmit the application, effectively restarting the federal clock and avoiding waiver of the state's authority.[75] This allowed for room to ensure the

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[69] Andrew H. Sawyer, *Rock Creek Revisited: State Water Quality Certification of Hydroelectric Projects in California*, 25 PAC. L.J. 973, 975-80 (1994) (discussing the impacts of hydroelectric and other water development projects to water quality and fish, wildlife, and habitat beneficial uses and citing National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 161-64 (D.C. Cir. 1982)).

[70] CAL. CODE REGS. tit. 23, §§ 3855-61.

[71] CAL. PUB. RES. CODE § 21080.

[72] *Id*.

[73] CAL. PUB. RES. CODE § 21067; CAL. CODE REGS. tit. 14, §§ 15050, 15051.

[74] CAL. PUB. RES. CODE §§ 21002.1(d), 21067, 21069; CAL. CODE REGS. tit. 14, § 15051(a); Planning & Conservation League v. Castaic Lake Water Agency (2009) 180 Cal. App. 4th 210, 239.

[75] *See e.g*., Constitution Pipeline Co., LLC, 162 F.E.R.C. ¶ 61,014 at para. 23 (Jan. 11, 2018); Ridgewood Maine Hydro Partners, L.P., 77 F.E.R.C. ¶ 62,201, 64,425 (Dec. 27, 1996).

application was complete enough for the state to prepare the certification and to account for any complexities encountered during the certification and environmental review processes. In many cases, the withdrawal and resubmittal of applications also created space for negotiation of settlement agreements.[76]

IV. Sweeping Changes to Certification Authority—Implied Waiver

The first recent major change to states' section 401 water quality certification authority came with the D.C. Circuit's decision in *Hoopa Valley* in 2019.[77] This decision, as interpreted by FERC, effectively invalidated the longstanding practice of "withdrawal-and-resubmission," putting an abrupt and retroactive end to the customary method of avoiding premature denial of a certification and waiver of a state's 401 certification authority where a certification was not completed within one year.[78]

A. Background on the *Hoopa Valley* Case and Klamath River Dam Removal Efforts

The *Hoopa Valley* case involved a large hydroelectric project on the Klamath River, which flows from Southern Oregon through Northern California.[79] Construction on the original project started in the early 1900s and extended through 1967, ultimately comprising several hydroelectric dams, powerhouses and fish hatcheries.[80] According to CEQA findings issued by the State Water Board in 2020,[81] the dams cause sig-

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[76] *See e.g*., Barrish & Sorenson Hydroelectric Co., Inc., 68 F.E.R.C. ¶ 62161, 64258 (Aug. 12, 1994); Ridgewood Maine Hydro Partners, L.P., 77 F.E.R.C. ¶ 62201, 64408 (Dec. 27, 1996); Citizens Utilities Co., 105 F.E.R.C. ¶ 62119, 64242 (Nov. 21, 2003).

[77] *Hoopa Valley*, 913 F.3d 1099, 1105 (D.C. Cir. 2019).

[78] *Id.* at 1105.

[79] *Id*. at 1101.

[80] *Id.*; *see also* PacifiCorps, *Klamath River* (Project Overview), https://www.pacificorp.com/energy/hydro/klamath-river.html (last visited Apr. 10, 2021).

[81] On April 7, 2020, the State Water Board issued a water quality certification for a project to remove four of the dams that are part of the Lower Klamath project. State Water Res. Control Bd., In the Matter of Water Quality Certification for Klamath River Renewal Corporation Lower Klamath Project License Surrender, FERC Project No. 14803 (April 7, 2020). Prior to the issuance of the water quality certification, the State Water Board prepared a CEQA Environmental Impact Report and issued CEQA Findings and Statements of Overriding Considerations. *Id*. at Attachment 4 (CEQA Findings and Statements of Overriding Consideration for the Lower Klamath Project License Surrender (Apr. 2020)).

nificant water quality impacts.[82] In fact, the impacts of the facilities to the Klamath's once-robust salmon fishery have been nothing short of devastating,[83] resulting in an existential threat to the way of life for many tribal communities, who for thousands of years have relied on the salmon for cultural practices, economic well-being, and basic subsistence.[84]

The Klamath Project's initial FERC license was issued in 1954 and its first relicensing effort began in 2004.[85] The relicensing meant that for the first time in the 100-year history of the Project, it would be required comply with modern federal environmental laws. Similarly, when PacifiCorp filed its requests to California and Oregon for section 401 water quality certifications in 2006, it was also to be the first time the states of California and Oregon would have a chance to condition the Klamath Project for the protection of downstream water resources.

Once the relicensing process began, PacifiCorp, the current owner of the Klamath hydroelectric project,[86] faced with the daunting expense of upgrading the dams to modern environmental standards, entered into negotiations that ultimately culminated in an agreement to remove the dams. The agreement, the Klamath Hydroelectric Settlement Agreement ("KHSA"),[87] was signed by more than 40 parties, including the United

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[82] *Id*. at Attachment 4, pp. 1-4. Additionally, portions of the Klamath River and the hydroelectric facilities that make up the Klamath Project are on the list of threatened and impaired waters for California, which states are required to submit to U.S. EPA every two years. 33 U.S.C. § 1313(d). *See* Lower Klamath Project: Federal Energy Regulatory Commission Project No. 14803, CAL. WATER BOARDS, https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/lower_klamath_ferc14803.html (last visited Apr. 10, 2021).

[83] John Heil, *The Natural Portfolio: Spring-run Chinook Salmon-essential to life history diversity*, U.S. FISH & WILDLIFE SERV., PAC. S.W. REGION (May 8, 2020) https://www.fws.gov/cno/newsroom/Featured/2020/Natural_Portfolio/. *See also* Species Directory: Coho Salmon, NOAA FISHERIES, https://www.fisheries.noaa.gov/species/coho-salmon.

[84] Alexander Matthews, *The Largest dam-Removal in US History*, BBC FUTURE (Nov. 10, 2020), https://www.bbc.com/future/article/20201110-the-largest-dam-removal-project-in-american-history; Jose Del Real, *Sick River: Can These California Tribes Beat Heroin and History*, N.Y. TIMES (Sept. 4, 2018), https://www.nytimes.com/2018/09/04/us/klamath-river-california-tribes-heroin.html.

[85] *Hoopa Valley*, 913 F.3d 1099, 1101 (D.C. Cir. 2019) (noting that the Klamath hydropower dams were originally licensed in 1954 to PacifiCorp's predecessor and the original license expired in 2006); Lower Klamath Project: Federal Energy Regulatory Commission Project No. 14803, *supra* note 82.

[86] PacifiCorp is owned by Warren Buffett's Berkshire Hathaway.

[87] Klamath Hydroelectric Settlement Agreement (KHSA) (Feb. 18, 2010, as amended Apr. 6, 2016 & Nov. 30, 2016), http://www.klamathrenewal.org/wp-content/uploads/2020/03/2016.12.31-Executed-and-Amended-Final-KHSA.pdf. A second agreement was signed at the same time, the Klamath Basin Restoration Agreement, which was designed to balance water use between the environment and farmers, provide funding for restoration and irrigation and fund economic development opportunities for the local communities. Due to inaction by Congress, the original agreements expired by their own terms in 2015. In April 2016, the KHSA was amended and remains the agreement governing the ongoing dam removal effort. *See* KLAMATH RIVER RENEWAL CORP., *Settlement Agreements*, https://www.klamathrenewal.org/settlement-agreements/ (last visited Apr. 11, 2021).

States, agencies of the states of California and Oregon, Tribes, irrigators, environmental organizations and dozens of others.[88]

The negotiations were formalized in 2008, making it a distinct possibility that neither a new FERC license nor the California and Oregon 401 certifications would be necessary.[89] Once the KHSA and related agreements were signed in 2010, the signatories specifically asked the State Water Board and the Oregon Department of Water Quality (Oregon's certification agency) to hold their section 401 certification proceedings in abeyance while the settlement agreements[90] were implemented.[91] Because the signing of the KHSA could have mooted the relicensing application and lead to dam removal if implemented, the project's relicensing effort was also put into abeyance by FERC, and the project continued to be operated on annual licenses.[92]

Additionally, pursuant to the terms of the KHSA, PacifiCorp withdrew and resubmitted its 401 certification requests each year to toll the one-year statutory period under section 401 within which states must act.[93] PacifiCorp's annual withdrawal and resubmittal was done to avoid expenditure of time and resources in pursuit of permits it may not need, but also to preserve the ability to obtain them if the KHSA was not implemented. Given the common practice at the time, those involved assumed this was the appropriate and effective way to preserve the states' certification authority should the dam removal negotiations fail.

The Hoopa Valley Tribe, which was not a signatory to the KHSA or the other related agreements, petitioned FERC in May 2012 for a declaratory order that California and Oregon had waived their section 401 authority.[94] In June 2014, FERC denied that petition finding that

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[88] Klamath Hydroelectric Settlement Agreement, *supra* note 87, at 60-98.

[89] In 2008, the negotiating parties entered into an "Agreement in Principle" to resolve litigation and other controversies in the Klamath Basin, with the express intent to "find a path to Facilities removal." *See* Agreement in Principle 1 (Nov. 2008), https://www.doi.gov/sites/doi.gov/files/archive/news/archive/08_News_Releases/klamathaip.pdf.

[90] The State Water Board was not a signatory to the Klamath Hydroelectric Settlement Agreement. *See* Klamath Hydroelectric Settlement Agreement, *supra* note 87, at 60-98.

[91] *Hoopa Valley*, 913 F.3d 1099, 1104 (D.C. Cir. 2019); Fourth Klamath Abeyance Resolution, State Water Resources Control Board Resolution No. 2012-0039 (July 17, 2012).

[92] If a new license is not granted prior to the expiration of the existing license, FERC may issue to the licensee an annual license to operate a project from year to year, "under the terms and conditions of the existing license until . . . a new license is issued." 16 U.S.C. § 808(a)(1); Klamath Water Users Ass'n v. FERC, 534 F.3d 735, 737 (D.C. Cir. 2008) (finding PacifiCorp entitled to annual licenses under the Federal Power Act while its license application is pending).

[93] *Hoopa Valley*, 913 F.3d at 1104.

[94] *Id.* at 1102. The motivation of the Hoopa Valley Tribe in pursuing the case was confusing to some because it seemed to be seeking a remedy that would undermine its own authority (the Tribe has "treatment as a state" with authority to set its own water quality conditions in a 401 certification, but lost it when the court concluded that the state 401 certification authority had been waived). Additionally, while it was not a signatory to the KHSA, it had expressed support for dam removal.

California and Oregon had not waived their water quality certification authority and that PacifiCorp had diligently prosecuted its relicensing application for the Klamath Hydroelectric Project.[95] The Hoopa Valley Tribe then sued FERC in the D.C. Circuit on December 14, 2014.[96]

The first iteration of the KHSA was subject to certain contingencies, including passage of federal legislation and a determination by the U.S. Secretary of the Interior that dam removal should proceed. By the end of 2015, however, neither federal legislation nor the required Secretarial Determination (that relied on the passage of legislation) were secured.[97] Due to the failure of those contingencies to realize, the KHSA and related agreements expired by their own terms.[98] Nevertheless, the signatories continued to request that the water quality certification process be held in abeyance so the KHSA could be renegotiated. The KHSA was subsequently amended in 2016 and is one of the agreements governing the dam removal process that is currently pending before FERC.[99] Initially, the D.C. Circuit also held the *Hoopa Valley* case in abeyance to allow the decommissioning to occur, but by May of 2018, when the Amended KHSA still had not been fully implemented, the D.C. Circuit took the matter out of abeyance and the case proceeded.[100]

B. THE *HOOPA VALLEY* DECISION

In *Hoopa Valley*, the D.C. Circuit ultimately resolved a single issue in the affirmative: "whether a state waives its section 401 authority when, *pursuant to an agreement between the state and applicant*, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."[101]

The Court found that the states and PacifiCorp's contractual agreement (the KHSA) to have PacifiCorp withdraw and resubmit its 401 certification applications to toll the one-year period consisted of an

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Because the states' 401 certification authority was a significant driver of PacifiCorp's agreement to decommission and remove the dams, seeking a waiver of that authority seemed to undermine the dam removal effort. In filings, however, the Tribe expressed the position that the outdated license and conditions were harming the Tribe's interests and that an updated license could bring the project into conformance with current resource protection laws. Brief of Hoopa Valley Tribe at 22, Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n, 913 F.3d 1099 (D.C. Cir. 2019) (No. 14-1271).

[95] *Hoopa Valley*, 913 F.3d at 1102.

[96] *Id.*

[97] This was not without significant effort to get legislation passed. Bills were introduced in 2011, 2014 and 2015. S. 1851 & H.R. 3398, 112th Congress (1st Sess. 2011); S. 2379 & S. 2727, 113th Congress (2d Sess. 2014); S. 133, 114th Congress (1st Sess. 2015).

[98] *See generally* Klamath Hydroelectric Settlement Agreement, *supra* note 87.

[99] *Id*.

[100] *Hoopa Valley,* 913 F.3d at 1102.

[101] *Id.* at 1103, emphasis added.

improper "scheme" to delay water quality certification and avoid waiver.[102] The court reasoned that this withdrawal and resubmittal "scheme," if allowed, could indefinitely delay the federal licensing action, and concluded that it was ineffective to extend the period within which a state must act.[103] "Such an arrangement," the court reasoned, "does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning and developing of a hydropower project."[104] The Court focused on the language of the KHSA and concluded that "California and Oregon's deliberate and contractual idleness defie[d]" the statutory time limit and that the agreement usurped FERC's control over whether and when a federal license could be issued.[105]

The Court's focus on the contractual arrangement between the states and applicant suggests that its holding should be limited to circumstances where a state enters into a written agreement with the licensee to delay processing the certification request. If that is indeed what the Court intended, then it should not have found waiver—at least with respect to California. While the California Governor and a two other California agencies were signatories to the KHSA, the State Water Board was not.[106] The State Water Board accommodated the requests of the applicant and other negotiating parties that it not take any actions in pursuit of a 401 certification because the parties believed such actions would impair implementation of the KHSA.[107] While it could be argued that the State Water Board's willingness to hold the certification process in abeyance reflected too much deference to the negotiating parties and not enough diligence, it is factually incorrect to conclude that the State Water Board entered into a contractual agreement with the applicant to do anything, let alone circumvent the law.

Unfortunately for the Water Board, it was difficult to correct the Court's apparent misconception that it was a party to the KHSA. Since the states declined to waive their sovereign immunity,[108] neither was a

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[102] *Id.* at 1101-02, 1104.

[103] *Id*. at 1104.

[104] *Id*.

[105] *Id*. at 1101-02.

[106] In addition to the Governor, the California Natural Resources Agency and Department of Fish and Wildlife were signatories to the KHSA on behalf of California. Klamath Hydroelectric Settlement Agreement, *supra* note 87, at 60-98.

[107] Fourth Klamath Abeyance Resolution, *supra* note 91.

[108] Under the doctrine of state sovereign immunity, federal courts are precluded from exercising jurisdiction over a state unless the state consents to jurisdiction. U.S. Const. amend. XI. A state can waive its sovereign immunity and allow a federal court to hear and decide a case against it (Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997)), but it is common for states not to consent to federal court jurisdiction in order to retain their sovereign immunity.

party to the matter, even though it was their certification authority at issue.[109] While the State Water Board did submit an amicus brief arguing against waiver and informed the court that it was not a signatory to the KHSA,[110] it had limited opportunity beyond that to ensure that the Court knew it was not a signatory to the KHSA. For example, when it became evident at oral argument that the contractual arrangement related to the 401 certifications in the KHSA would be central to the Court's decision, and it did not seem clear to the Court which California agencies were (and were not) parties to the KHSA, the State Water Board could not speak up at oral argument to clear the record because it was not a party to the case.[111] And of the parties that were able to speak during oral argument—FERC and the Hoopa Valley Tribe—neither had an interest in pointing out the nuance that while certain other California entities were parties to the KHSA, the State Water Board was not. Indeed, even though it was purportedly defending its own finding that the states had not waived their authority, FERC ended up making it very clear to the Court that it "sympathize[d]" with the Hoopa Valley Tribe's position and noted for the Court that the state's lengthy delay in issuing Section 401 certifications was "regrettable."[112]

It is possible the D.C. Circuit simply did not find it significant that the specific agency with California's section 401 certification authority—the State Water Board—was not a party to the KHSA since California's Governor and other state agencies were signatories. After all, the point was made in the State Water Board's amicus brief.[113] Additionally, the factual error in the decision was addressed in a petition for a writ of certiorari (albeit in a footnote), so the U.S. Supreme Court also apparently did not find the error significant enough to warrant review.[114]

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[109] *Hoopa Valley*, 913 F.3d at 1102-1103.

[110] Brief of Amicus Curiae California State Water Resources Control Board in Support of Respondent and Affirmance at 30, 32, Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n, 913 F.3d 1099 (D.C. Cir. 2019) (No. 14-1271) (filed December 1, 2015).

[111] A Deputy Attorney General with the California Attorney General's Office representing the State Water Board was at the oral argument but did not have an opportunity to speak since the State Water Board was not a party. *See* Oral Argument Recordings, *Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n*, D.C. Cir. (Oct. 1, 2018), https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/147ABBE5D626EB4A852583190059D9B5/$file/14-1271.mp3.

[112] *Hoopa Valley*, 913 F.3d at 1104.

[113] Brief of Amicus Curiae California State Water Resources Control Board in Support of Respondent and Affirmance, *supra* note 110, at 30, 32.

[114] An application petition for writ of certiorari was filed in the United States Supreme Court by two interested environmental organizations, California Trout and Trout Unlimited, on August 26, 2019. Petition for a Writ of Certiorari, Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2019), No. 19-257, 2019 WL 4072818 (U.S.). Twenty-one states, including California and Oregon, filed an amicus to support the petition. *Id.*; Brief for the States of Oregon, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New

It nonetheless remains concerning that so much of the Court's decision in this case rested on the apparent incorrect assumption that there was a formal contractual agreement between the State Water Board and PacifiCorp to delay the certification process for the Klamath Project.[115]

Nevertheless, the Court's focus on the contractual arrangement between the applicant and the states to withdraw and resubmit the same application year after year is important because the holding of the case appears to be limited to the practice of withdrawal and resubmittal under those particular circumstances. The Court could have—but did not—expressly invalidate the practice of withdrawal and resubmittal altogether. Accordingly, the case could be viewed as leaving open the question of whether, under different facts, a withdrawn request for a 401 certification that is resubmitted later, would be an acceptable procedure.[116]

C. FERC's Broad and Retroactive Application of the *Hoopa Valley* Decision

For now, the *Hoopa Valley* ruling stands as D.C. Circuit precedent.[117] Since *Hoopa Valley* was decided, FERC has applied the decision broadly and retroactively by finding that California waived its section 401 certification authority in numerous cases. FERC has imposed a waiver of the State Water Board's 401 certification authority for fourteen hydroelectric projects that are—and have been for decades—impacting California's water quality, many without modern environmental protections.[118] Like the Klamath Project, many of these hydropower

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Jersey, New Mexico, North Carolina, Rhode Island, South Dakota, Utah, Washington and Wisconsin as Amici Curiae in support of Petitioners 15 n. 4, Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2019), No. 19-257, (filed on September 27, 2019). The petition was denied on December 9, 2019. Cal. Trout v. Hoopa Valley Tribe, 140 S.Ct. 650 (2019).

[115] Despite similarities to the federal structure, California, like many other states, has a divided executive power (unlike the federal government that is a unitary executive power). Marine Forests Soc'y v. Cal. Coastal Comm'n (2005) 36 Cal. 4th 1, 31. The executive function of the state is dispersed among several elected officials, each of whom are independently accountable to the voters. *Id*. California state agencies are therefore independent legal entities and the action of one state agency cannot bind another. People v. Hy-Lond Enters., Inc. (1979) 93 Cal. App. 3d 734, 751-52 (holding that a judgment obtained in litigation against one state agency did not bind other state agencies that were not parties to the litigation).

[116] *See Hoopa Valley*, 913 F.3d at 1104 (construing section 401(a)(1)'s reference "to act on a request for certification" to apply to "a specific request" and noting the record did not indicate whether PacifiCorp's resubmitted requests were "wholly new" and reaching its holding on the facts presented).

[117] The U.S. Supreme Court declined to review the matter, leaving intact the D.C. Circuit's opinion. Cal. Trout v. Hoopa Valley Tribe, 140 S. Ct. 650 (2019).

[118] Placer Cty. Water Agency (*In re* Middle Fork American River), 167 F.E.R.C. ¶ 61,056 (2019); Yuba Cty. Water Agency (*In re* Yuba River Development Project), 171 F.E.R.C. ¶ 61,139

dams are being relicensed by FERC for the first time since the enactment of modern environmental laws, and once a new license is issued, the project may not come up for relicensing again for 40-50 years.[119]

The State Water Board petitioned FERC to rehear each of its administrative waiver decisions and has challenged several of them in the U.S. Court of Appeals for the Ninth Circuit, not only because of the importance of retaining the ability to protect California's water resources through its section 401 certification authority, but also because it does not believe *Hoopa Valley* should apply.[120]

None of FERC's post-*Hoopa Valley* decisions have facts that align with the unique facts in the *Hoopa Valley* case. In fact, in many of the post-*Hoopa Valley* matters, FERC has extended the case to find that a formal agreement between the licensee and the State Water Board was not necessary to support a finding of waiver.[121] Instead, where FERC has determined the record shows both sides worked to ensure the withdrawal and resubmittal happened each year, or even where it concluded that the State Water Board presumed the applicant would withdraw and resubmit to prevent the State Water Board from having to deny certification, it has concluded the State Water Board was complicit in delaying issuance of a certification, thereby waiving its certification authority.[122]

In some of the cases, however, the record FERC relied on for the waiver conclusion included informal correspondence from the State

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(2020); Merced Irrigation District (*In re* Merced Hydroelectric Project, Merced Falls Hydroelectric Project), 171 F.E.R.C. ¶ 61,240 (2020); Pac. Gas and Elec. Co. (*In re* Upper North Fork Feather River), 172 F.E.R.C. ¶ 61,064 (2020); S. Cal. Edison Co. (*In re* Big Creek Hydroelectric Projects) (includes six hydropower projects), 170 F.E.R.C. ¶ 61,135 (2020); Pac. Gas and Elec. Co. (*In re* Kilarc-Cow Creek Hydroelectric Project), 170 F.E.R.C. ¶ 61,232 (2020); S. Feather Water and Power Agency, 171 F.E.R.C. ¶ 61,242 (2020); Nevada Irrigation District (*In re* Yuba-Bear Hydroelectric Project), 171 F.E.R.C. ¶ 61,029 (2020). And there is another waiver request currently pending at FERC, Pacific Gas & Electric's Mc-Cloud Pitt Hydroelectric Project, FERC Project No. 2106. If past is prologue, the list will continue to grow.

[119] *See e.g*., Placer Cty. Water Agency (*In re* Middle Fork American River), 167 F.E.R.C. ¶ 61,056 (2019) (license last issued in 1963); Merced Irrigation District (*In re* Merced Hydroelectric Project, Merced Falls Hydroelectric Project), 171 F.E.R.C. ¶ 61,240 (2020) (license last issued in 1965); Yuba Cty. Water Agency (*In re* Yuba River Development Project), 171 F.E.R.C. ¶ 61,139 (2020) (license last issued in 1963); Nevada Irrigation District (*In re* Yuba-Bear Hydroelectric Project), 171 F.E.R.C. ¶ 61,029 (2020) (license last issued in 1963).

[120] State Water Resources Control Board v. FERC (Nevada Irrigation District), No. 20-72432 (9th Cir. Aug. 14, 2020); State Water Resources Control Board v. FERC (Yuba County Water Agency), No. 20-72782 (9th Cir. Sept. 17, 2020); State Water Resources Control Board v. FERC (Merced Irrigation District), Case No. 20-72958 (9th Cir. Oct. 2, 2020).

[121] *See e.g*., Placer Cty. Water Agency (*In re* Middle Fork American River), 167 F.E.R.C. ¶ 61,056 (2019) (waiver order issued April 18, 2019); Yuba Cty. Water Agency (*In re* Yuba River Development Project), 171 F.E.R.C. ¶ 61,139 (2020) (Waiver order issued May 21, 2020); Merced Irrigation District (*In re* Merced Hydroelectric Project, Merced Falls Hydroelectric Project), 171 F.E.R.C. ¶ 61,240 (2020) (waiver order issued June 18, 2020).

[122] *Id.*

Water Board to the applicant reminding the applicant of the upcoming one-year deadline and explaining that it would need additional information, sometimes including a completed CEQA document, before it could issue a certification.[123] In these cases, there was no express agreement between the licensee and the state to delay the process, but rather, there was evidence of the state exercising diligence to keep the process moving. Nonetheless, finding the State Water Board's conduct evidenced the existence of an implied agreement or at least complicity in the delay, and citing the *Hoopa Valley* case as the basis, FERC has found the State Water Board waived its certification authority in each case where the applicant withdrew and resubmitted its application and later sought a waiver order from FERC.[124]

Moreover, these waiver decisions have been retroactively applied by FERC to certification requests that were withdrawn and resubmitted before *Hoopa Valley* was decided.[125] This is true even though prior to *Hoopa Valley*, FERC had long held that an applicant's withdrawal and resubmittal started a new one-year certification period.[126] As recently as 2018, FERC stated in an order: "[w]e reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1)."[127] Prior to the *Hoopa Valley* case, the State Water Board therefore relied on the common—and sanctioned—withdrawal and resubmit practice as a mechanism for applicants to avoid premature denial of a certification or waiver of the state's authority. Based on prior FERC actions, its retroactive application of the *Hoopa Valley* decision is troubling on equitable principles alone.

Finally, in several of the recent cases where FERC found waiver due to the State Water Board's purported complicity or inaction, the applicant was a public water agency—and therefore acting as the lead agency for the purposes of CEQA—but never completed (and in some

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[123] *Id*.

[124] *See* FERC cases, *supra* note 118.

[125] *See e.g*., Placer Cty. Water Agency (*In re* Middle Fork American River), 167 F.E.R.C. ¶ 61,056 (2019) (originally requested a 401 certification in 2011); Merced Irrigation District (*In re* Merced Hydroelectric Project, Merced Falls Hydroelectric Project), 171 F.E.R.C. ¶ 61,240 (2020) (originally requested a 401 certification in 2014); Yuba Cty. Water Agency (*In re* Yuba River Development Project), 171 F.E.R.C. ¶ 61,139 (2020) (originally requested a 401 certification in 2017).

[126] *See e.g.,* Barrish & Sorenson Hydroelectric Co., Inc., 68 F.E.R.C. ¶ 62,161, 64,258 (Aug. 12, 1994); Ridgewood Maine Hydro Partners, L.P., 77 F.E.R.C. ¶ 62,201, 64,425 (Dec. 27, 1996); Cent. Vt. Pub. Serv. Co., 113 F.E.R.C. ¶ 61,167, 61,653 at para. 19 (Nov. 17, 2005).

[127] Constitution Pipeline Co., *LLC*, 162 F.E.R.C. ¶ 61,014 at para. 23 (Jan. 11, 2018), *rehearing denied*, 164 F.E.R.C. ¶ 61029 (July 19, 2018), *order on voluntary remand*, 168 F.E.R.C. ¶ 61129 (Aug. 28, 2019), *rehearing denied*, 169 F.E.R.C. ¶ 61199, 62461 (Dec. 12, 2019).

cases never even started) the requisite CEQA review.[128] Prior to last year, the State Water Board could not have legally issued a 401 certification without a completed CEQA document, and it often had no control over that process. Thus, to the extent there was delay and inaction that led to the withdrawal and resubmittal of an application, it was typically on the part of the applicant, not the state—making the finding of waiver even more problematic as a potential means for applicants to avoid the state certification process.[129] At the very least, under the circumstances where the applicant was the agent of delay, it seems that a more appropriate consequence for the lapse of the statutory timeline should not be a waiver of the states' certification authority, but rather a denial of certification.

The State Water Board's challenges to FERC's post-*Hoopa Valley* decisions of waiver will likely take years to make their way through the courts. If the State Water Board is not successful in limiting the reach of *Hoopa Valley* in these matters, however, California will have lost its principal authority to protect water resources from adverse effects of federally-licensed hydropower projects in numerous important watersheds for a generation.

V. The California State Legislature's Response to *Hoopa Valley*—A CEQA Fix

Hoopa Valley is a disappointing and consequential loss for the State Water Board (and many other state certification authorities nationwide). But FERC's apparent willingness to apply the decision broadly and retroactively made it clear that the State Water Board's ability to condition FERC-licensed projects in California is under serious threat. Since adjustment to the Clean Water Act by the U.S. Congress is uncertain, the California Legislature took action to ensure preservation of this critically important State Water Board authority.

On June 29, 2020, Governor Newsom signed amendments to the California Water Code to provide the State Water Board with the authority to issue 401 certifications before CEQA review is completed.[130]

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[128] *See e.g.*, Merced Irrigation District, 171 F.E.R.C. ¶ 61,240 (2020); Nevada Irrigation District, 171 F.E.R.C. ¶ 61,029 (2020).

[129] Even when the State Water Board is CEQA lead agency, the applicant has substantial control over the timing of CEQA compliance because the State Water Board needs a complete project description and to make arrangements with the applicant for payment for preparation of environmental documentation, which can sometimes turn into lengthy negotiations in and of themselves.

[130] Cal. Water Code § 13160, as amended by Stats. 2020, ch. 18, § 9 (AB 92), eff. June 29, 2020.

Importantly, the new law did not waive CEQA requirements for issuance of 401 certifications. Instead, it was carefully crafted to preserve the CEQA process. It provides the State Water Board with authority to issue certifications before CEQA review is completed, if waiting for such completion "poses a substantial risk of waiver."[131] Once the CEQA process is completed, the new law provides a mechanism for the Board to reopen any final certification to incorporate CEQA findings or mitigation measures, "to the extent authorized by federal law."[132]

As a result, the new law adjusts the sequencing of the State Water Board's review, recognizing CEQA is not only time-consuming for these complex projects but also frequently within the sole control of the project applicant. Its aim is to ensure the State Water Board can meet its 401-certification deadline and protect water quality. The Legislature therefore found a creative way to ensure that CEQA's environmental protections are preserved without impeding the protections that can be provided through the Clean Water Act. These changes in the law ensure that the State Water Board is in a better position to protect water quality into the future despite new constraints resulting from the *Hoopa Valley* case.

Remarkably, however, the recent attacks on state certification authority did not end here. In 2019, the Trump Administration's U.S. EPA squarely targeted that authority, further stripping the states of their ability to protect water resources within their respective borders.

VI. Trump-Era Environmental Roll-Backs for Section 401 Authority Unravel Judicial Decisions That Have Interpreted the Authority Broadly

To understand how sweeping the Trump U.S. EPA 401 certification regulations are in restricting state authority, it is important to understand the judicial decisions that have long ratified an expanded view of the scope of state section 401 authority. The following addresses two U.S. Supreme Court cases that evaluated a state's authority to condition a certification, and important precedents from the federal Circuit Courts of Appeals concerning federal agencies' lack of authority to review or modify a state's conditions of certification.

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[131] Cal. Water Code § 13160(b)(2).

[132] Cal. Water Code § 13160(b)(2). Notably, the ability for the State Water Board to reopen the certification to include additional conditions and address CEQA findings or mitigation measures may be subject to a legal challenge, given U.S. EPA's interpretation of its new rule governing certifications. *See* discussion *infra* Section IV.D.2-3 and note 192. However, state conditions preserving authority to reopen and amend 401 certifications are common and have been upheld as consistent with the Federal Power Act. Am. Rivers v. FERC, 129 F.3d 99, 102, 111-12 (2d Cir. 1997).

A. *PUD No. 1:* State Certification Authority Extends to the "Activity as a Whole"

In *PUD No. 1 v. Washington Dept. of Ecology* ("*PUD No. 1"*), the U.S. Supreme Court examined the State of Washington's authority to condition a certification under section 401 with a minimum instream flow requirement to maintain the fisheries in the reach of a river from which the project would divert water.[133]

Although the project at issue would have resulted in two possible discharges, one from the release of dredge and fill material during project construction and another from the end of the tailrace after having been used to generate power, the instream flow requirement was not related to the two possible discharges.[134] The project proponent argued that because that requirement was unrelated to the project's two possible discharges, the requirement was impermissibly outside of the State's certification authority under section 401.[135]

The Court disagreed, holding that a discharge is the necessary condition to trigger certification authority under section 401(a)(1), but section 401(d) expands state certification authority "as authorizing additional conditions and limitations on *the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied."[136]

To arrive at that conclusion, the Court evaluated the use of two different terms in section 401(a)(1) and section 401(d). The Court reasoned that while section 401(a)(1) ties state certification to a "discharge," section 401(d) ties certification to "the applicant."[137] Section 401(d) authorizes states to place "any effluent limitations and other limitations [. . .] necessary to assure that any applicant" will comply with the listed provisions of Clean Water Act and "with any other appropriate requirement of State law."[138]

Having concluded that the certification may include requirements placed on the project as a whole unrelated to the discharge, and recognizing that a state's conditioning authority "is not unbounded,"[139] the Court then turned to the question of whether the instream flow requirement was within the proper scope of section 401(d).[140] The State asserted the instream flow requirement was necessary to meet the applicable water

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[133] *PUD No. 1*, 511 U.S. 700 (1994).
[134] *Id*. at 710-11.
[135] *Id*. at 711.
[136] *Id.* at 711-712 (emphasis added).
[137] *Id.* at 711.
[138] *Id.*
[139] *Id*. at 712.
[140] *Id*. at 712-13.

quality standard adopted pursuant to section 303 of the Clean Water Act.[141] Although section 303 is not one of the provisions identified in section 401(d), the Court concluded section 401(d) authorized a state to place limits to ensure compliance with section 303.[142] The Court reasoned that section 401(d) requires compliance with section 301, which in turn incorporates section 303 by reference. As a result, the Court held that a state's water quality standards[143] adopted pursuant to section 303 qualify as a permissible "other limitation" to assure compliance with section 301 of the Act.[144] The Court also found that "limitations to assure compliance with state water quality standards are also permitted by section 401(d)'s reference to 'any other appropriate requirement of State law.' "[145]

Under *PUD No. 1*, certification authority is broad and includes limitations related to water quality impacts from the project as a whole.[146] That is, certification authority is triggered by a project's possible discharge, but once that authority is triggered, a state's regulatory reach extends beyond that threshold condition to project activities. Moreover, regulatory limitations may be used to assure compliance with Clean Water Act provisions beyond those enumerated in section 401(d), including section 303.[147] While the Court declined to examine what additional requirements could comprise the outermost scope of certification authority based on "any other appropriate requirements of state law," it held that water quality limitations necessary for compliance with water quality standards established pursuant to section 303 are "at a minimum . . . 'appropriate' requirements of state law."[148]

As a result, the State Water Board may impose conditions on certifications that are necessary to enforce beneficial (designated) uses, water quality objectives (criteria), and TMDLs established in water quality

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[141] *Id*. at 712.

[142] *Id.* at 712-13.

[143] The project proponent also argued that the minimum flow requirement was impermissible because its purpose was to protect a designated use (fish migration, rearing, and spawning), contending that section 303(c)(2)(A) required states to protect designated uses only through the implementation of specific numeric water quality criteria. The Court evaluated the plain language of section 303(c)(2)(A) and disagreed with the project proponent's interpretation. The Court pointed out that water quality standards consist of both components—designated uses and water quality criteria. *PUD No. 1*, 511 U.S. at 714-715. "[U]nder the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards." *Id.* at 715.

[144] *Id.* at 713.

[145] *Id.*

[146] *Id*.

[147] *Id*. at 712-13.

[148] *Id.* at 713.

control plans.[149] Because the reach of the state's certification authority extends to setting conditions or limitations on project activities and are not limited to the discharge, a state's regulatory authority extends to water chemistry and fisheries management control actions related to water quality impacts affecting beneficial uses caused by dam and project operations.[150] Such impacts may include, but are not limited to, reductions in instream flow, changes in temperature, turbidity, dissolved oxygen, algal productivity, siltation, loss of assimilative capacity, and saltwater intrusion—in addition to direct impacts from the discharge from project construction and the water from the tailrace.[151]

Thus, with the scope of certification authority adopted in *PUD No. 1*, the Court restored the states' section 401 permitting authority previously held to be preempted by the Federal Power Act in *First Iowa* and *Rock Creek*,[152] reaffirming the cooperative federalism scheme of the Clean Water Act.

B. *S.D. Warren:* To Be Subject to State 401 Certification Authority, the "Discharge" Need Not Include a Pollutant

In 2006, the U.S. Supreme Court in *S.D. Warren Co. v. Maine Board of Environmental Protection* ("*S.D. Warren"*) was called upon to address an issue readily accepted by the Court in *PUD No. 1*—whether certification authority under section 401 is triggered by a dam's potential to have a "discharge" in the broad sense (i.e., a discharge of water from the dam), without necessarily discharging any "pollutants."[153]

Because the Clean Water Act does not define the term "discharge," the Court evaluated the Clean Water Act's use of the term "discharge" in section 401 and the triggering statutory phrase in section 402—a "discharge of a pollutants."[154] The Act defines "discharge of pollutant" as meaning "any addition of any pollutant to navigable waters from any point source."[155] The Court found that the term alone in the context of certification authority should be afforded its ordinary meaning, "flowing

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[149] *See* authorizing statutes, *supra* notes 30 through 34 and accompanying text.

[150] *See e.g., PUD No. 1*, 511 U.S. at 709-710, 712-13.

[151] *See* Sawyer, *supra* note 69, at 975-80 (discussing the impacts of hydroelectric and other water development projects to water quality and fish, wildlife, and habitat beneficial uses).

[152] *See PUD No. 1*, 511 U.S. at 734 (Thomas, J., dissenting) ("Today, the Court gives the States precisely the veto power over hydroelectric projects [through section 401] that we determined in [*Rock Creek*] and *First Iowa* they did not possess [under the Federal Power Act].").

[153] S.D. Warren Co. v. Maine Bd of Env't Prot. (*S.D. Warren*), 547 U.S. 370, 376-87 (2006) (discussing *PUD No. 1*, 511 U.S. at 711, 725).

[154] *Id.* at 375, 380-85; *see also* 33 U.S.C. §§ 1341(a)(1), 1362(12)

[155] *Id.* at 381 (citing 33 U.S.C. § 1362(12)).

or issuing out,"[156] and concluded that section 401 has a broader reach than "discharge of a pollutant."[157]

While the Court noted that the Clean Water Act defines "discharge of pollutants," in part, as coming from a point source, the Court did not specifically address whether the triggering discharge for certification authority must be from a point source.[158] Yet the Ninth Circuit has concluded that under section 401 the "discharge" must be from a point source.[159]

As for the Court's holding, the Court brought to focus the Clean Water Act's overarching goal of protecting the quality of the Nation's waters not just by controlling "the addition of pollutants" but also addressing "pollution" generally.[160] Reinforcing the Clean Water Act's principal of cooperative federalism, the Court affirmed, "State certifications under section 401 are essential in the scheme to preserve state authority to address the broad range of pollution."[161]

C. *American Rivers v. FERC*: Federal Agencies Lack Authority to Second Guess State 401 Certification Conditions and Review Is in State Court

In *American Rivers v. FERC*, the Second Circuit Court of Appeals addressed whether the seemingly mandatory language of section 401 of the Clean Water Act effectuated an impermissible incursion into the Federal Power Act's broad preemptive reach.[162] As noted above, section 401 provides that any conditions imposed by a certification issued under that section "shall become a condition" on any federal license or permit subject to the section.[163] But FERC argued that the Federal Power Act empowered it to refuse to include certain conditions imposed by the state's certification if it believed the conditions to be beyond the scope of

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[156] *Id.* at 376 (citing Webster's New International Dictionary).

[157] *Id.* at 375-76, 380.

[158] *Id.* at 375-76 (citing 33 U.S.C. § 1362(12) (defining discharge of pollutants)).

[159] Or. Nat. Desert Ass'n v. Dombeck, 172 F.3d 1092, 1099 (9th Cir. 1998). Additionally, in the context of National Pollutant Discharge Elimination System ("NPDES") Permits, the D.C. Circuit held that discharges from dams are "point sources" but are not subject to NPDES permitting requirements because dams do not discharge pollutants added by the dam or reservoir, and because the type and severity of pollution caused by dams is so varied, dam regulation under the NPDES permitting system would be impractical. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165, 171, 182 (D.C. Cir. 1982).

[160] *S.D. Warren*, 547 U.S. at 385 (citing 33 U.S.C. § 1251 and citing and quoting 33 U.S.C. § 1362(12) (defining "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water.")).

[161] *Id.* at 386.

[162] Am. Rivers v. FERC, 129 F.3d 99, 102, 111 (2d Cir. 1997).

[163] 33 U.S.C. § 1341(a).

a state's section 401 authority.[164] In rejecting that argument, the Second Circuit held that FERC is bound by the mandatory language in section 401 to include state-imposed conditions.[165] The Court reasoned that while the Federal Power Act has a broad preemptive effect, the Clean Water Act "has diminished this preemptive reach by expressly requiring [FERC] to incorporate into its licenses state-imposed water-quality conditions."[166]

With respect to the ability to challenge state-imposed conditions, the *American Rivers v. FERC* Court and other courts have concluded that the proper venue is in state court.[167] As a result, the federal agency has two choices when a state grants a certification with conditions it finds to be beyond the scope of section 401: it can either issue the license or permit with the conditions, or it can refuse to issue the hydropower license altogether.[168] Notably, the Second Circuit found that while the federal agency may not second-guess the appropriateness of a state's conditions, it is empowered to determine whether the state issued the certification within the statutorily prescribed period or whether the proper state has issued the certification.[169] The implications here are that the federal agency may not trespass into the substantive aspects of a state's certification, but it does have at least some authority to evaluate whether certain procedural aspects of section 401 are properly satisfied.

D. How U.S. EPA's "Clean Water Act Section 401 Certification Rule" Reshapes State Certification Authority

During the decades following the decision in *PUD No. 1*, numerous federal appellate courts addressed additional important features of section 401, in addition to the waiver provision evaluated in *Hoopa Valley*.[170] On April 10, 2019, just two months after the *Hoopa Valley* case was decided, President Trump issued Executive Order No. 13868, "Promoting Energy Infrastructure and Economic Growth."[171] In it, the for-

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[164] Am. Rivers v. FERC, 129 F.3d at 102, 111.

[165] *Id.* at 111.

[166] *Id.* at 107, 111 (citing 33 U.S.C. § 1341(a)(1)).

[167] *Id.* at 107, 110-11; *see, e.g*., Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982).

[168] Am. Rivers v. FERC, 129 F.3d at 111 (2d Cir. 1997).

[169] *Id.* at 110-11.

[170] *See, e.g.,* N.Y. State Dept. of Env't Conservation v. Fed. Energy Regul. Comm'n, 884 F.3d 450, 455-56 (2d Cir. 2018) (holding the statutory time period does not begin when the certifying authority determines the request for certification is "complete" but upon "receipt" of the request).

[171] Exec. Order No. 13,868, 84 Fed. Reg. 15,495 (Apr. 10, 2019).

mer President highlighted America's energy abundance and declared that needless red tape to permitting energy projects and regulatory uncertainty are a hindrance to realizing its full economic potential.[172] It also directed the U.S. EPA Administrator to review section 401 of the Clean Water Act and related regulations to "take into account federalism considerations underlying section 401" and focus on: timely federal-state cooperation and collaboration, the appropriate scope of state water quality reviews, the types of appropriate conditions that may be included in a certification, the times for reasonable certification reviews, and the sufficiency of information with which a state should substantively act on a certification request.[173]

On June 1, 2020, U.S. EPA, for the first time in 50 years, enacted its statutory interpretation of section 401 of the Clean Water Act, entitled "Clean Water Act Section 401 Certification Rule" ("Certification Rule").[174] U.S. EPA addressed all the aspects of section 401 as directed.[175] As a result, the Certification Rule contains significant substantive and procedural regulatory changes which diminish state certification authority—including many that seem incongruent with the plain language of the Clean Water Act and precedent interpreting that authority.

It comes as no surprise, then, that at the time of writing this Article, the Certification Rule is subject to legal challenges in numerous federal courts, including a multi-state challenge brought in the U.S. District Court for the Northern District of California.[176]

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[172] *Id.*

[173] *Id.* at 15,495-96.

[174] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (to be codified at 40 C.F.R. pt. 121) [hereinafter Certification Rule]. The Certification Rule is effective on September 11, 2020 and applies to certification requests filed on or after that date and not to requests filed before that date. *Id.*at 42,287; *see* Clean Water Act Section 401 Certification Final Rule (Fact Sheet), https://www.epa.gov/sites/production/files/2020-06/documents/frequently_asked_questions_fact_sheet_for_the_clean_water_act_section_401_certification_rule.pdf (Question 6).

[175] U.S. EPA characterizes the rule as "intended to increase the predictability and timeliness of CWA section 401 certification actions by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures." Certification Rule, 85 Fed. Reg. 42,210. While 401 certifications often cause extensive delay, one can debate whether the delay is because of the complexity of the technical and biological issues, the substantive and procedural requirements of modern environmental statutes, applicant foot-dragging, failure of FERC to update the license or require appropriate reporting and monitoring before the relicensing process is initiated, or lack of state resources or redirecting those resources to more immediate issues like drought response. It is likely that delay occurs for all those reasons.

[176] California v. Andrew Wheeler, No.: 3:20-cv-4869 (N.D. Cal. July 21, 2020). Plaintiffs represent the States of California, Washington, New York, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Caroline, Oregon, Rhode Island, Vermont, Wisconsin, the Commonwealths of Massachusetts and Virginia, the District of Columbia, and the California State Water Resources Control Board. *See also*, Am. Rivers v. Wheeler, No. 3:20-cv-04636 (N.D. Cal. July 13, 2020); Suquamish Tribe v. Wheeler, No. 3:20-cv-

Additionally, immediately upon taking office, President Biden issued an Executive Order directing numerous executive agencies to review federal regulations enacted during the Trump Administration that may be inconsistent with the purpose of the order (primarily aimed at protecting public health and the environment from the impacts of climate change).[177] For any such regulations identified, the federal agencies are directed to consider suspending, revising, or rescinding them.[178] The Certification Rule is among several rules under U.S. EPA's jurisdiction subject to such review.[179]

Of the numerous changes contained in the Certification Rule, the following focusses on three of the most noteworthy ones.

1. The Scope of Certification Authority

The Certification Rule drastically narrows the scope of certification authority in a couple ways. First and foremost, it limits the scope of certifications to the consideration solely of the impacts of "discharges."[180] That limitation departs from the U.S. Supreme Court's long-standing holding in *PUD No. 1* that a state's certification authority extends to impacts of the construction or operation of the facility's "activity as a whole," upon the triggering event of the existence of a "discharge."[181] U.S. EPA justifies that significant departure by seizing on the different language used in section 401(a)(1) and 401(d).

06137 (N.D. Cal. Aug. 31, 2020); Del. Riverkeeper Network v. EPA, No. 2:20-CV-3412 (E.D. Pa. July 13, 2020); S.C. Coastal Conservation League v. Andrew Wheeler, No. 2:20-cv-03062 (D.S.C. Aug. 26, 2020).

[177] Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021) ("Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis").

[178] *Id.*

[179] The Biden-Harris transition team put out a fact sheet identifying the list of agency actions subject to review in accordance with the executive order. The U.S. EPA subsequently requested the U.S. Department of Justice to seek stays or abeyances of federal actions challenging rules subject to U.S. EPA's review. Rebecca Beitsch, *Biden EPA Asks DOJ to Hit Pause on Defense of Trump-era Rules*, THE HILL (Jan. 22, 2021, 3:03 PM), https://thehill.com/policy/energy-environment/535450-biden-epa-asks-doj-to-hit-pause-on-defense-of-trump-era-rules. At the time of this writing, the court ordered the multi-state challenge brought in the U.S. District Court for the Northern District of California to be held in abeyance for 60 days, until April 20, 2021. Order re Joint Motion to Hold Proceedings in Abeyance, California v. Andrew Wheeler, No.: 3:20-cv-4869 (N.D. Cal. Feb. 22, 2021).

[180] Certification Rule, 85 Fed. Reg. 42,210, 42,251-53 (codified at 40 CFR §§ 121.3 (defining the scope of certification as "limited to assuring that a discharge [. . .] will comply with water quality requirements"), 121.1(n) (defining "water quality requirements" as the provisions of sections "301, 302, 303, 306, and 307 of the Clean Water Act" and state "requirements for point source discharges into waters of the United States")).

[181] *PUD No. 1*, 511 U.S. 700, 711-12 (1994).

U.S. EPA pivots from *PUD No. 1's* holding by dismissing the notion that it was based on a plain reading of the text.[182] U.S. EPA argues that because section 401(a) uses "discharge" and section 401(d), "applicant," ambiguity is created which opens the door for its statutory interpretation.[183] In so doing, U.S. EPA concludes that the Court's holding does not prevent it from reaching a different interpretation.[184] U.S. EPA also states that *PUD No. 1's* holding relied, at least in part, on U.S. EPA's interpretation of its certification regulations that pre-dated the 1972 Clean Water Act amendments.[185] Because U.S. EPA now believes the "most appropriate" interpretation is that "applicant" in section 401(d) simply refers to the entity responsible for complying with certification, the term should not be construed as broadening the scope of certification authority.[186]

As for the meaning of "discharge" to trigger section 401(a) authority, U.S. EPA affirms the decision in *S.D. Warren*, that "any discharge" should be given its plain and ordinary meaning and should not be interpreted to require a "discharge of pollutants."[187] Yet with respect to the other critically important aspect of certification authority—the additional language in section 401(d) that specifies certifications may include requirements as necessary to assure compliance with "with any other appropriate requirement of State law,"—the Certification Rule even further limits the scope of water quality problems the states may address. U.S. EPA had previously interpreted that language to include non-point discharges to non-federal waters.[188] Pursuant to decisional authority and

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[182] U.S. EPA also seems to admonish the Supreme Court's "reasonable read" of the statutory provisions and its failure to perform any legislative analysis of the amendments made to the Clean Water Act. 85 Fed. Reg. 42,210, 42,233.

[183] Certification Rule, 85 Fed. Reg. 42,210, 42,232-34.

[184] *Id.* at 42,233.

[185] *Id.*

[186] *Id.* at 42,232, 42,234.

[187] *Id.* at 42,238 (discussing *S.D. Warren*, 547 U.S. 370, 376 (2006). *See* discussion of *S.D. Warren*, *supra* Section VI.B.

[188] Certification Rule, 85 Fed. Reg. 42,210, 42,234-35. "Non-federal waters" refer to those waters within a state's boundaries that are not waters of the United States. *Id.* at 42,234. Non-federal waters include groundwater and isolated wetlands. Rapanos v. United States, 547 U.S. 715 (2006). Under the Navigable Waters Protection Rule, promulgated by U.S. EPA and the U.S. Army Corps of Engineers under the Trump Administration, the definition of "waters of the United States," was revised and non-federal waters were expanded to include ephemeral waters and wetlands that were no longer deemed adjacent to other jurisdictional waters. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,251 (Apr. 21, 2020) (codified at 33 CFR §§ 328.3(c)(1) (definition of adjacent wetlands), 328.3(b)(3) (ephemeral streams)). The Biden Administration has since directed U.S. EPA and the U.S. Army Corps of Engineers to revisit that rule considering the environmental priorities announced in the Administration's Executive Order. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2020); Fact Sheet: List of Agency Actions for Review, THE WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/state-

U.S. EPA interpretation, states have used section 401(d) authority to address a broad range of water quality problems (e.g., as noted in the discussion of PUD No. 1). The Certification Rule now specifies that certification authority is limited to assuring the discharge complies with "water quality requirements," and defines that term as limited to certain provisions in the Clean Water Act and state "regulatory requirements for point source discharges into waters of the United States."[189]

Of course, section 401(d) does not contain any language to limit its reach to impacts caused by point sources to federal jurisdictional waters. U.S. EPA suggests that for reasons similar to why it has chosen to interpret "applicant" in section 401(d) as not broadening "discharge" in section 401(a), it also believes the section 401(d)'s express allowance that a certification may include requirements necessary to assure compliance "with any other appropriate requirement of State law" should not be read any broader than its reach to point source discharges to waters of the United States in section 401(a).[190]

While the meaning of the statutory text in section 401(d) is not entirely clear, its interpretation by the agency charged with its implementation must be reasonable, and U.S. EPA's interpretation of the scope of certification authority is challenging to reconcile.[191] Its effort to align sections 401(a) and 401(d) renders meaningless the additional language in section 401(d). As a result, as interpreted by U.S. EPA, there is no difference between the triggering discharge under section 401(a) and the state's ability to include water quality protection requirements in the certification to address impacts from the facility as a whole or from nonpoint sources to nonfederal waters under section 401(d).

In limiting the reach of certification authority to begin and end with a point source discharge to waters of the United States, the Certification Rule drastically reduces the ability of states to address the full scope of impacts to water quality and beneficial uses occasioned by hydropower projects. As earlier noted, those impacts could include water quality problems from nonpoint pollution that occurs within a reservoir and not from ongoing point source discharges, including: dissolved minerals, soil

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ments-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/. As a result, the scope of waters that comprise non-federal waters is subject to change.

[189] Certification Rule, 85 Fed. Reg. 42,210, 42,251-53 (codified at 40 CFR §§ 121.3 (defining the scope of certification as "limited to assuring that a discharge [. . .] will comply with water quality requirements"), 121.1(n) (defining "water quality requirements" as the provisions of sections "301, 302, 303, 306, and 307 of the Clean Water Act" and state "requirements for point source discharges into waters of the United States")).

[190] *Id.* at 42,253.

[191] Lever Bros. Co. v. United States, 877 F.2d 101, 105 (D.C. Cir. 1989) (citing and quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-43).

erosion, or oxygen content; barriers to fish passage from existing dams and diversion works; and reduced instream flows where water is diverted from a stream but there is no discharge back into the stream after use; and impacts to non-federal waters, such as groundwater and certain isolated wetlands or ephemeral streams.[192]

As a result, with its Certification Rule, U.S. EPA dispenses with what the *S.D. Warren* Court observed was squarely preserved by the Clean Water Act's system respecting a state's concern: "state authority to address a broad range of pollution."[193]

2. State Conditions and Denials

Although section 401 gives states broad authority to deny and condition certifications, the Certification Rule authorizes the federal agency to encroach on that authority. It establishes new procedural requirements that must accompany state-imposed conditions or a denial of certification and, as discussed in the next section, authorizes the federal agency to find waiver if the federal agency determines the state action failed to meet those requirements.

With respect to the new procedural requirements, the Certification Rule requires any condition to be accompanied by written information explaining "why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements" and a citation to the federal or state law that authorizes the condition.[194] Similarly, for any denial of certification, the Certification Rule requires the state to provide written information that identifies "the specific water quality requirement with which the discharge will not comply," and that explains why the discharge is unable to comply with the identified requirements.[195] If the denial is due to insufficient information, the state must identify the information that it needs.[196]

U.S. EPA's rationale for those procedural requirements is to increase transparency and, in the furtherance of promoting regulatory cer-

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[192] Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 174-77 (D.C. Circuit, 1982). With its Certification Rule, U.S. EPA also finds that "reopener" clauses, included to ensure water quality is protected over the relatively long life of the license, are inconsistent with section 401 and not permissible under the Certification Rule's requirement that the state not take any action that extends the reasonable period of time identified by the federal agency to act on the certification. Certification Rule, 85 Fed. Reg. 42,210, 42,280 (see 40 CFR § 121.6(e)). *See also* Sawyer, *supra* note 69.

[193] *S.D. Warren*, 547 U.S. 370, 386 (2006).

[194] Certification Rule, 85 Fed. Reg. 42,210 42,286 (codified at 40 CFR § 121.7(d)(1)(i)-(ii)).

[195] *Id.* at 42,286 (codified at 40 CFR § 121.7(e)(ii)-(iii)).

[196] *Id.* at 42,286 (codified at 40 CFR § 121.7(e)(iii)).

tainty, to make sure the certification authority understands its own authority as currently interpreted by U.S. EPA.[197]

Prior interpretations from U.S. EPA did not require any specific findings for a condition or denial. More significantly, and as discussed above, prior U.S. Supreme Court and U.S. Circuit Court of Appeals interpretations did not permit a federal agency to interfere with a state's mandatory conditioning and denial authority, and most certainly did not allow the federal agency to unilaterally find waiver based on its own discretionary decision that the state failed to meet new regulatory requirements.

3. Implied Waiver

One of the most striking features of the Certification Rule is that it specifies the federal agencies' role in determining whether a state's certification complies with section 401 and empowers federal agencies to void the denial or condition if it finds that it does not. To arrive there, U.S. EPA chronicles numerous cases that have evaluated the federal agencies' role in the certification process.[198] On the one hand, federal agencies have been counseled not to interfere with a state's certification, even in deciding the condition does not go "far enough" in protecting water quality standards.[199] In other cases, the federal agencies are instructed that they may include conditions in the federal license more protective than that required by the state and, in still other cases, that federal agencies have an affirmative obligation to determine whether the certifying authority correctly complied with the procedural components of the statute.[200] With its Certification Rule, U.S. EPA purports to reconcile the patchwork of case law and articulate the federal agencies' role in the certification process.[201]

Specifically, U.S. EPA interprets that portion of section 401(a) that specifies that a state waives certification when it "fails or refuses to act on a request for certification, within a reasonable period of time (which

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[197] *Id.* at 42,256, 42,258.

[198] *Id.* at 42,222-24.

[199] *Id.* at 42,223 (citing and quoting, among other cases, Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 648 (4th Cir. 2018) (holding the federal agency has no authority to replace a state's condition even where the federal agency deems it to be more protective of beneficial uses)).

[200] *Id.* at 42,223 (citing and quoting, among other cases, Snoqualmie Indian Tribe v. Fed. Energy Regul. Comm'n., 45 F.3d 1207, 1219 (9th Cir. 2008) (upholding FERC's license condition increasing minimum instream flows necessary to create mist designed to "augment the Tribe's religious experience") and Keating v. FERC, 927, F.2d 616, 622-23, 625 (D.C. Cir. 1991) ("FERC must at least decide whether the state's assertion of revocation satisfies section 401(a)(3)'s predicate requirements)).

[201] 85 Fed. Reg. at 42,223-24.

shall not exceed one year)."[202] As improbable as it may seem, U.S. EPA purports to "clarify" the meaning of the statute by explaining that a key ambiguity in the phrase "fail or refuse to act" is the meaning of "to act."[203] U.S. EPA concludes that "to act," and with it, the federal agency's corresponding authority to find waiver, must be informed by the procedural context of applicable statutes and regulations rather than to mean "just any act."[204] The Certification Rule goes on to specify what "acts" are *not* in conformance with section 401 and therefore constitute waiver.[205]

Under the Certification Rule, waiver occurs when the state does not (1) act within the reasonable period of time; (2) provide certifications in writing; (3) provide the findings the Certification Rule requires to support a denial of certification (discussed above); (4) comply with other procedural requirements of section 401 (e.g., providing public notice); or (5) provide the findings the Certification Rule requires to support a condition (discussed above).[206] Moreover, where the federal agency deems the state's supporting information infirm or absent and finds waiver, the federal agency will grant the federal permit or license in the case of a denial of certification, or without the condition if a condition is at issue.[207]

Assigning the federal agency with authority to review whether the state's written explanation accompanying the condition or denial satisfies the new procedural requirements or is in some manner inadequate—and to find waiver in the latter circumstance—is incongruent with the plain language under the Clean Water Act, and precedents from the Second Circuit in *American Rivers v. FERC* and other federal Circuit Courts of Appeals concerning the federal agency's lack of authority to review or modify a state's conditions of certification, and in a manner that undermines state self-governance.[208]

Although cast as procedural requirements, potentially as a means to get around precedents concerning the federal agency's lack of authority

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[202] 33 U.S.C. § 1341(a)(1).

[203] Certification Rule, 85 Fed. Reg. 42,210, 42,266.

[204] *Id.* at 42,266.

[205] *Id.* at 42,286 (codified at 40 C.F.R. § 121.9(a), (b)).

[206] *Id.* at 42,286 (codified at 40 C.F.R. §§ 121.9(a)(2)(i)-(iv), 121.9(b)).

[207] 85 Fed. Reg. at 42,286 (codified at 40 CFR § 121.9(b)). Regarding waiver for conditions not supported by sufficient findings, U.S. EPA provides that that such waiver is severable—waiver is limited to the condition and not the overall certification. 85 Fed. Reg. 42,267.

[208] *See, e.g.*, Am. Rivers v. FERC, 129 F.3d 99, 107, 110-11 (2d Cir. 1997); *see, e.g.*, Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982).

to second guess state-imposed conditions,[209] FERC's determination that a state's finding is inadequate has the drastic effect of voiding the state's certification or condition altogether.[210] Of course, there is nothing in section 401, express or implied, that gives the federal agency authority to evaluate whether a state has adequately justified its decision to deny or condition certification.[211] Thus, rather than falling within the proper bounds of FERC's authority to determine certain procedural aspects of section 401 are satisfied (*e.g.*, timeliness, the proper certifying authority, or a state's assertion of revocation) acknowledged by *American Rivers* and in *Keating v. FERC*, these procedural requirements likely run afoul of those proper bounds.[212] This aspect of the Certification Rule will undoubtedly be addressed by courts on challenges to the plain reading of section 401 and as federal agencies apply it to the states' actions on certifications moving forward.

Finally, yet importantly, while the Certification Rule codifies *Hoopa Valley*'s central holding,[213] it also extends it to preventing a state from *requesting* the project applicant withdraw its certification request and resubmit it with additional information the state deems necessary for its review.[214] The clear implication here is that certifying states will simply have to deny certifications without prejudice when the applicant fails

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[209] *See supra* text accompanying note 169; *see also*, Keating v. FERC, 927, F.2d 616, 622-23, 625 (D.C. Cir. 1991) ("FERC must at least decide whether the state's assertion of revocation satisfies section 401(a)(3)'s predicate requirements").

[210] Of course, state law may impose requirements for findings to support agency decisions. *See, e.g*. Asociacion de Gente Unida por el Agua v. Cent. Valley Reg'l Water Quality Control Bd., 210 Cal. App. 4th 1255, 1281 (2012). But review of those findings is in state court, and if the court finds the agency has failed to make adequate findings the remedy is a remand to the state agency to reconsider its decision. *See, e.g., Id.* The agency's failure to make adequate findings is not a bar to a decision on remand reaching the same result, or substituting different conditions addressed to the same issue, if that decision is supported by adequate findings. Additionally, although the certification at issue is subject to the Natural Gas Act rather than the Federal Power Act, with judicial review in the federal Courts of Appeals instead of state court, and pre-dates the Certification Rule, in *Mountain Valley Pipeline, LLC v. North Carolina Department of Environmental Quality*, the court found that denial of certification was within the state's authority, but the state failed to adequately explain its reasoning. 990 F.3d 818, 821 (4th Cir. 2021). The remedy was a remand to the state to explain its reasoning. *Id.* at 833. That is in sharp contrast to the Certification Rule, where the remedy for a state's failure to explain its denial is to void the denial and treat it as a waiver. Certification Rule, 85 Fed. Reg. 42,210, 42,286 (codified at 40 CFR §§ 121.9(a)(2)).

[211] *Compare* 33 U.S.C. § 1341(a)(1) (providing "[n]o license or permit shall be granted if certification has been denied by the State") and 1341(d) (providing that requirements set forth in the certification by the State "shall become a condition" of the federal license) *with* 40 CFR § 121.9(a)(2)(iii), (iv) (authorizing the federal agency to find waiver where the state has granted a certification with conditions or denied certification upon the state's failure to satisfy the new procedural requirements that must accompany a certification condition or denial).

[212] Am. Rivers v. FERC, 129 F.3d 99, 110-111 (2d Cir. 1997).

[213] *See* discussion of *Hoopa Valley*, *supra* Section IV.B.

[214] Certification Rule, 85 Fed. Reg. 42,210, 42,285-86 (codified at 40 CFR § 121.6(e)).

to provide information the state needs to complete its review. Of course, under the Certification Rule, FERC would have the ability to review the state's findings underlying that denial and potentially void the denial and find waiver if it deems the findings inadequate.[215]

It is worth emphasizing that prior interpretations of section 401 have never encompassed these procedural requirements. Never under any circumstance has a federal agency ever been permitted to find waiver based on its own determination that a state's condition or denial is insufficient. This aspect of the new rule effectively grants the federal agency veto authority over the states' certification conditions and denials—authority that is at odds with the plain language of the law, decisional authority, and the principles of cooperative federalism.

VII. Conclusion

For now, California will have to contend with the *Hoopa Valley* case and its fallout. It is possible that the FERC waiver decisions the State Water Board is challenging (along with others being challenged nationwide) will limit the reach of *Hoopa Valley* and reduce its constraints on states' section 401 certification authority. But even if those challenges are not successful, since the California Legislature amended the California Water Code to allow certifications to be issued before completion of the CEQA process where there is significant risk of waiver, the basic ability to exercise the authority in California is preserved for now.

With the Certification Rule's narrowing of the scope of section 401 certification, however, U.S. EPA under the Trump Administration drastically undercut the state's ability to assure impacts from FERC-licensed hydropower facilities comply with the full range of water quality pollution control requirements under state law. Taken together, the new substantive and procedural requirements of the Certification Rule represent a radical departure from long-standing Supreme Court and Court of Appeals precedents, as well as prior U.S. EPA interpretations, and state action on certifications. In so doing, the Certification Rule upends the fundamental structure of the Clean Water Act that affords states with substantial authority to regulate water quality within their respective borders. Moreover, the Rule disrupts the cooperative federalism scheme on which the Clean Water Act is premised.

To be sure, the Certification Rule's path is fraught with its potential demise. Ongoing litigation could succeed in having the rule set aside

[215] *Id.* at 42,286 (codified at 40 CFR §§ 121.9(a)(2)(iii), 121.9(c)).

and rescinded. U.S. EPA under the Biden Administration would then have an opportunity to review the Rule and initiate the full public process to develop a new rule. Even if the Certification Rule is not set aside by the courts, U.S. EPA could undertake to rescind the rule through a formal rulemaking process.

In the meantime, FERC continues to apply its expansive interpretation of *Hoopa Valley* and is likely to further limit state authority through its application of the Certification Rule. For now, one thing is certain: Except where waiver decisions are successfully challenged or repealed, states will be substantially deprived of their authority under the Clean Water Act to protect the quality of the waters within their states.

TRADE AND ENVIRONMENT IN NAFTA'S REPLACEMENT: AN OLD GAS GUZZLER GETS A PAINT JOB

GEOFFREY GARVER[1]

I. INTRODUCTION

The North American Free Trade Agreement (NAFTA)[2] is now history, and, depending on where you are, as of July 1, 2020, the Canada-United States-Mexico Agreement (CUSMA) in Canada,[3] the United-States-Mexico-Canada (USMCA) in the United States,[4] or the Tratado entre México, Estados Unidos y Canadá (T-MEC)[5] is in force.[6] The renegotiation of NAFTA fulfilled candidate Donald Trump's promise to scrap or renegotiate NAFTA in order to protect and restore United States

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[2] North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 289.

[3] *See* Government of Canada, A New Canada-United States-Mexico Agreement, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx (last visited Mar. 1, 2021). In French, it is called l'Accord Canada-États-Unis-Mexique (ACEUM). *Id.*

[4] *See* Office of the United States Trade Representative (USTR), United States-Mexico-Canada Agreement, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last visited Mar. 1, 2021).

[5] *See* Government of Mexico, Tratado entre México, Estados Unidos y Canadá (T-MEC) (Spanish only), https://www.gob.mx/t-mec (last visited Mar. 31, 2021).

[6] One is left to wonder why the three countries were unable to agree on a single name for the pact in English, and why the agreement's official name makes no reference to trade or investment, leaving a vague but false impression that it deals comprehensively with all matters of mutual concern to the signatories. One set of commentators observed that "[t]he seemingly trivial brand-name change from NAFTA to USMCA evinces a deeper problem of deinstitutionalization," or weakening of the post-Cold War international order more broadly. Gustavo A. Flores-Macías & Mariano Sánchez-Talanquer, *The Political Economy of NAFTA/USMCA*, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 17 (Aug. 28, 2019), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1662. This article will refer to the agreement as NAFTA's replacement or CUSMA-USMCA.

jobs and industrial capacity and increase economic growth,[7] themes that consistently helped define his trade agenda politically as President.[8] But what about the environment? When NAFTA was finalized early in the Clinton Administration in 1993, North American environmental groups insisted that the agreement address their concerns that liberalized trade and investment would lead to environmental dumping, environmental backsliding, weak environmental enforcement and scale effects (i.e., more trade equals more environmental impact).[9] The environmental provisions of NAFTA and its environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC),[10] responded to many of those concerns, at least on paper, and set the broad contours of United States trade and environment policy ever since.

Broadly speaking, rising socio-economic trends such as population, gross domestic product (GDP), foreign direct investment and many kinds of production and consumption, correlate strongly with rising ecological impacts, such as climate change, loss of biodiversity and other pressures on critical planetary boundaries of safe operating space for humanity.[11] Consistent with this correlation, while NAFTA and its progeny have taken effect over the past three decades, the aggregate ecological impacts of human activity, with international trade a major driver, have worsened according to many key measures. Within the hierarchy of planetary boundaries, climate change and biosphere integrity are reasonable proxies for broad-scale ecological impact because they are global-scale boundaries that are "highly integrated, emergent system level phenomena . . . connected to all of the other [boundaries]."[12] From January 1994 to January 2021, the atmospheric concentration of carbon dioxide measured

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[7] Emily Stephenson & Amanda Baker, *Trump Vows to Reopen, or Toss, NAFTA Pact with Canada and Mexico,* REUTERS (June 28, 2016, 3:06 AM), https://www.reuters.com/article/us-usa-election-idUSKCN0ZE0Z0; Mary E. Burfisher et al., *NAFTA to USMCA: What is Gained?,* (IMF, Working Paper No. 19/73, Mar. 26, 2019), https://www.imf.org/en/Publications/WP/Issues/2019/03/26/NAFTA-to-USMCA-What-is-Gained-46680.

[8] DAN CIURIAK, HOW U.S. TRADE POLICY HAS CHANGED UNDER PRESIDENT DONALD TRUMP – PERCEPTIONS FROM CANADA (Mar. 29, 2019), https://ssrn.com/abstract=3362910.

[9] *See* Geoffrey Garver, *Forgotten Promises: Neglected Environmental Provisions of the NAFTA and the NAAEC, in* NAFTA AND SUSTAINABLE DEVELOPMENT: HISTORY, EXPERIENCE AND PROSPECTS FOR REFORM 15 (Hoi L. Kong & L. Kinvin Wroth eds., 2015); Linda J. Allen, *The Environment and NAFTA Policy Debate Redux: Separating Rhetoric from Reality*, 42 WILLIAM & MARY ENV'T L. & POL'Y REV. 965, 970-71 (2018).

[10] North American Agreement on Environmental Cooperation (NAAEC), Sept. 14, 1993, 32 I.L.M. 1480.

[11] *See* Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet,* 347 SCIENCE 1259855, 1259855-8 (2015); Xuemei Bai et al., *Plausible and desirable futures in the Anthropocene: A new research agenda,* 39 GLOBAL ENVIRONMENTAL CHANGE 351 (2016).

[12] Steffen et al., *supra* note 11, at 8.

at Mauna Loa rose sixteen percent, from to 358.24 ppm to 415.28 ppm.[13] Biodiversity loss, measured by risk of species extinction, overall species abundance or biodiversity intactness, steadily worsened over this period as well.[14] International trade has contributed significantly to this loss of biodiversity, particularly as higher-income countries have increased their consumption of goods from lower-income countries where habitat loss and other threats to biodiversity are especially severe—as in Mexico and other parts of Latin America and the Caribbean.[15] Trade has also factored significantly in the ongoing rise in ecological footprint globally, in North America, and in Canada, Mexico and the United States individually since 1994, despite some relative (but not absolute) decoupling of some ecological impacts from trade-related consumption.[16]

So, what kind of environmental provisions would a new NAFTA, negotiated with no evident consideration of these broad regional and global ecological trends, at the insistence of a climate skeptic, environmentally insouciant President backed initially with Republican majorities in both houses of Congress, include?[17] In the end, the NAFTA's replacement made no radical changes for better or worse in regard to the environment. Indeed, the agreement has been described as mostly "old wine in a new bottle."[18] The agreement brings North American trade and environment policy more or less in line with post-NAFTA trade agreements of the three countries without changing the basic structure for approaching trade and environment that, with some small tweaks, has been in place since NAFTA. And, that is precisely the problem. The trade and environment policy regime of CUSMA-USMCA perpetuates an approach that remains blind to, and ineffective in confronting, the most pressing ecological challenges that global and regional trade and investment help drive.

In this article, I will first review, analyze and critique the key changes that NAFTA's replacement made to the environmental provi-

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[13] Monthly CO2, *Mauna Loa CO_2: January 2021*, CO2 EARTH, https://www.co2.earth/monthly-co2 (last visited Mar. 23, 2021). *See also* QUENTIN KARPILOW ET AL., NAFTA: 20 YEARS OF COSTS TO COMMUNITIES AND THE ENVIRONMENT 6 (Mar. 2014) (noting that from 1990 to 2005, greenhouse gas emissions rose by 17% in the United States, 26% in Canada and 37% in Mexico).

[14] *See* WWF, LIVING PLANET REPORT 2020: BENDING THE CURVE OF BIODIVERSITY LOSS 28 (R.E.A. Almond et al., eds., 2020) (Switz.) (hereinafter LPR 2020).

[15] *See* LPR 2020, *supra* note 14, at 17-20, 52.

[16] WWF, LIVING PLANET REPORT 2008 28-29 (Chris Hails et al. eds., 2008) (Switz.). For more detail regarding the rising ecological footprint in North America, *see* discussion *infra* Section III.A.

[17] *See* Ruth Zavala, *El ACAAN y sus instituciones como catalizadores de la gobernanza ambiental en Meéxico: del TLCAN al T-MEC* (*The NAAEC and Its Institutions as Catalysts for Environmental Governance in Mexico: From NAFTA to the USMCA*), 15 NORTEAMÉRICA 9 (2020).

[18] Flores-Macías & Sánchez-Talanquer, *supra* note 6, at 16.

sions of NAFTA and the NAAEC. I will then explain why the environmental provisions of CUSMA-USMCA and its ancillary Environmental Cooperation Agreement (ECA),[19] like the environmental policy approach typical of post-NAFTA trade and investment agreements, are woefully inadequate for helping to solve urgent challenges, like climate change and loss of biodiversity, that the human enterprise faces in these ecologically dire times.

II. Comparison of CUSMA-USMCA's Environmental Provisions To Those of NAFTA and NAAEC

Like nearly all post-NAFTA trade and investment agreements involving at least one of the NAFTA parties, the CUSMA-USMCA includes an environment chapter,[20] no longer relegating environment largely to a side agreement.[21] Only time will tell whether this change will give greater weight to the environment in the North American trade arena or will lead to party-to-party enforcement of environmental matters that are now subject to the agreement's dispute resolution provisions.[22] However, there are many reasons for suspecting that the environmental revisions in NAFTA's replacement will have only modest impact, at best.

A. Adopting, Maintaining and Improving on High Levels of Environmental Protection

Akin to the sailor's trick of tying many knots if you do not know the right one, the parties loaded NAFTA and the NAAEC with many overlapping efforts to stymie any conceivable effort to make the adoption or maintenance of ever higher levels of environmental protection in North America in any way enforceable. Both NAFTA and the NAAEC made

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[19] Agreement on Environmental Cooperation among the Governments of Canada, the United States of America, and the United Mexican States (ECA) (2019), https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-ECA.pdf (hereinafter Environmental Cooperation Agreement).

[20] United States-Mexico-Canada Agreement art. 24, Sept. 30, 2018, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (hereinafter CUSMA-USMCA or ECA).

[21] I.e., the NAAEC.

[22] For a cautiously optimistic perspective, *see* Anne-Catherine Boucher, *The USMCA Contains Enhanced Environmental Protection Provisions but Will They Lead to Substantive Environmental Protection Outcomes?*, American Bar Association (Nov. 20, 2020), https://www.americanbar.org/groups/environment_energy_resources/publications/ierl/20201120-the-usmca-contains-enhanced-environmental-protection-provisions/. Canada's and the United States' self-serving environmental reviews are also quite optimistic about the agreement's environmental provisions; *see* discussion *infra* Section II.C.

the desire for ever-improving environmental standards explicit policy. In NAFTA's preamble, the parties stated their aim "to strengthen the development and enforcement of environmental laws and regulations,"[23] and in the NAAEC preamble they noted "the importance of the environmental goals and objectives of the NAFTA, including *enhanced* levels of environmental protection."[24] The NAAEC also included the agreed objective to "foster the protection and *improvement* of the environment in the territories of the Parties for the well-being of present and future generations."[25] Yet, these statements of policy objectives would need teeth to make them credible and meaningful.

The text of NAFTA and the NAAEC clearly did not provide those teeth, despite the use of "shall" in regard to some of the relevant mandates. The requirement in NAAEC article 3 that each party "shall ensure that its laws and regulations provide for high levels of environmental protection" is fatally qualified by the parties' recognition in the same article of each party's "right to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations."[26] Further, article 3 requires only that each party "shall *strive* to continue to improve those laws and regulations,"[27] a hobbled mandate that is likewise subject to the parties' right to establish or modify their domestic levels of environmental protection. Article 906(2) of NAFTA, which suggested a policy of upward harmonization of North American health, environmental and safety standards, diluted any mandate to do so with language that the parties "shall, *to the greatest extent practicable*, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties."[28] NAFTA article 714(1) uses nearly identical language with regard to sanitary and phytosanitary measures.[29] The strongest suggestion of a policy of non-regression in either NAFTA or the NAAEC, in NAFTA article 1114(2), avoided the use of "shall" altogether and provided party-to-party consultations as the sole remedy:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party *should not* waive or otherwise derogate from, or

[23] NAFTA Preamble.
[24] NAAEC Preamble.
[25] NAAEC art. 1(a) (emphasis added).
[26] NAAEC art. 3.
[27] *Id.* (emphasis added)
[28] NAFTA art. 906(2) (emphasis added).
[29] NAFTA art. 714(1).

> offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[30]

When NAFTA was adopted, these environmental "mandates" were widely seen to be mere aspirational policy statements.[31] Not surprisingly, then, these provisions of NAFTA and the NAAEC have been entirely ineffectual in preventing environmental backsliding in Canada, Mexico and the United States, all of which have done so,[32] or in ensuring significant upward harmonization of North American environmental standards.[33] Indeed, despite numerous instances of weakening of environmental laws and regulations among the NAFTA parties, no party has ever sought consultations or even developed a means for tracking the other parties' compliance with this soft mandate.[34]

In contrast, the CUSMA-USMCA jettisoned any ambition for upward harmonization of environmental standards but retained soft requirements for the parties to achieve high levels of environmental protection of their own choosing and to avoid environmental backsliding. Article 24.3 preserves the unenforceable mandate to "strive" for high levels of environmental protection,[35] as well as the qualification that each party reserves its sovereign right "to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt, or modify its environmental laws and policies accordingly."[36] However, CUSMA-USMCA chapters 9 (Sanitary and Phytosanitary Measures) and 28 (Good Regulatory Practices), undercut any objective

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[30] NAFTA art. 1114(2) (emphasis added).

[31] *See* Garver, *supra* note 9, at 25-26.

[32] *See id.* at 22-25; GEOFFREY GARVER, ECOLOGICAL LAW AND THE PLANETARY CRISIS: A LEGAL GUIDE FOR HARMONY ON EARTH 193-95 (2021).

[33] *See* Halil Hasic, *Article 1110 of NAFTA: Investment Barriers to Upward Harmonization of Environmental Standards*, 12 SW. J. L. & TRADE AM. 137, 139 (2005). Nonetheless, successes such as Mexico's phase out of DDTs and its adoption of a national pollutant release and transfer inventory, the *Registro de Emisiones y Transferencia de Contaminantes*, akin to Canada's National Pollutant Release Inventory and the United States' Toxics Release Inventory are noteworthy. *See* Government of Mexico, *Registro de Emisiones y Transferencia de Contaminantes (RETC)*, https://www.gob.mx/semarnat/acciones-y-programas/registro-de-emisiones-y-transferencia-de-contaminantes-retc.

[34] During the author's time on the JPAC from 2010 to 2013, it became clear through informal discussions with government representatives that no systems were in placed to track other parties' performance in this regard. In addition, a search of relevant government websites revealed no evidence of such efforts.

[35] CUSMA-USMCA, art. 24.3(2).

[36] CUSMA-USMCA, art. 24.3(1).

of strengthened environmental measures with provisions that prohibit such measures from being any stronger than necessary.[37] In essence, the CUSMA-USMCA, like nearly all contemporary free trade agreements, adopts a reverse precautionary approach, whereby instead of promoting precaution to ensure that environmental measures are not too weak, it promotes trade-protective precaution to ensure that they are not too strong.

In addition, the "should" in NAFTA's toothless article 1114(2) became a "shall" in CUSMA-USMCA article 24.4(3), which states that "a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties."[38] As well, the remedy for environmental regression under article 24.4(3) is full dispute resolution under CUSMA-USMCA's chapter 31 on dispute settlement, not consultations as under NAFTA article 1114(2).[39] Yet, that has been the case for many of Canada's and the United States' post-NAFTA trade and investment agreements,[40] which have incorporated environmental chapters with similar language directly into the agreement and not relegated them to a side

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[37] *See, e.g*., CUSMA-USMCA art. 9.6(2) ("Each Party has the right to adopt or maintain sanitary and phytosanitary measures necessary for the protection of human, animal, or plant life or health, *provided that those measures are not inconsistent with the provisions of this Chapter*") (emphasis added). Those other provisions include requirements to adopt the least trade restrictive measures possible. *See* CUSMA-USMCA arts. 9.6(10), 9.13(8). In general, CUSMA-USMCA chapter 28 is replete with bureaucratic procedures that seem aimed at rendering the adoption or maintenance of regulations more time-consuming and difficult, with one objective being to "avoid unnecessary restrictions on competition in the marketplace" (art. 28.4(1)(f)). For example, the parties are required to have in place processes for assessing regulatory impacts (art. 28.4(1)(e)), to publish a list of anticipated regulations a year in advance with an indication of any expected significant impact on international trade and investment (art. 28.6), to develop a website dedicated to providing the information required under chapter 28 (art. 28.7), to expand opportunities for comments on regulations and to evaluate all such comments in writing (art. 28.9), and to have a process for retrospective reviews of regulations with a view to modifying or repealing them on its own initiative or at the request of any interested person (arts. 28.13, 28.14). One commentator concludes that Chapter 28 is a big win for multinational corporations and that it "places significant burdens on regulatory agencies that are, in many cases, already under-resourced." Kyla Tienhaara, *NAFTA 2.0: What are the implications for environmental governance,* 1 EARTH SYSTEM GOVERNANCE 1, 2 (2019).

[38] CUSMA-USMCA art. 24.4(3).

[39] CUSMA-USMCA art 24.32.

[40] *See, e.g.,* US-Peru Trade Promotion Agreement art. 18.3(2); US-Panama FTA art. 17.3(2); KORUS FTA art. 20.3(2); Trans-Pacific Partnership Agreement art. 20.3(6); Canada-Colombia FTA art. 1702; Canada-EU Comprehensive Economic and Trade Agreement art. 24.5(2). Some U.S. agreements, such as CAFTA-DR and the US-Chile FTA, use the weaker "shall strive to ensure" instead of "shall." *See* CAFTA-DR, art. 17.2(2); US-Chile FTA, art. 19.2(2). *See generally* Free Trade Agreements, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements (last visited Mar. 31, 2021); *and* Trade and Investment Agreements, GOVERNMENT OF CANADA, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx (last visited Mar. 31, 2021).

agreement like the NAAEC. Not surprisingly, neither Canada, the United States nor any of their trading partners has ever initiated a dispute regarding weakened environmental laws under provisions akin to CUSMA-USMCA article 24.4(3). Not only would a such a claim require proof that a waiving or derogation of an environmental law (terms that the agreement does not define or contextualize) was done in order to promote trade or investment, but the party making the claim would also have to contend with other provisions, such as CUSMA-USMCA article 24.3, that give the parties wide discretion to choose and modify (i.e., strengthen *or* weaken) the level of environmental protection they deem appropriate.

Chapter 24 of CUSMA-USMCA actually is replete with party mandates regarding the environment, expressed using "shall", that are now technically subject to dispute settlement under chapter 31. For example, each party "shall promote public awareness of its environmental laws and policies,"[41] "shall provide for the receipt and consideration of written questions or comments from persons of that Party regarding its implementation of this Chapter,"[42] "shall" ensure that certain procedures are available to redress environmental harms,[43] "shall take measures to prevent the pollution of the marine environment from ships,"[44] "shall take measures to prevent and reduce marine litter,"[45] "shall" encourage corporate social responsibility and responsible business conduct,[46] "shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy,"[47] "shall seek to operate a fisheries management system that regulates marine wild capture fishing,"[48] "shall" promote the conservation of marine species,[49] "shall" take action to end certain fisheries subsidies,[50] and "shall" cooperate or exchange information on a number of topics.[51] However, nearly all of these "shall" mandates are either not of a nature that would likely lead to a trade dispute or contain modifying language that makes them virtually unenforceable. Additional weaknesses of the mandates in chapter 24 are discussed below, in connection with the provisions on environmental en-

[41] CUSMA-USMCA art. 24.5(1).
[42] CUSMA-USMCA art. 24.5(2).
[43] CUSMA-USMCA art. 24.6.
[44] CUSMA-USMCA art. 24.10(1).
[45] CUSMA-USMCA art. 24.12(2).
[46] CUSMA-USMCA art. 24.13.
[47] CUSMA-USMCA art. 24.15(2).
[48] CUSMA-USMCA art. 24.18(1).
[49] CUSMA-USMCA art. 24.19.
[50] CUSMA-USMCA art. 24.20.
[51] *See*, *e.g.*, CUSMA-USMCA arts. 24.15(6) (biodiversity), 24.21(2)(g) (illegal fishing), 24.22(2) (illegal trade in species), and 24.23(5) (forest management).

forcement, environmental impact assessment and multilateral environmental agreements.

B. Addressing Weak or Ineffective Environmental Enforcement

The CUSMA-USCMA retains, with some modifications, the two primary mechanisms in the NAAEC for addressing concerns that a party is failing to effectively enforce its environmental law: (1) the submissions on enforcement matters (SEM) process, which allows North American persons or organizations to seek preparation by the CEC Secretariat of a detailed factual record regarding allegations of ineffective environmental enforcement by a party;[52] and (2) the party-to-party dispute resolution process in NAAEC Part V, which allowed a party to seek remedies for another party's persistent pattern of failing to effectively enforce its environmental law.[53] In the case of the SEM process, the CUSMA-USMCA and the ECA include modest revisions regarding follow up to factual records. They allow the new Environment Committee[54] and the Council to consider cooperative activities that respond to information in factual records,[55] and the CUSMA-USMCA requires the parties to "provide updates to the Council and the Environment Committee on factual records, *as appropriate*."[56]

These mostly cosmetic changes to the SEM process fail to address the most prominent concerns that users and observers of the process have raised since its inception. The chief concern is that the process lacks adequate independence from the parties, acting individually or collectively as the Council, to be credible and effective.[57] Party or Council interference with the independence of the process, and the Secretariat's role in administering it, has occurred most egregiously in Council votes on whether to authorize the Secretariat to prepare a factual record for a submission and in factual record instructions where one is authorized.

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[52] *See* NAAEC art. 14, 15; CUSMA-USMAC art. 24.27, 24.28.

[53] *See* NAAEC art. 22 et seq.; *cf.* CUSMA-USMCA art. 24.4(1), (2).

[54] *See* discussion *infra* Section II.E.

[55] CUSMA-USMCA art. 24.28(7); ECA art. 4(1)(m).

[56] CUSMA-USMCA art. 24.28(8) (emphasis added). This language effectively makes the provision of updates discretionary, not mandatory. Based on experience to date following revised SEM guidelines adopted in 2012 with similar language, it is likely that these updates will rarely if ever be provided. *See* Council Ministerial Statement (July 11, 2012) (revised guidelines "call for Parties to follow up on concluded submissions with information on any new developments and actions taken regarding matters raised in such submissions.")

[57] *See* Garver, *supra* note 32, at 200; Paul Stanton Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission,* 32 Env't. L. Rep. News & Analysis 10769 (2002) *passim.*

For example, in the case of several submissions, the Council has either voted against preparation of a factual record or issued instructions, typically drafted by the party whose environmental enforcement is the target of the submission, that significantly diverged from what the submission asked for and what the Secretariat recommended.[58] In the Species at Risk submission involving Canada, the scope of the factual record authorized by the Council diverged so significantly from what the Submitters requested and what the Secretariat recommended that the Submitters withdrew the submission instead of allowing a distorted factual record to be published.[59] Because of these concerns, the JPAC informed the Council in 2011, following a survey, that the credibility and utility of the process as an independent accountability mechanism was seriously eroded in that many environmental NGOs found the process did not provide information they were seeking or resolve their concerns.[60] The modest changes made in the CUSMA-USMCA and the ECA do virtually nothing to address the most serious flaws in the SEM process, the most prominent of which is the built-in conflict of interest[61] that parties face as both targets and (through the Council) active manipulators and overseers of the process.

Under the regime of NAFTA and the NAAEC, Part V of the NAAEC never came to life. Canada, Mexico and the United States never adopted the rules of procedure for Part V required under NAAEC Article 28 or established a roster of Part V arbitrators as required under NAAEC

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[58] GARVER, *supra* note 32, at 200; JPAC, Advice to Council 11-04 — Submissions on Enforcement Matters (SEM) and Cross Border Movements of Chemicals in North America 2 (December 7, 2011), http://www.cec.org/files/documents /jpac_advice_council/jpac-advice-11-04-en.pdf ("JPAC advises the Council that its focus . . . should be on the timeliness and accessibility of the process, *on giving more deference to the Secretariat's independent recommendations and interpretations in the process*, and on follow-up to factual records") (emphasis added).

[59] Letter from Devon Page, Ecojustice, to Evan Lloyd, CEC Secretariat (Jan. 17, 2011), http://www.cec.org/wp-content/uploads/wpallimport/files/06-5-not_en.pdf.

[60] JPAC, Advice to Council 11-04, *supra* note 58.

[61] *See* Garver, *supra* note 9, at 26; JPAC, Advice to Council 03-05 — Limiting the scope of factual records and review of the operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation 3 (Dec. 17, 2003), http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-03-05-en.pdf (noting "an emerging perception of Council being in conflict of interest" and recounting public testimony at a JPAC meeting that "Council is having a hard time differentiating their role-when they are acting as a Council and when they are acting individually as Parties"); Geoff Garver, *Tooth decay* 25 ENV'T F. 34, 38 (May/June 2008) ("Providing the CEC secretariat with greater discretion to define the scope of factual record investigations would address a fundamental concern about the process: the inherent conflict of interest that the NAFTA governments face in being both council members who vote on factual records and also, since the council is composed of the three countries' environmental ministers, targets of individual submissions."); David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 440 (2010).

Article 25. Further, no party to the NAAEC has ever initiated a Part V dispute with another party, just as no government party to any of the myriad post-NAFTA agreements[62] with this type of provision targeting persistent failures to effectively enforce environmental law has ever initiated such a dispute. This wholesale failure to use Part V and similar provisions is most likely because of serious structural flaws in the dispute process, especially key definitions and burdens of proof.[63] In particular, a successful party claimant would have to defeat exceptions for *bona fide* decisions to allocate enforcement resources to higher priority matters and for reasonable exercise of enforcement discretion, as well as to prove a sustained or recurring course of action amounting to a persistent pattern of weak environmental enforcement linked to trade.[64] Despite a risible clarification in the CUSMA-USMCA that sustained or recurring failure to effectively enforce environmental law is presumed to be "in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise,"[65] disputes regarding such failures of environmental enforcement are likely to remain "a Pandora's box no government is likely to open."[66]

C. Environmental Impact Assessment

Chapter 24 of CUSMA-USMCA includes new language making it mandatory for each party to have "*appropriate* environmental impact assessment procedures for assessing the environmental impact *of proposed projects* that are subject to an action *by that Party's central level of government* that may cause significant effects on the environment,"[67] and that these include provisions for public disclosure of information and public participation.[68] Putting aside that the word "appropriate" renders this language effectively unenforceable, the need for this provision is elusive, because Canada, Mexico and the United States all have had environmental impact assessment requirements for their federal govern-

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[62] *See, e.g.,* US-Colombia FTA, Articles 18.3(1), 18.12; DR-CAFTA, Articles 17.2(1), 17.10; US-Peru TPA, Articles 18.3(1), 18.12; US-Panama TPA, Articles 17.3(1), 17.11; US-Chile FTA, Articles 19.2(1), 19.6; US-Australia FTA, Articles 19.2(1), 19.7; Canada-EU Comprehensive Economic and Trade Agreement art. 24.5(3); Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 20.3(4); Canada-Colombia Agreement on the Environment art.2(2).

[63] *See* NAAEC art. 22 et seq.

[64] *See* Garver, *supra* note 9, at 27-28.

[65] CUSMA-USMCA, art. 24.4(1) note 5.

[66] Garver, *supra* note 9, at 28 (quoting Geoff Garver, *Tooth Decay*, 25 Env't. F. 34, 39 (May/June 2008)).

[67] CUSMA-USMCA art. 24.7(1) (emphasis added).

[68] CUSMA-USMCA art. 24.7(2).

ments since before NAFTA.[69] Moreover, the agreement excludes sub-national levels of government, whose projects can elude federal requirements,[70] and strategic or regional environmental impact assessments of policies and programs, which are mandatory at the federal level in the United States but not in Canada or Mexico.[71] If the intent was to preserve the mandate in the NAAEC requiring each party to "assess, as appropriate, environmental impacts,"[72] the governments opted to weaken the requirement by referring only to federal projects rather than strengthen it by expanding it explicitly to include sub-national levels of government and strategic impact assessment.

Ironically, both Canada and the United States conducted environmental impact assessments of the CUSMA-USMCA,[73] both of which fall far short of the gold standard for rigorous and objective scientific impact assessment designed to identify and avoid or mitigate significant environmental impacts. The United States Trade Representative's (USTR's) environmental review,[74] conducted without the rigor generally applied under NEPA, is more of a pro-USMCA public relations pamphlet than a credible environmental impact assessment. It mostly touts the expected benefits of the environmental provisions that were included, states that no significant negative environmental impacts were identified and glaringly excludes analysis of climate impacts, despite a few references to pre-existing binational or trinational cooperation on some climate issues

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[69] Canada may have sought to include this provision, which it has included in some post-NAFTA agreements. *See, e.g.*, Canada-Colombia Agreement on the Environment art. 2(5).

[70] Negotiation of the Transboundary Environmental Impact Assessment (TEIA) agreement called for under NAAEC Article 10(7) collapsed in 1999, in part because of Mexico's concern that a Texas low-level nuclear waste site, which was subject to state environmental assessment law but not NEPA, would not be covered by a TEIA agreement. Because such a project would trigger a federal environmental impact assessment in Mexico, the Texas example revealed a serious lack of reciprocity among the parties. *See* Geoffrey Garver & Aranka Podhora, *Transboundary Environmental Impact Assessment as Part of the North American Agreement on Environmental Cooperation*. 26 IMPACT ASSESSMENT AND PROJECT APPRAISAL 253, 259 (2008).

[71] In the United States, the National Environmental Policy Act (NEPA) mandates environmental impact assessment for major federal actions, which includes programs and policies. 42 U.S.C. § 4332(2)(C). In Canada, regional and strategic impact assessments are discretionary. Impact Assessment Act (S.C. 2019, c. 28, s. 1) §§ 92, 95(1). Mexico has no federal mandate to conduct strategic environmental assessments for federal policies or programs.

[72] NAAEC, art. 2(1)(e).

[73] The author could find no environmental assessment of T-MEC by Mexico.

[74] USTR, Final Environmental Review of the United States-Mexico-Canada Agreement (2019), https://ustr.gov/sites/default/files/files/agreements/usmca/USMCA_Final_Environmental_Review.pdf. The review was conducted not under NEPA, but under the Clinton-era Executive Order 13141, which includes language that insulates environmental reviews of trade agreements from judicial review. E.O. 13141 § 7 (Nov. 16, 1999). In Public Citizen v. United States Trade Representative, 5 F.3d 549, 553 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994), the D.C. Circuit held that negotiation of trade agreements such as NAFTA is not subject to judicial review, effectively precluding application of NEPA to trade agreements.

that will continue after the agreement is in force.[75] And Canada's environmental review is dated July 14, 2020,[76] two weeks *after* CUSMA-USMCA took effect. Thus, one can hardly expect it to have met the core objective of environmental assessment to consider potential impacts early in the decision-making process so any important environmental impacts can be avoided or mitigated. Instead, it appears to be mostly a post-hoc analysis and justification of the agreement.[77] The review notes that "CUSMA generally carries forward the key provisions of NAFTA, including virtually tariff-free market access, and therefore important environmental considerations of relevance to North American trade are not expected to change significantly with the transition to the new Agreement."[78] Despite this forecast of no significant change from NAFTA and the exclusion of climate change in the CUSMA-USMCA, the review optimistically concludes:

> Based on the environmental impact studies undertaken on NAFTA, as well as on the qualitative chapter-by-chapter assessment of the environment-related provisions under CUSMA, this report finds that CUSMA's impacts on the environment will be more positive than NAFTA as the new Agreement is expected to strengthen environmental protection and governance practices in North America.[79]

D. Enforcement of Multilateral Environmental Agreements Through CUSMA-USMCA

The CUSMA-USMCA goes beyond NAFTA, which gave three multilateral environmental agreements (MEAs) qualified precedence over NAFTA,[80] by referring to a longer list of seven MEAs[81] and requiring each party to "adopt, maintain, and implement laws, regulations, and

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[75] USTR, *supra* note 74.

[76] Government of Canada, Final Environmental Assessment of the Canada-United States-Mexico Agreement (CUSMA) (July 16, 2020), https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/final_ea-ee_finale-en.pdf.

[77] *Id.*

[78] *Id.* at 3.

[79] *Id.* at 4. The environmental review is entirely devoid of any rigorous explanation or justification for this expectation.

[80] NAFTA art. 104. The listed agreements included the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), which prevailed over inconsistent provisions of NAFTA "to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement." NAFTA art. 104(1).

all other measures necessary to fulfill its respective obligations" under them.[82] This party obligation is enforceable through the agreement's party-to-party dispute settlement provisions, as long as the alleged violation is "in a manner affecting trade or investment between the Parties."[83] This is one of the more significant new enforceable provisions, although whether and how any such violations will be addressed through the dispute settlement mechanism, and whether the arbitrators to any such disputes will be competent to adequately address claims regarding MEAs, remains to be seen. Moreover, the exclusion of the Paris Climate Agreement from the list of MEAs, along with the absence of other significant provisions in the agreement regarding mitigation of or adaptation to climate change, is a glaring omission.[84]

E. Environment Committee

Although the CUSMA-USMCA and the ECA retain the CEC Council,[85] the CUSMA-USMCA also establishes an Environment Committee "composed of senior government representatives, or their designees, of the relevant trade and environment central level of government authorities of each Party"[86] whose purpose is to oversee implementation of Chapter 24.[87] By contrast, the CEC Council is made up of "the cabinet-level or equivalent representatives responsible for environmental affairs of the Parties, or their designees."[88] The CUSMA-USMCA calls for the Environment Committee to meet within one year of the July 1, 2020, entry into force of the agreement,[89] but as of April 2021, the committee

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[81] The seven listed MEAs are "the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended; the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended; the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended; the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended; the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980; the International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949." CUSMA-USMCA art. 24.8(4).

[82] CUSMA-USMCA art. 24.8(4).

[83] CUSMA-USMCA art. 24.8 note 6.

[84] *See* Press Release, NRDC, NAFTA Rewrite Fails Key Climate Test (Dec. 9, 2019), https://www.nrdc.org/media/2019/191209.

[85] *See* NAAEC arts. 8-10 (Part III).

[86] CUSMA-USMCA art. 24.26(2).

[87] CUSMA-USMCA art. 24.26(3).

[88] ECA, art. 3(1).

[89] CUSMA-USMCA art. 24.26(4).

does not appear to have been established.[90] The agreement leaves much to be clarified in regard to the relationship between the Environment Committee, whose focus appears to be Chapter 24,[91] and the Council, whose focus appears to be the ECA.[92] Whether these two trinational committees will be complementary or conflictual remains to be seen; certainly, the formal inclusion of trade-related officials on the Environment Committee could lead to conflicts with the more environmentally oriented Council, although pre-existing domestic interagency processes within the federal governments of Canada, Mexico and the United States already provide fertile ground for such trade and environment conflicts.

F. Tri-National Environmental Cooperation

The ECA, which is parallel to the CUSMA-USMCA, maintains the Commission for Environmental Cooperation (CEC) established under the NAAEC and its three main constituent bodies, the Council, the Secretariat and a smaller Joint Public Advisory Committee (JPAC).[93] The Council retains its broad authority to establish the strategic priorities and work program of the CEC, and the ECA identifies the following initial priorities for cooperation: "[s]trengthening environmental governance;" "[r]educing pollution and supporting strong, low emissions, resilient economies;" "[c]onserving and protecting biodiversity and habitats;" "[p]romoting the sustainable management and use of natural resources;" and "[s]upporting green growth and sustainable development."[94] Overall, the CUSMA-USMCA does not set in motion any major changes in the functioning or structure of the CEC.

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[90] Neither the USEPA nor the Environment and Climate Change Canada webpages that list the committees related to the CUSMA-USMCA's environmental provisions included the Environment Committee in early April 2021. USEPA, International Cooperation, https://www.epa.gov/international-cooperation/epas-role-north-american-commission-environmental-cooperation-cec (last visited Apr. 7, 2021); Government of Canada, International Affairs and the environment, https://www.canada.ca/en/environment-climate-change/corporate/international-affairs.html (last visited Apr. 7, 2021). However, in an e-mail communication with the author, the Government of Canada indicated that plans for holding the first formal meeting of the Environment Committee prior to July 1, 2021, were underway as of the end of March 2021. E-mail from CUSMA Inquiry, Global Affairs Canada, to Geoffrey Garver (Mar. 30, 2021).

[91] *See* CUSMA-USMCA art. 24.26(3).

[92] *See* ECA art. 4.

[93] ECA art. 2. The JPAC must now consist of at least nine members, instead of fifteen as the NAAEC mandated. ECA art. 6.

[94] ECA art. 10(2).

G. Modification of the Investor-State Dispute Mechanism

The CUSMA-USMCA includes significant changes in regard to investor-state disputes that were possible under NAFTA Chapter 11.[95] NAFTA Chapter 11 included an unprecedented waiver of sovereign immunity that allowed a private investor to sue a NAFTA government in arbitration that bypassed national judicial systems if the investor believed the government treated the investment unfairly under NAFTA's investment rules, and environmental groups have highlighted evidence that these investor-state disputes have undermined environmental regulation and protection in North America.[96] Most notably, the CUSMA-USMCA phases out investor-dispute settlement between Canada and the United States, thereby removing in part the potentially chilling effect that those disputes can have on strong environmental laws and regulations.[97] Nonetheless, they are retained with some modifications for Mexico and the United States, and the Trans-Pacific Partnership Agreement includes an investor-state dispute mechanism that applies to Canada and Mexico as signatories to that agreement.[98] Although the diminution in the scope of investor-state disputes in the CUSMA-USMCA takes away one avenue for private entities to create a chill on environmental regulation, the inclusion of new regulatory obstacles in Chapter 28 mitigates this gain,[99] especially because they are backed with the possibility of party-to-party dispute settlement through Chapter 31. How much of a meaningful difference the changes in the investor-state dispute mechanism will make remains to be seen.

H. Other Provisions

One interesting new feature of CUSMA-USMCA is the sunset clause in Chapter 34, under which the agreement expires after 16 years unless the parties explicitly agree to extend it for another 16 years.[100] Although this clause has been criticized for creating business uncertainty

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[95] *See* NAFTA arts. 1101-39 (Part V).

[96] *See* Karpilow et al., *supra* note 13, at 7-9.

[97] *See* Garver, *supra* note 32, at 201; Karpilow et al., *supra* note 13, at 8-9 (quoting a Canadian government official who related examples of U.S. law firms representing industry clients raising Chapter 11 concerns in pressuring the Canadian government to back off a wide range of regulations).

[98] *See* Tienhaara, *supra* note 37, at 2.

[99] *See id.* at 2-3.

[100] CUSMA-USMCA art. 34.7.

that could impede investment among the three countries,[101] it could benefit the environment if it prevents locking in ecologically harmful long-term investments driven by the GDP growth imperative or other economic considerations. Another novel feature of CUSMA-USMCA is a provision that allows a party to adopt or maintain measures deemed "necessary to fulfill its legal obligations" toward Indigenous peoples[102]—as long as the measure is "not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment."[103] Given the hurdles environmental measures have faced historically when challenged as discriminatory or as disguised trade restrictions,[104] it is too soon to assess whether this qualified nod to the rights of Indigenous peoples is more than an optical illusion.[105] Last, the CUSMA-USMCA also eliminated the energy proportionality clause that prevented Canada from reducing the proportion of energy exports to the United States.[106] This added flexibility for Canada is an environmental improvement in the agreement.

III. The Lost Opportunity To Move Toward Ecologically Sustainable Trade and Investment

Brigham Daniels coined the term "tragic institutions" to refer to institutions designed to address an environmental Tragedy of the Commons problem that themselves become tragic in that they lack the authority, capacity or flexibility to fulfill their original objectives or to adapt to new information and circumstances.[107] They are tragic not only

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[101] David A. Gantz, *Important New Features in the USMCA*, Rice University's Baker Institute for Public Policy Issue Brief (May 5, 2020), https://www.bakerinstitute.org/files/15846/; Flores-Macías & Sánchez-Talanquer, *supra* note 6, at 16.

[102] CUSMA-USMCA art. 32.5.

[103] *Id.* As with Chapters 9 and 28 with respect to environmental measures, the language qualifying this exception suggests a reverse precautionary approach that could inhibit strong protections for Indigenous peoples.

[104] *See* Daniel C. Esty & James Salzman, *Rethinking NAFTA: Deepening the Commitment to Sustainable Development*, in A Path Forward for NAFTA 125, 127 (C. Fred Bergsten & Monica de Bolle eds., 2017) (discussing environmentally problematic GATT rulings in the 1990s *tuna-dolphin* and *shrimp-turtle* cases).

[105] *Id.* (contending that NAFTA softened the requirement that environmental measures be the least trade restrictive option such that no challenges to such measures have been pursued under NAFTA, and the same might be true with respect to measures to meet obligations to Indigenous peoples).

[106] *See* M. Angeles Villereal & Ian F. Fergusson, The United States-Mexico-Canada Agreement (USMCA) 19, Congressional Research Service, No. R44981 (July 27, 2020), https://crsreports.congress.gov/product/pdf/R/R44981.

[107] Brigham Daniels, *Emerging Commons and Tragic Institutions,* 37 Env'T Law 515, 539 (2007).

because they are ineffective wastes of public resources, but also because they block the adoption of better alternatives for the policy space they occupy. In North America, no better example exists than the environmental regime of NAFTA and now CUSMA-USMCA, which can be lumped together as a continuum of failure, because CUSMA-USMCA represents another tragedy: the rare and now wasted opportunity to learn the right lessons about the gross inadequacy of the original NAFTA environmental regime and make a serious change in course.

A. The Lost Opportunity of NAFTA's Replacement

Trade and investment agreements like CUSMA-USMCA are negotiated first and foremost from the perspective that trade generates wealth and opportunity for many as it spreads goods, services, capital and information around the world.[108] This is the narrative in which the General Agreement on Trade and Tariffs (GATT), the World Trade Organization (WTO), relevant pronouncements of the G20 nations and the United Nations, and regional trade arrangements such as the European Union and NAFTA are rooted. Globalized trade and finance are cornerstones of the globally dominant growth-insistent economic system in which protection of private property rights and state sovereignty and limited regulation of ever-expanding market regimes are strongly and presumptively favored and environmental protections are limited, secondary and ultimately woefully inadequate.[109] Indeed, the resistance of the international trade policy community to even including environmental concerns in trade agreements, which persisted into the 1990s and lingers still, is well known. The mounting dilemma is that the dominant paradigm for trade and investment continually perpetuates and locks in a fundamental lack of scientific understanding and appreciation of the ultimate impossibility of its implicit assumptions about ecological sustainability and of the key role of international trade and finance as drivers of significant and worsening ecological impacts on Earth's ecosystems.[110] Falling far short of bringing a needed end to this ecological illiteracy in the international trade and finance regime, CUSMA-USMCA represents yet another lost

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[108] *See* Oran Young et al., *The Globalization of Socio-Ecological Systems: An Agenda for Scientific Research*, 16 Global Env't Change 304, 307-310 (2006).

[109] *See* Rachel Beddoe et al., *Overcoming Systemic Roadblocks to Sustainability: The Evolutionary Redesign of Worldviews, Institutions, and Technologies*, 106 PNAS 2483, 2486 (2009); David W. Orr, Hope Is an Imperative 151 (2011); Geoffrey Garver, *The Rule of Ecological Law: The Legal Complement to Degrowth Economics*, 5 Sustainability 316, 325 (2013).

[110] *See* William E. Rees, *Globalization and Sustainability: Conflict or Convergence?*, Bulletin of Science, Technology & Soc'y 22 (Aug. 2002).

opportunity to envelope trade and investment rules within ecological constraints.

Like most national and sub-national systems of environmental law,[111] the international policy on trade and environment has focused policy ambitions and, more rarely, legally binding action on discrete environmental impacts rather than on a comprehensive, systems-based and holistic approach for monitoring and decreasing aggregated and cross-scale ecological effects. One well known tool for tracking aggregate ecological impacts of human activity is the ecological footprint,[112] which is "a comprehensive sustainability metric that aims to capture all aspects of human consumption that derive from mutually exclusive bioproductive areas."[113] In the North American context, despite a JPAC recommendation in 2010 to "develop common metrics for tracking progress on greening the economy, such as ecological footprint, material and energy flow accounts, or other appropriate measures,"[114] neither Canada, Mexico nor the United States, nor the CEC, yet frames comprehensive policies around bringing the countries' or the region's ecological footprint, or other holistic metric of ecological impact, back to ecologically sustainable levels.[115] Although the per capita and total ecological footprint in North America has stabilized or slightly decreased since the 1990s,[116] the region's total and per capita footprints remain among the highest

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[111] *See generally* Garver, *The Rule of Ecological Law*, *supra* note 109.

[112] Mathis Wackernagel and William Rees developed the leading ecological footprint methodology in the mid-1990s. MATHIS WACKERNAGEL & WILLIAM E. REES, OUR ECOLOGICAL FOOTPRINT: REDUCING HUMAN IMPACT ON THE EARTH (1996). *See also generally* GLOBAL FOOTPRINT NETWORK, https://www.footprintnetwork.org.

[113] David Lin et al., *Ecological Footprint Accounting for Countries: Updates and Results of the National Footprint Accounts, 2012-2018*, 7 RESOURCES 58, at 16.

[114] JPAC, Advice to Council 10-03 - The Strategic Plan of the Commission for Environmental Cooperation 2010-2015, at 3-4 (October 8, 2010), http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-10-03-en.pdf. The JPAC advised: "Given that the sustainable ecological footprint is estimated to be about 2 hectares person globally and the North American average is about 7.8 hectares per person (9.4 in the U.S., 7.1 in Canada and 3.4 in Mexico), greening the economy must be about greatly increasing the efficiency of material and energy use in North America." The Council never responded to this advice.

[115] Some federal agencies, states, provinces and local governments do make marginal use of ecological footprint. *See, e.g., Empreinte écologique du Québec*, Rapport du Commissaire du développement durable, 2007-08 (2008); GLOBAL FOOTPRINT NETWORK, *San Francisco*, Case Studies (Aug. 15, 2011), https://www.footprintnetwork.org/2011/08/15/san-francisco-looks-footprint-2/; GLOBAL FOOTPRINT NETWORK, *The Ecological Footprint and Biocapacity of California* (Mar. 2013), http://footprintnetwork.org/images/article_uploads/EcologicalFootprint BiocapacityOfCalifornia_2013.pdf.; GLOBAL FOOTPRINT NETWORK, *Calgary*, Case Studies (Apr. 10, 2015), https://www.footprintnetwork.org/2015/04/10/calgary/; GLOBAL FOOTPRINT NETWORK, *Vancouver kicks off neighborhood Footprint Campaign* (Feb. 20, 2017), https://www.footprintnetwork.org/2017/02/20/vancouver-kicks-off-neighborhood-footprint-campaign/; GLOBAL FOOTPRINT NETWORK, *State of the States Report* (July 14, 2015), https://www.footprintnetwork.org/2015/07/14/states/.

[116] Lin et al., *supra* note 107, at 11.

globally and require a drastic decrease. Instead of tracking and responding to aggregate, holistic indicators like ecological footprint, the reductionist and fragmented approach to environmental policy in North America, which is particularly weak in the international trade and investment context, implicitly and unjustifiably relies on the thermodynamically flawed assumption that economic growth will yield technological innovations that will sufficiently increase the efficiency of material and energy throughput to address aggregate ecological concerns.[117]

Simply put, the weak environmental safeguards in the NAFTA model, even with modifications in its replacement, the CUSMA-USMCA, and other post-NAFTA trade and investment agreements, are insufficient to regulate the drivers of ecological pressures associated with increasing international exchange of goods and services and strong protection of foreign investments. Worse, even those weak provisions have not been adequately implemented. Again, this failing approach to environmental regulation of trade and investment is hard-wired into policy, not only in North America but globally.

B. The Need for Stronger Advocacy for Counter-Narratives to the NAFTA and Post-NAFTA Framing of Trade and Environment

A strong, united shift in the positions of North American environmental NGOs could help shift public debate, and ultimately trade policy, to align it better with a rigorous response to the region's and the world's looming ecological crisis.[118] In 1993, environmental NGOs in North America were divided on the merits of the trade and environment compromise that resulted from President Clinton's insistence on labor and environment side agreements to the final NAFTA text that he inherited.[119] The Sierra Club, Friends of the Earth, the Humane Society, Greenpeace, the Council of Canadians, and Public Citizen were prominent groups insisting that NAFTA and the NAAEC did not go far enough in protecting the environment, pointing in particular to the chilling effect

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[117] For examples of unsubstantiated assumptions that GDP growth will lead to environmental improvements, *see* Jeffrey D. Sachs, Common Wealth: Economics for a Small Planet (2008); UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication – A Synthesis for Policymakers* (2011), https://www.unep.org/resources/report/pathways-sustainable-development-and-poverty-eradication.

[118] *See* Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment,* 30 Stanford J. Int'l L. 379, 390 (1994) ("international alliances among environmental groups are vital to advancing an environmental agenda in trade fora").

[119] NAFTA was negotiated and signed during the Bush Administration, but it had not yet received Congressional approval when the Clinton Administration took over in January 1993.

that Chapter 11 and other NAFTA provisions could have on effective environmental regulation and enforcement.[120] The Natural Resources Defense Council (NRDC), the Audubon Society, the Center for International Environmental Law (CIEL), the Environmental Defense Fund (EDF), Conservation International, the National Wildlife Federation (NWF), and the World Wildlife Fund (WWF) sided with the Clinton Administration and supported Congressional ratification of NAFTA in light of the NAAEC.[121]

International trade is undeniably an intricate part of a globalized economy that is exacting a mounting and critical toll on Earth's ecosystems. The precise contribution of NAFTA to regional and global ecological impacts is impossible to determine, and some of the worst environmental fears about NAFTA (such as massive environmental dumping to less developed countries due primarily to laxer environmental law) have not materialized. However, the general demise and neglect of many of NAFTA's and the NAAEC's environmental provisions, such as the SEM process, should warrant some consternation on the part of the environmental NGOs that supported NAFTA. A search of the EDF, NWF, Conservation International, National Audubon Society[122] and WWF websites for USMCA or NAFTA returned no results regarding the renegotiation of NAFTA, and those organizations no longer have active work programs regarding trade. CIEL has an active work program on international trade and investment and signed onto statements by several environmental NGOs opposing "Trump's NAFTA 2.0".[123] NRDC focused its attention during NAFTA's renegotiation on the failure to include the Paris Climate Agreement in the CUSMA-USMCA, and also submitted a comment to the House Ways and Means Committee in June 2019 calling for stronger enforcement mechanisms for the new agree-

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[120] *See* Keith Schneider, *Environment Groups Are Split on Support For Free-Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1; Annette Baker Fox, *Environment and Trade: The NAFTA Case*, 110 POL. SCIENCE Q. 49, 64-66 (1995); Council of Canadians v. Canada (Attorney General), [2006] OJ No 4751, 277 DLR (4th) 527 (Ont. C.A.).

[121] *See* Schneider, *supra* note 120; Fox, *supra* note 120. However, CIEL, NRDC and the Audubon Society filed an amicus brief in support of Public Citizen's unsuccessful litigation to subject NAFTA to environmental impact assessment under NEPA. CTR. FOR INT'L ENV'T L. (CIEL), *1993 Annual Report* (1994), http://www.ciel.org/wp-content/uploads/2015/06/CIEL_Report_1993.pdf.

[122] *But see* Raillan Brooks, *New Trade Agreements Gut Environmental Protections,* AUDUBON (July-Aug. 2014), https://www.audubon.org/magazine/july-august-2014/new-trade-agreements-gut-environmental (last visited Mar. 26, 2021).

[123] *See* Press Release, Sierra Club et al., New NAFTA Deal Threatens Our Air, Water, and Climate, CIEL (Nov. 26, 2018), https://www.ciel.org/news/new-nafta-threatens-air-water-climate (last visited Mar. 26, 2021); Sierra Club et al., NAFTA Talks Have Ignored Environmental Concerns (May 16, 2018), https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/NAFTA%20Environmental%20Letter%20May%202018.pdf (last visited Mar. 26, 2021).

ment's environmental provisions.[124] The groups that opposed NAFTA in 1993 by and large also opposed the CUSMA-USMCA.[125]

The Council of Canadians, perhaps the most consistent Canadian organization raising concerns about trade liberalization and globalization, concisely captured the central idea around which environmental groups and other civil society groups in North America and beyond should coalesce and rally: "As trade and globalization contribute to the climate crisis, it is vital to have a new NAFTA agreement that not only doesn't worsen the crisis, but contributes to addressing it."[126] Of course, it is not just the global climate that is facing dire threats from human economic activity, but many of the features of regional and global ecosystem functioning that are reflected by planetary boundaries. The ecological limits that planetary boundaries of safe operating space represent are not a straitjacket that will lead to human misery and deprivation, but a set of guidelines that offer "the flexibility to choose a myriad of pathways for human well-being and development."[127] The increasingly sophisticated development of "doughnut economics," which combines the planetary boundaries with a set of criteria for establishing a social baseline for just and equitable societies, is showing ever more clearly what these pathways look like.[128] The challenge, then is to start with structures based on planetary boundaries and doughnut economics, or similar ecologically-limited models, and then consider what kind of trade and investment makes sense. The outdated CUSMA-USMCA approach is still firmly grounded in a completely inverse logic that no longer makes sense in a world in ecological crisis.

IV. CONCLUSION

As climate change, biodiversity loss and other urgent ecological crises facing North America and the rest of world worsen, the failure of

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[124] *See* NRDC, Press Release: NAFTA Rewrite Fails Key Climate Test (Dec. 9, 2019), https://www.nrdc.org/media/2019/191209 (last visited Mar. 26, 2021); NRDC& Sierra Club, Comment letter to the House Ways and Means Committee on "Enforcement in the New NAFTA" (June 5, 2019), https://www.nrdc.org/sites/default/files/comment-house-ways-and-means-nafta-enforcement-06052019.pdf (last visited Mar. 26, 2021).

[125] *See* Brooks, *supra* note 121; Sierra Club et al., *supra* note 122.

[126] Council of Canadians, *CUSMA – The "New" NAFTA*, https://canadians.org/nafta (last visited Mar. 25, 2021).

[127] Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 ECOLOGY AND SOCIETY 32, 2009, at 6, http://www.ecologyandsociety.org/vol14/iss2/art32/ES-2009-3180.pdf.

[128] *See generally* KATE RAWORTH, DOUGHNUT ECONOMICS: SEVEN WAYS TO THINK LIKE A 21ST CENTURY ECONOMIST (2017). Amsterdam is working to apply doughnut economics to a large urban center. Daniel Boffey, *Amsterdam to embrace 'doughnut' model to mend post-coronavirus economy*, GUARDIAN, Apr. 8, 2020.

contemporary law to regulate the human activities that drive this global change is becoming more and more apparent. International trade and environment agreements like NAFTA and the CUSMA-USMCA are intended to increase economic activity that, despite some improvements in resource efficiency, inevitably builds pressure on the ecosystems that sustain humanity. Environmental law is subservient to this approach to provisioning human societies, a weak cousin to the laws and policies that protect rights to produce and consume and support endless economic growth.[129] Alternatives to managing the social metabolism of humanity are not only possible, but critically necessary. To pursue those alternatives, ecologically-limited approaches to law are essential, in which only options for trade, investment and other economic activity that respect planetary boundaries such as climate change are allowed. The Paris Climate Agreement is an outlier in environmental law, because its foundational goal of limiting global heating to 1.5 degrees C is based on ecological limits, rather than on technological or economic feasibility. Whether the nations of the world take that goal seriously and achieve it remains to be seen, but the agreement includes mechanisms for tighter requirements over time. The CUSMA-USMCA, which completely ignored the Paris agreement, employs an outdated and failing approach to integrating trade and the environment and falls far short of meeting 21st century ecological challenges. It is a tragic lost opportunity. It is past due time for civil society, the broader public and ultimately the nations of the world to unite around an ecological approach to trade that leaves the NAFTA and CUSMA-USMCA approach in the bins of history.

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[129] *See* Ecological Law and Governance Association (ELGA), Oslo Manifesto for Ecological Law and Governance (June 2016), https://elgaworld.org/oslo-manifesto (last visited Mar. 26, 2021), which states:

> Among the flaws of environmental law are its anthropocentric, fragmented and reductionist characteristics. It is not only blind to ecological interdependencies, but also politically weak as it competes with other, more powerful areas of law such as individualized property and corporate rights. As a consequence, the legal system has become imbalanced and unable to secure the physical and biological conditions, upon which all human and other life depends.

A CLEAN WATER ACT, IF YOU CAN KEEP IT

SEAN G. HERMAN[1]

I. INTRODUCTION

The Clean Water Act has traveled a successful but tortuous path. From combustible beginnings on the Cuyahoga River; through the Lake St. Clair wetlands; to reservoirs near the Miccosukee; and eventually discharged (or "functionally" discharged) off the Maui coast.[2] With each bend, the nearly fifty-year-old Act has proven to be not just resilient, but among our most successful environmental laws.[3] Much of that success stems from an effective enforcement structure that focuses more on treating pollutant sources rather than just impaired waters.[4] The text creating that structure has largely remained untouched by Congress for decades. Though static, the text's success in reducing pollution may reflect its ingenuity. But even if true, its ingenuity would not entirely explain the Act's success.

Much of the success also arises from the Act's evolution with technology. Tracer dye studies,[5] LiDAR mapping,[6] and reporting databases,[7]

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[2] Rapanos v. United States, 547 U.S. 715 (2006); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004); Cty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020).

[3] *See* Oliver A. Houck, *TMDLs IV: The Final Frontier*, 29 ENV'T. L. REP. 10,469 (Aug. 1999) ("The federal Clean Water Act (CWA) could lay claim to being the most successful environmental program in America. . . Yet, we do not have clean water.").

[4] *See* Env't Prot. Agency v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 204 (1976) (discussing intent of that Clean Water Act as including "direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated.").

[5] *See* Hawai'i Wildlife Fund v. Cty. of Maui, 24 F. Supp. 3d 980, 984 (D. Haw. 2014) (discussing tracer dye study).

[6] *See* The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,327 (April 21, 2020) [hereinafter Navigable Waters Protection Rule] (discussing LiDAR as tool for assessing wetlands).

among other tools, have lowered to unprecedented levels the barrier to water quality enforcement. As technology takes off, regulations have tried to keep pace.[8] So if technology has been the engine driving the Act's evolution, regulations have been the gear shift governing the speed with which it is implemented.

But unlike the statutory text, regulations under the Clean Water Act change often. In this last decade alone, we saw one administration craft a regulation called the Clean Water Rule, which the next tore down through suspension and repeal.[9] Then, it installed a replacement regulation called the Navigable Waters Protection Rule.[10] And now, a new administration of differing political views may tear that regulation down just like its predecessor.[11] Perhaps this third mutation may prove the process—promulgate, suspend, repeal, replace—to be some Hegelian dialectic that satisfies all in the end.[12] That is an unlikely outcome, however, since the problem lies not in the ingenuity (or lack thereof) of the regulatory language, but in the immutable text of its origin statute.

When it enacted the original statute in 1972, Congress chose the following phrase to describe what the Clean Water Act protects: "the waters of the United States."[13] The phrase lacked any commonly understood meaning in 1972, just as it does today. It cannot mean all waters within the United States, as this would risk overstepping the Commerce Clause.[14] But it also must mean more than just the navigable waters

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[7] *See, e.g.*, California State Water Resources Control Board's Stormwater Multiple Application and Report Tracking System, available at https://smarts.waterboards.ca.gov/smarts/faces/SwSmartsLogin.xhtml.

[8] For instance, the Clean Water Rule discussed how science "has advanced considerably in recent years" and how that development "play[s] a critical role in informing the agencies' interpretation of the [Act's] scope." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,057 (June 29, 2015) [hereinafter Clean Water Rule].

[9] *Id*.; Definition of "Waters of the United States"–Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018); Definition of "Waters of the United States"–Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[10] Navigable Waters Protection Rule, 85 Fed. Reg. 22,250.

[11] *See* Press Release, The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ [hereinafter White House Fact Sheet].

[12] Hegel's dialectic assumes a rational political structure and begins with a political thesis (e.g., a ruler's authority is absolute). An antithesis then contradicts the thesis (e.g., resistance to ruler's absolute authority). As the populace's resistance and ruler's suppression intensify, they move toward a synthesis (e.g., the ruler brings the populace back under control by providing the populace with more control through charters, rights, or laws). Charles Edward Andrew Lincoln IV, *Hegelian Dialectical Analysis of U.S. Voting Laws*, 42 U. DAYTON L. REV. 87, 91-92 (2017); Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT'L L. 159, 181 (1997) [hereinafter *Hegelian Reflections*].

[13] *See* 33 U.S.C. § 1362(7) (defining "navigable waters").

[14] *See* The Daniel Ball, 77 U.S. 557, 563-64 (1870) (holding that navigable waters form a continued highway for interstate commerce that is subject to Commerce Clause jurisdiction).

traditionally regulated since the United States' inception, like waters used for interstate commerce and waters susceptible for use with reasonable improvement.[15] If not, then what purpose would the definition serve?[16] Had Congress intended to reach only those waters historically known as "navigable waters," it begs the question of why Congress would bother defining "navigable waters" as anything besides its traditional meaning. And its chosen definition—"waters of the United States"—does not fit within that traditional meaning.

Where then in the wide spectrum of "waters of the United States" does the subject matter of this statute fall? Without definition or criteria from Congress to guide their way, the agencies' answers from the last ten presidential administrations have shown that the question is a Rorschach Test. To one administrator, a prairie pothole could be a jurisdictional water.[17] To another, it's not.[18]

The framers warned of such mutability in policymaking. "It poisons the blessing of liberty itself," wrote Publius, and it would be of little benefit if laws are "repealed and revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow."[19] Without knowing what the law will be, what merchant, farmer, or manufacturer would invest their fortunes in a future when they "can have no assurance that [their] preparatory labors and advances will not render [them] a victim to an inconstant government?"[20] The "continual change even of good measures is inconsistent with every rule of prudence and every prospect of success."[21]

The safeguard against the political instability that Publius feared was a separation of powers and a system of checks and balances. Splitting legislative powers between the House of Representatives and Senate encourages stability as the Senate acts as a "salutary check" on the House.[22] But since Congress passed the Clean Water Act, we have not seen mutable policymaking arising in the legislative branch. We have

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[15] United States v. Appalachian Elec. Power Co., 311 U.S. 377, 404-10 (1940).

[16] *See* Rapanos v. United States, 547 U.S. 715, 731 (2006) ("This provision shows that the Act's term 'navigable waters' includes something more than traditional navigable waters.").

[17] Clean Water Rule, 80 Fed. Reg. at 37,059.

[18] Navigable Waters Protection Rule, 85 Fed. Reg. at 22,314.

[19] THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison).

[20] *Id.*

[21] *Id.*

[22] *Id.*

seen the opposite: a period of stasis.[23] Congressional stasis has forced the executive branch to assume a larger role in policymaking.

Rather than address policy to keep pace with technology and litigation by passing legislation, Congress has relied on vague directives it gave the agencies decades ago. One such vague directive is the Act's subject matter: "waters of the United States."[24] Rather than assume its laboring oar and resolve the difficult task of determining what waters the federal government regulates, Congress has left the task to the agencies. Through its inaction, this article contends, Congress's delegation of policymaking authority to the agencies violates the separation of powers in two ways.

First, the phrase "waters of the United States" fails to provide agencies and courts with an intelligible principle that can measure whether the agencies have followed Congress's guidance. A missing intelligible principle violates the nondelegation doctrine. And this missing intelligible principle is all the more apparent as textualism and its demand for clarity gains general acceptance as an interpretative methodology among courts.

Second, because the phrase "waters of the United States" is standardless, it fails to apprise the public of what conduct the law requires. Not even a majority of the Supreme Court can decide what the phrase means.[25] When ambiguity becomes this uncertain, it violates the void-for-vagueness doctrine.

With these two violations in mind, this article begins by posing a thesis: The Clean Water Act regulates all "waters of the United States." It then suggests a two-part antithesis: Congress violated the nondelegation and void-for-vagueness doctrines by defining the Clean Water Act only as reaching "waters of the United States." And it resolves the conflict with a synthesis: a call for Congress to amend the Clean Water Act by providing the statute with a more stable and intelligible jurisdictional reach. Federal oversight in water quality regulation is a necessity. But to what degree is a policy decision that Congress has yet to make.

II. Thesis: A History of Clean Water in Four Cases

Begin with the statute. Enacted in 1972, the Clean Water Act amended the Federal Water Pollution Control Act and remade how the

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[23] Congress has not significantly amended the Clean Water Act since it enacted the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 76 (1987).

[24] 33 U.S.C. § 1362(7).

[25] Rapanos v. United States, 547 U.S. 715 (2006).

United States regulated water quality at a federal level.[26] The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[27] And one of its primary goals was to eliminate the discharge of pollutants to "navigable waters" by 1985.[28] Though it did not reach this goal, its enforcement mechanism proved effective.

The Act's core prohibition is the unpermitted "discharge of any pollutant,"[29] a phrase which means "any addition of any pollutant to navigable waters from any point source."[30] The regulated conduct thus is the "discharge" or "addition" of pollutants, and the "navigable waters" are what the Act protects. But for all of the Act's definition and structure, it never determines what are the "navigable waters" it protects. It simply defines these as "the waters of the United States, including the territorial seas."[31]

Indeterminacy surrounds this definition of the Act's keystone, "navigable waters." When Congress enacted the Act in 1972, "navigable waters" enjoyed a commonly understood, historical meaning. The term meant waters that are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[32] Congress could regulate the "navigable waters" within each State so long as it tied those waters to the interstate commerce clause with navigability.[33]

But Congress did not draw only on this historical meaning when defining what waters its Act protected. Instead, Congress defined "navigable waters" as "the waters of the United States, including the territorial seas."[34] Unlike "navigable waters," the phrase "waters of the United States" had no commonly understood meaning. Nor does the Act define "waters of the United States."[35] Without a definition, courts have described the phrase as "notoriously unclear,"[36] "elusive and unpredictable,"[37] and defining it "a contentious and difficult task."[38] This lack of

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[26] An Act to amend the Federal Water Pollution Control Act, Pub. Law No. 92-500, 86 Stat. 816 (1972).

[27] 33 U.S.C. § 1251(a).

[28] 33 U.S.C. § 1251(a)(1).

[29] 33 U.S.C. § 1311(a).

[30] 33 U.S.C. § 1362(12).

[31] 33 U.S.C. § 1362(7).

[32] The Daniel Ball, 77 U.S. 557, 563 (1870).

[33] Gibbons v. Ogden, 22 U.S. 1, 197 (1824).

[34] 33 U.S.C. § 1362(7).

[35] 33 U.S.C. § 1362.

[36] Sackett v. Env't Prot. Agency, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

[37] State v. U.S. Env't Prot. Agency, 989 F.3d 874, 879 (10th Cir. 2021).

definition is the focus of constitutional concern, which has been litigated at length in the half-century since its enactment.

Four cases underscore this constitutional concern. First is *Natural Resources Defense Council, Inc. v. Callaway*.[39] After the Act's enactment in 1972, one of the two agencies charged with enforcing it—the Army Corps of Engineers (the other being Environmental Protection Agency)—promulgated regulations defining "waters of the United States" in accordance with its historical meaning.[40] But without much of any analysis or discussion of the Act's text, the U.S. District Court for the District of Columbia held that the Army Corps lacked authority to adopt this definition because Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause." So the Act's phrase, "navigable waters," "is not limited to the traditional tests of navigability."[41]

The second case is *United States v. Riverside Bayview Homes, Inc*.[42] After *Callaway*, the Army Corps revisited its regulations and promulgated a definition that included within "navigable waters" non-navigable wetlands adjacent to navigable creeks.[43] The regulations sought to extend the definition of "waters of the United States" to the outer limits of Congress's commerce power.[44] In considering the Army Corps' regulation, the Supreme Court invoked *Chevron*[45]—which was just a year old at that point—and concluded with a double negative: The Court could not say that the Army Corps' interpretation of the Act was unreasonable.[46] The Court acknowledged that it was facially "unreasonable to classify 'lands,' wet or otherwise, as 'waters.'"[47] But the transition from water to solid ground is not necessarily or typically an abrupt one, and the transition includes shallows, marshes, mudflats, swamps, and bogs that make determining a water's limit "far from obvious."[48] So the Court turned to legislative history and the Act's purpose to support its deference to the Army Corps' assertion of jurisdiction over non-naviga-

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[38] Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 624 (2018).

[39] 392 F. Supp. 685, 686 (D.D.C. 1975).

[40] Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,119 (April 3, 1974).

[41] Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

[42] 474 U.S. 121 (1985).

[43] Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975); Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

[44] Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 37,144 n.2.

[45] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[46] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).

[47] *Id.* at 132.

[48] *Id.*

ble wetlands.[49] At bottom, the Court noted, "the term 'waters' as used in the Act does not necessarily exclude 'wetlands.'"[50]

The third case is *Solid Waste Agency of Northern Cook County v. Army Corp of Engineers*.[51] The Army Corps' 1986 regulations defined "navigable waters" to include all waters "used as habitat by [ ] migratory birds which cross state lines."[52] The Supreme Court looked upon this regulation with some skepticism, noting that when "an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[53] The Army Corps' regulation—often called the Migratory Bird Rule—had asserted jurisdiction over an abandoned sand and gravel pit. But the Court could find no "clear statement from Congress" that would allow the Army Corps to regulate waters like the isolated pond at issue.[54] Federal regulation of isolated ponds "would result in a significant impingement of the States' traditional and primary power over land and water use," but no language within the Act could countenance such an outcome.[55] The Court then made two comments in dictum that casted doubt on the *Callaway* holding. First, the Court commented on how the Migratory Bird Rule strays from the Army Corps' original interpretation of the Act as extending only to navigable-in-fact waters.[56] Second, the Court noted that Congress enjoys broad authority under the Commerce Clause, but that authority is not unlimited.[57]

The fourth case is *Rapanos v. United States*.[58] A fractured Supreme Court invalidated the tributary and adjacent wetlands provisions of the Army Corps' 1986 regulations. Justice Scalia wrote the plurality, joined by three other justices; Justice Kennedy wrote his own concurrence; and Justice Stevens wrote a dissent joined by three others.[59] The issue was whether "navigable waters" includes wetlands that do not physically abut navigable-in-fact waters.[60] The plurality noted that the phrase "naviga-

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[49] *Id.* at 132-33.

[50] *Id.* at 139 n.11.

[51] 531 U.S. 159 (2001).

[52] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) [hereinafter 1986 Regulations].

[53] Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 172 (2001).

[54] *Id.* at 174.

[55] *Id.*

[56] *Id.* at 168.

[57] *Id.* at 173.

[58] 547 U.S. 715 (2006).

[59] Chief Justice Roberts and Justice Breyer also wrote a clarifying concurrence and dissent, respectively, but joined in the plurality and dissent, respectively.

[60] Rapanos v. United States, 547 U.S. 715, 729-30 (2006) (plurality).

ble waters" means something more than traditional navigable waters, but the qualifier "navigable" is not without significance.[61] Regulating non-navigable waters and lands abutting navigable-in-fact waters impinges upon the States' traditional and primary power over land and water use.[62] Without a "clear and manifest" statement that Congress intended to intrude upon this traditional state authority, the plurality would not interpret "waters of the United States" as allowing it.[63] So the plurality defined "navigable waters" in accordance with its commonsense understanding of the term: "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.' "[64]

Only four justices signed onto the plurality. Justice Kennedy joined the plurality in judgment and wrote a concurrence that defined "navigable waters" by a "significant nexus" test.[65] Through the "significant nexus" test, the EPA and Army Corps could determine what "navigable waters" they may regulate by finding whether non-abutting wetland significantly affects the physical, chemical, and biological integrity of a navigable-in-fact water.[66] Faced with a plurality and concurrence, it has been unclear whether either opinion controls district courts and circuit courts' interpretations of the Clean Water Act.[67]

Chief Justice Roberts foresaw this obvious consequence when he bemoaned how the Court could not issue an opinion commanding a majority for how to read the Clean Water Act's reach.[68] He then called on the EPA and Army Corps to develop regulations within "the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed" to define "waters of the United States."[69]

The EPA and Army Corps accepted that invitation, but ultimately without success. Under the Obama Administration, the agencies promul-

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[61] *Id.* at 731.

[62] *Id.* at 738.

[63] *Id.*

[64] *Id.* at 739 (cleaned up).

[65] *Id.* at 759 (Kennedy, J., concurring).

[66] *Id*. at 779.

[67] For instance, the First, Third, and Eighth Circuits have concluded that the Clean Water Act may reach either the plurality's or Justice Kennedy's standard. United States v. Johnson, 467 F.3d 56, 64-66 (1st Cir. 2006); United States v. Donovan, 661 F.3d 174, 176, 182 (3d Cir. 2011); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009). The Fourth Circuit follows Justice Kennedy's test, without having decided whether the plurality's test may also apply. Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288 (4th Cir. 2011). The Seventh, Ninth, and Eleventh Circuits have held that Justice Kennedy's test controls. Orchard Hill Bldg. Co. v. U. S. Army Corps of Eng'rs, 893 F.3d 1017, 1021 (7th Cir. 2018); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007); United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007).

[68] *Id*. at 758 (Roberts, C.J., concurring).

[69] *Id*.

gated the Clean Water Rule, which followed Justice Kennedy's "significant nexus" test.[70] This regulation extended the Act's jurisdiction to include intermittent and ephemeral streams that are hydrologically connected to navigable waters by either being within a specified distance of a navigable water's ordinary high water mark, or as determined case-by-case.[71]

The Clean Water Rule became mired in litigation and ultimately subject to repeal efforts under the Trump Administration.[72] For its part, the Trump Administration promulgated the Navigable Waters Protection Rule, which aimed to align the agencies' definition with the *Rapanos* plurality.[73] Among its changes was the categorical exclusion from "navigable waters" of those ephemeral waters that flow only in response to precipitation.[74] These seasonal or temporary bodies of water are prevalent in the arid and semi-arid west and include vernal pools, arroyos, and dry washes that fill with water only after seasonal rains or snowmelt.[75] The 2020 regulation also limited the Act's jurisdiction over wetlands to include only "adjacent wetlands" that either abut or have a direct hydrological surface connection with traditionally navigable waters.[76]

At the time of this article, the Biden Administration is now reconsidering the 2020 regulation.[77] And it has several options before it. It could leave the 2020 regulation in place; or repeal it and reinstate the 1986 regulation.[78] Or it could repeal and re-promulgate the 2015 regulation. It could also repeal and replace the regulation with something entirely new. Or it could promulgate a new regulation that builds off the 2020 regulation.

Of these options, leaving the 2020 regulation as-is appears to be the least tenable. Political pressures make that outcome unlikely, which highlights the game of regulatory volleyball taking place.[79] In eight

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[70] Clean Water Rule, 80 Fed. Reg. 37,054.

[71] *Id*. at 37,058.

[72] Definition of "Waters of the United States"–Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. at 5,201; Definition of "Waters of the United States"–Recodification of Pre-Existing Rules, 84 Fed. Reg. at 56,626.

[73] Navigable Waters Protection Rule, 85 Fed. Reg. 22,250.

[74] *Id*. at 22,251.

[75] *Id*. at 22,288.

[76] *Id.* at 22,251.

[77] White House Fact Sheet, *supra* note 11.

[78] Until the Clean Water Rule in 2015, the text of the agencies' regulations has been consistent since 1986 (Army Corps) and 1988 (EPA). *See* 1986 Regulations, 51 Fed. Reg. 41,206; Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764 (June 6, 1988).

[79] *See, e.g.*, Beth Burger, *Climate Collision: Trump's EPA Rewrote the Rules on Air, Water Energy*, USA TODAY (Oct. 29, 2020), https://www.usatoday.com/in-depth/news/investigations/2020/10/29/climate-change-escalates-voters-face-choice-deregulate-re-regulate/3668667001/ (quoting

years, we have seen the agencies impose four different jurisdictional reaches for the Clean Water Act: the 1986 Army Corps Rule, the 2015 Clean Water Rule, return of the 1986 Army Corps Rule, and the 2020 Navigable Waters Protection Rule. With the Biden Administration, we may soon see our fifth.

III. Antithesis 1: Nondelegation Doctrine and the Rise of Textualism

When agencies play a game of regulatory volleyball, they risk violating the separation of powers doctrine. Under this foundational doctrine, American democracy diffuses its governing powers across the three branches. Congress legislates (Article I), the President executes (Article II), and the courts interpret (Article III).[80] This separation of powers was a remedy born from tyranny. When both "legislative and executive powers are united in the same person," "there can be no liberty."[81] So the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty."[82] The gradual encroachment on and accumulation of all powers of one branch by another is the "tyrannical concentration of all the powers of government in the same hands."[83] A government breaches its duty to the People to preserve liberty when "Congress gives up its legislative power and transfers it to the President, or to the judicial branch."[84] Put otherwise, the Constitution puts it beyond Congress's power to delegate all of its legislative power to another branch.[85] This bar against certain delegations of constitutional authority is otherwise known as the nondelegation doctrine.

A. The Nondelegation Doctrine

The nondelegation doctrine arises not from the Constitution's text but from its underlying principle. Nondelegation is "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[86] That "system of govern-

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then-California Attorney General Xavier Becerra as believing there was no "environmental policy stance the Trump administration had taken that a hypothetical Biden administration would likely defend," including the Navigable Waters Protection Rule).

[80] U.S. Const. art. I-III.

[81] The Federalist No. 47 (James Madison) (cleaned up).

[82] The Federalist No. 51 (James Madison).

[83] The Federalist No. 48 (James Madison).

[84] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

[85] *Id.* at 407.

[86] Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

ment" is the separation of powers outlined in the Constitution's first three articles.

Of course, a separation of powers does not prohibit a sharing of powers. Practicality requires a government "in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct."[87] A separation of powers thus does not seek purity in preventing powers from bleeding among the three branches. It instead protects against the accumulation of the whole power of one branch in the hands of another.[88] Powers may mix among the branches, with the separation of powers violated when there is "too great a mixture, and even an actual consolidation, of the different powers."[89] Nondelegation thus allows one branch to seek assistance from another branch, but "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[90] Neither separation of powers nor the nondelegation doctrine prohibit Congress from obtaining another branch's help.[91] And today, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[92] The "complex economic and social problems" that demand broad delegations are as much a reality today as they were seventy-five years ago when the Supreme Court first acknowledged this reality.[93]

The point at which a general directive from Congress violates the nondelegation doctrine, however, is at best unclear; at worst, it is perhaps perfunctory. All the nondelegation doctrine demands is that Congress accompany its delegation of power with an "intelligible principle."[94] The "intelligible principle" requires only that "Congress clearly delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[95] So, on one hand, Congress "must provide substantial guidance" to agencies in how to regulate matters affecting "the entire national economy."[96] But on the other hand, Congress need not legislate with precision by, say, providing a "determi-

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[87] THE FEDERALIST NO. 47 (James Madison).

[88] *See id*. (interpreting Montesquieu as saying that when "the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted.").

[89] *Id.*

[90] J.W. Hampton, 276 U.S. at 406.

[91] Mistretta v. United States, 488 U.S. 361, 372 (1989).

[92] *Id.*

[93] Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946).

[94] J.W. Hampton, 276 U.S. at 409.

[95] Am. Power & Light, 329 U.S. at 105.

[96] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

nate criterion" for when an agency is regulating too much.[97] Requiring an intelligible principle ensures that Congress—the branch that is most responsive to the electorate—makes the important policy choices.[98] And on balance, a law violates the nondelegation doctrine only absent standards that make it impossible for courts to determine whether an agency has obeyed the will of Congress.[99]

As the Supreme Court recently acknowledged, this test is "not demanding."[100] That is an understatement. Only twice has the Court found that a statute violated the nondelegation doctrine.[101] And both times were in 1935. So, to paraphrase Cass Sunstein, the nondelegation doctrine has had one good year, and 232 bad ones (and counting).[102]

Given the trouble defining where to draw the line between prohibited and permitted delegations, nondelegation has been "a judicially underenforced norm, and properly so."[103] Despite its vital aim at preserving the constitutional design of American democracy, history shows that courts place (and have always placed) the nondelegation doctrine threshold on the floor, near the dustbin.

B. Rise of Textualism

In theory, the rise of textualism would appear to strengthen the nondelegation doctrine. As Justice Elena Kagan has proclaimed, "We're all textualists now."[104] The proclamation reflects how courts interpret law today, which differs substantially from how they interpreted law in 1972 when Congress enacted the Clean Water Act. Textualism emphasizes the primacy of a statute's text and requires that courts use all objective tools of statutory construction when interpreting law.[105] Not so much before the rise of textualism.

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[97] *Id.*; *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317 (2000) [hereinafter *Nondelegation Canons*] ("it is extremely difficult to defend the idea that courts should understand Article I, section 1 of the Constitution to require Congress to legislate with particularity.").

[98] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment).

[99] Mistretta v. United States, 488 U.S. 361, 379 (1989) (quoting Yakus v. United States, 321 U.S. 414, 425-26 (1944)).

[100] Gundy v. United States, 139 S. Ct. 2116, 2129 (2019).

[101] A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

[102] *Nondelegation Canons*, *supra* note 97, at 322.

[103] *Id.* at 338.

[104] Justice Elena Kagan, "A Dialogue with Justice Elena Kagan on the Reading of Statutes" The Scalia Lecture, Harvard Law School (Nov. 17, 2015), available at https://www.youtube.com/watch?v=DPEtszFT0Tg.

[105] *Textualism As Fair Notice*, 123 Harv. L. Rev. 542 (2009).

Take the Supreme Court's 1971 holding in *Overton Park, Inc. v. Volpe*.[106] The Court noted in the opinion's twenty-ninth footnote that it would use the statute's text to divine legislative intent—but only after concluding that the legislative history itself was ambiguous.[107] Working alongside a judicial branch that approached cases like *Overton Park* with little concern for a statute's text, it follows that Congress in 1971 would have been less concerned about the text it negotiated and placed in the final statute. If it could expect that the words exchanged on the Senate floor would have equal if not greater force than the words set to paper, then why put forth the added effort to clarify the ambiguous words on the paper?

Now contrast *Overton Park* with *Milner v. Dep't of Navy*, in which Justice Kagan noted that courts should not allow an ambiguous legislative history "to muddy clear statutory language."[108] Courts should now turn to legislative history to "clear up ambiguity, not create it."[109] This approach reflects that "legislative history is not the law."[110] Unlike the purposivist approach that prioritizes considerations like legislative history, textualism ensures that the regulated community has fair notice of what the law requires.[111] "Fair notice squarely aligns with textualism's goal of approximating how the average, reasonable citizen would interpret a statute."[112]

With textualism in mind, return to the nondelegation doctrine. In its most recent encounter with the doctrine, the Supreme Court noted that "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation."[113] Courts must look to the statute's text—considered alongside its context, its purpose, and then its history—to see what task it delegates and the instructions provided to achieve that task.[114]

Add to this inquiry deference to agencies under the *Chevron* doctrine.[115] When a statute is clear, a court's inquiry ends. But when there is ambiguity, a court will defer to an agency's permissible interpretation of that ambiguous text.[116] That "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by

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[106] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[107] *See id*. at 412 n.29 ("Because of this ambiguity [in the legislative committee reports] it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

[108] Milner v. Dep't of Navy, 562 U.S. 562, 572 (2011).

[109] *Id*. at 574.

[110] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018).

[111] *Textualism As Fair Notice*, *supra* note 105, at 542.

[112] *Id.* (cleaned up).

[113] Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

[114] *Id*. at 2123-24.

[115] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[116] *Id*. at 842-45.

the administrator of an agency."[117] If through ambiguity Congress "explicitly left a gap for the agency to fill," then courts will consider that as an express delegation of authority.[118]

Ambiguity, however, may be in the eye of the beholder. "Of course, there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language."[119] In other words, "[o]ne judge's clarity is another judge's ambiguity."[120] And "[a]s is all too often the case with deceptively simple statutory provisions," a statutory provision—especially one addressing jurisdiction—"admits of a troublesome ambiguity."[121] The ambiguity may arise when the law is subject to more than two meanings, or when the language confronts the realities of trade and commerce.[122] And if courts cannot defer to Congress's interpretation of a statute, then how can they defer to the executive agency's interpretation?[123]

Given that the textualist purview that Congress now faces is more demanding than the more purposivist approach that dominated in 1972, one would think that courts would turn a more critical eye toward the stunted hurdle that is the nondelegation doctrine. Not so—or at least, not yet. Even through the exacting textualist eye, "once a court interprets the statute, it may find that the constitutional question all but answers itself."[124] In its most recent nondelegation case, *Gundy v. United States*, the Court considered a statute giving the Attorney General "authority to specify the applicability of" sex offender requirements to those convicted before the law's enactment.[125] And in holding that the law did not violate the nondelegation doctrine, the Court's plurality noted that if this "delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[126] Even in a textualist's world, nondelegation may have no home. With *Gundy*, the Supreme Court entrenched the doctrine's impotence and left it without a cure. Perhaps it is time to move on—or perhaps not.

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[117] *Id*. at 843-44.

[118] *Id*.

[119] United States v. Turkette, 452 U.S. 576, 580 (1981).

[120] Judge Brett Kavanaugh, "The Role of the Judiciary in Maintaining the Separation of Powers" Joseph Story Lecture, The Heritage Foundation (Feb. 1, 2018), available at https://www.heritage.org/sites/default/files/2018-02/HL1284.pdf.

[121] Phillips Petroleum Co. v. F.E.R.C., 792 F.2d 1165, 1166 (D.C. Cir. 1986).

[122] Ruth Bader Ginsburg, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1421-22 (1987).

[123] Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1234 (2016).

[124] Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

[125] *Id.* at 2122.

[126] *Id.* at 2130.

With his dissent in *Gundy*, Justice Gorsuch (joined by Chief Justice Roberts and Justice Thomas) would have given the nondelegation doctrine teeth.[127] Though Justice Alito did not join the *Gundy* dissent, he wrote separately to acknowledge that he would reconsider nondelegation when there was a majority for him to join.[128] And Justice Kavanaugh—who took no part in considering and deciding *Gundy*—later expressed a desire to consider the nondelegation doctrine in future cases.[129] With at least five justices interested in revisiting nondelegation, the nondelegation doctrine appears dormant but not extinct.

C. The Nondelegable Policy of Deciding What Waters the Clean Water Act Regulates

Given this renewed interest, the Clean Water Act and its jurisdictional phrase, "waters of the United States," violates the nondelegation doctrine. Congress rightly decided that water quality in the United States demanded regulation. It created a permit or prohibit enforcement structure, buttressed with investigative directives and grant programs. And it left to the agencies the tough decision of deciding what "waters" to regulate. Fair enough, as Congress need not legislate with precision.

But Congress must at least provide the agencies with an "intelligible principle" that allows Congress, the courts, and the public to know whether the agencies are following Congress's guidance. Congress could have listed particular waters that it intended to regulate. Or it could have excluded waterbodies it desired not to regulate. Better yet, Congress could have provided criteria that the EPA and Army Corps must rely on in identifying which of the waters fell within the Act's jurisdiction and which fell outside it. Benchmarks like these could provide the meaningful way to know what the law requires and whether the agencies and public are following it.

Yet the only standard Congress offered was that the agencies regulate "waters of the United States." Without a commonly understood meaning, its meaning was—and remains—unascertainable. Does this phrase include only waters, or does it also include wetlands, pocosins, bogs, and desert swales? Does the phrase reach only traditionally navigable-in-fact waters, or does it encompass all waters—whether navigable

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[127] *Id.* at 2131-48 (Gorsuch, J., dissenting) (discussing a restated "intelligible principle" test that asks whether the statute assigns to the executive only the responsibility to make factual findings, or whether it sets forth facts that the executive must consider and criteria against which to measure them, or whether Congress—not the Executive—made the policy judgment).

[128] *Id.* at 2130-31 (Alito, J., concurring).

[129] Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

or otherwise? If these hyper-technical questions only addressed issues at the fringe of the agencies' jurisdiction, then the constitutional inquiry would not be as difficult to resolve. But these questions go to the heart of the Act, with particular attention to its section 404 dredge and fill permitting structure.[130] If you fill in a wetland, you may be violating the Clean Water Act—or not. The answer depends as much on the wetland's location as it does the year in which the activity takes place.

Justice Breyer tried clarifying the scope of "waters of the United States" by interpreting it so it reflects Congress's intent to fully exercise its Commerce Clause powers and "leave the enforcing agency with the task of restricting the scope of that definition, either wholesale through regulation or retail through development permissions."[131] Even if we could glean that intent from the statute's text (a murky "if"), the interpretation concedes that Congress offered no guidance to the agencies as to how far the Clean Water Act's jurisdiction extends. At most, it sets a floor at "navigable waters" and a ceiling at "waters." But even then, land like wetlands is considered to be jurisdictional. So its ceiling is not limited to even "waters." Without much of any guidance, let alone substantial guidance, the Act lays down no clear rule and provides no framework for the agencies to follow in determining which waters the Act regulates. Even under the easily surmountable test outlined in the *Gundy* plurality, this statutory delegation of authority violates the nondelegation doctrine.

IV. ANTITHESIS 2: VOID-FOR-VAGUENESS DOCTRINE

The rise of textualism and its concern for fair notice sprang from similar constitutional roots as the concern for excessively vague laws. This concern is known as the void-for-vagueness doctrine.[132] Under it, courts emphasize the Fifth Amendment's prohibition on depriving persons of life, liberty, or property without due process of law.[133] The government violates this guarantee through laws that fail to give people of "ordinary intelligence" fair notice of the conduct it punishes, or through laws so standardless that they invite arbitrary enforcement.[134] Prohibiting vagueness in criminal statutes thus protects due process by ensuring the "ordinary notions of fair play and the settled rules of law."[135]

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[130] 33 U.S.C. § 1344.

[131] Rapanos, 547 U.S. at 811 (Breyer, J., dissenting).

[132] Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

[133] *Id*.

[134] *Id*. at 108; Johnson v. United States, 576 U.S. 591, 595 (2015).

[135] Johnson, 576 U.S. at 595 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

A. Vagueness as the Other Side of the Nondelegation Coin

A void-for-vagueness doctrine shares with the nondelegation doctrine the same concerns over separation of powers. With a vague statute, Congress has impermissibly delegated basic policy matters to those enforcing the law, such as agencies.[136] A vague law invites the agency to resolve disputes on "an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[137] With vague, uncertain statutes, how is the ordinary person supposed to know what conduct the statute polices? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"[138] With vague statutes, the answer is not evident.

To be sure, there are many otherwise constitutional laws that place a person's fate on their ability to estimate rightly to "some matter of degree."[139] Citizens bear some responsibility for resolving ambiguity by playing "an active civic role" in informing themselves of what a law requires.[140] But if the regulated community cannot readily understand what conduct the statute prohibits, then the statute fails to provide fair warning.[141] Without fair warning, a vague statute will trap the innocent.[142]

That is why the void-for-vagueness doctrine is "a corollary of the separation of powers," much like the nondelegation doctrine.[143] Like the nondelegation doctrine and its "intelligible principle," the void-for-vagueness doctrine requires that Congress, and not any other branch, define the basics of what conduct the law permits or prohibits.[144] As with nondelegation doctrine, "perhaps the most meaningful aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement."[145] A legislature may not abdicate its responsibility "for setting the standards of the criminal law" by enacting standardless statutes that allow the executive and judicial branches "to pursue their personal predilections."[146]

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[136] Grayned, 408 U.S. at 108-09.

[137] *Id.*

[138] Johnson, 576 U.S. at 597 (quoting United States v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing *en banc*)).

[139] *Id.* at 603-04 (quoting Nash v. United States, 229 U.S. 373, 377 (1913)).

[140] *Textualism As Fair Notice*, *supra* note 105, at 548.

[141] *Id.* at 550 (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)).

[142] Grayned, 408 U.S. at 109.

[143] Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018).

[144] *Id.*

[145] Smith v. Goguen, 415 U.S. 566, 574 (1974).

[146] *Id.* at 575.

But unlike the nondelegation doctrine, as some have argued, the void-for-vagueness doctrine rests on "principled judicial application" that does not "threaten to unsettle so much of modern government."[147] Unsurprisingly then, courts have relied on the void-for-vagueness doctrine to strike down unconstitutional statutory provisions while the nondelegation doctrine finds refuge only in dissents and academia.

The void-for-vagueness doctrine's extent, however, is limited. What ambiguity the Constitution tolerates depends on the statute. Economic and civil enactments may enjoy greater ambiguity, while laws imposing criminal penalties require greater precision.[148] With economic and civil statutes, courts are more willing to resolve ambiguity by deferring, "perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it."[149] When those charged with enforcing the statute adopt regulations, courts may then charge the regulated community with some duty "to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process."[150] As the Supreme Court noted in dictum in its 1982 decision, *Village of Hoffman Estates*, an "administrative regulation will often suffice to clarify a[n economic regulation] standard with an otherwise uncertain scope."[151]

In the nearly-forty years since *Village of Hoffman Estates*, the Supreme Court has embraced a greater focus on textualism. In turn, the Court increased its demands of Congress's statutes—whether criminal or civil—by focusing more on the statute's language. Two years after the Court decided *Village of Hoffman Estates* it decided *Chevron*. While the Court has not overturned *Chevron* and courts still defer to reasonable agency interpretations of genuinely ambiguous statutes, the Court appears less willing to subordinate to the other branches its interpretative powers to say what the law is.[152] This hesitancy may arise from concerns for the separation of powers and for ensuring that statutes provide fair notice. Allowing agencies to clarify vague civil statutes with regulations aligns with *Chevron*. But is that consistent with textualism's goal of providing fair notice by approximating how average, reasonable citizens would interpret statutes?[153] The question touches on the intersection of nondelegation, vagueness, and textualism, with no ready answer.

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[147] *Nondelegation Canons*, *supra* note 97, at 315.

[148] Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498-99 (1982).

[149] Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

[150] Vill. of Hoffman Ests., 455 U.S. at 498.

[151] *Id.* at 504.

[152] *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 934-35 (2021) (discussing how Chief Justice Roberts and Justices Thomas, Breyer, Alito, Gorsuch, and Kavanaugh have expressed either skepticism of or a desire to overturn *Chevron*).

[153] *Textualism As Fair Notice*, *supra* note 105, at 542.

Whatever the answer, it seems that courts are more willing to reconsider the constitutionality of an ambiguous, standardless statute on the void-for-vagueness doctrine than on the nondelegation doctrine.

B. An Unconstitutionally Vague Clean Water Act

A standardless "waters of the United States" definition violates the void-for-vagueness doctrine. Given the historical and commonly understood meaning of "navigable waters" in 1972, if Congress had left the phrase undefined, it would have passed muster under the void-for vagueness doctrine. Forgoing that path, Congress expanded the scope of the Act's jurisdiction to an uncertain reach.

Complicating this uncertainty is that the Act criminalizes violations with fines and imprisonment.[154] As a criminal statute, courts expect that Congress legislates with greater precision.[155] Yet, the "reach of the Clean Water Act is notoriously unclear."[156] The Supreme Court's *Rapanos* opinion reflects this lack of clarity. If neither the agencies nor Supreme Court justices can arrive at a consensus about what Congress meant by "waters of the United States," then how could we expect a person of ordinary intelligence to know what the law requires? Must they determine its reach by hydrological or biological analysis? Other expert evidence? Google? Gut instinct?[157]

Consider, too, that a permit under the Clean Water Act takes more than two years on average to obtain and costs several hundred thousand dollars.[158] And that effort will be subject to the ebbs and flows of changing regulations between administrations, forcing the regulated community to track the Federal Register and latest district and circuit court opinions. This demand implies that a person of ordinary intelligence will have fair notice so long as they perform the exhausting task of tracking, for instance, in which counties in New Mexico the 2015 regulation applies as a result of an injunction issued in pending litigation.[159] It also

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[154] 33 U.S.C. § 1319(c).

[155] Vill. of Hoffman Ests., 455 U.S. at 498-99.

[156] Sackett, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

[157] Johnson v. United States, 576 U.S. 591, 597 (2015).

[158] *See* Rapanos v. United States, 547 U.S. 715, 721 (2006) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes.").

[159] Ellen M. Gilmer & Ariel Wittenberg, *Court Sides with WOTUS Foes As Legal Fight Gets Messier*, Greenwire (May 29, 2019), https://www.eenews.net/greenwire/stories/1060425141/ (discussing how ten counties in New Mexico joined a coalition that obtain an injunction against the Clean Water Rule, leaving it unclear whether the Clean Water Rule was stayed in those ten counties or the entire state).

implies that they have read the ninety-three page Navigable Waters Protection Rule that followed.[160] When done performing that task, that person must also keep tabs on litigation over that Rule, including whether the Tenth Circuit has lifted a district court injunction prohibiting enforcement of the Rule,[161] or whether the District Court for the Northern District of California denied a similar request for an injunction.[162] Perhaps one court may take sympathy and issue a nationwide injunction.[163]

Courts thus have demanded that a person of ordinary intelligence is supposed to know what the law regulates. But "[w]ho can even attempt all that, at least without an army of perfumed lawyers and lobbyists?"[164]

Yet that is what the Clean Water Act demands of the public.[165] Take the recent Ninth Circuit decision, *United States v. Lucero*.[166] The Ninth Circuit began by acknowledging, as it must, that "[m]ost Americans would be surprised to learn that dry land might be treated as 'navigable waters' under the Clean Water Act."[167] But that surprise is immaterial because, according to the Ninth Circuit, a person must still engage in the "time-consuming, difficult, and expensive" task of determining whether a particular piece of *land* fits within the Clean Water Act's definition of "waters of the United States."[168] At issue in the case was Mr. Lucero's dumping of fill into a wetland between July and August 2014.[169] And during those summer months, the agencies had one regulatory definition of "waters of the United States" in effect.[170] So the court rejected the criminal defendant's void-for-vagueness argument because the agencies' regulation defining "waters of the United States" at

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[160] Navigable Waters Protection Rule, 85 Fed. Reg. 22,250.

[161] *Judge Blocks WOTUS Rule in Colorado While Legal Challenges Increase*, InsideEPA.com (June 22, 2020), https://insideepa.com/daily-news/judge-blocks-wotus-rule-colorado-while-legal-challenges-increase (U.S. District Court for the District of Colorado issued a stay in Colorado only that blocked implementation of the 2020 regulation).

[162] California v. Wheeler, 467 F. Supp. 3d 864 (N.D. Cal. 2020).

[163] S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018).

[164] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

[165] *See* United States v. Lucas, 516 F.3d 316, 328 (5th Cir. 2008) ("Even in the absence of disputed agency warnings, the prevalence of wet property at BHA and an area network of creeks and their tributaries leading to the Gulf, some of which connected to wetlands on the property, should have alerted 'men of common intelligence' to the possibility that the wetlands were waters of the United States under the CWA.'"); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 917 (5th Cir. 1983) ("if they wished to protect themselves from liability they could have applied for a permit and thus obtained a precise delineation of the extent of the wetland, as well as the activities permissible on the land.").

[166] United States v. Lucero, 989 F.3d 1088 (9th Cir. 2021).

[167] *Id.* at 1091.

[168] *Id.* at 1102.

[169] *Id.* at 1092.

[170] Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,036 (Aug. 25, 1993).

the time of the incident—codified at 33 C.F.R. § 328.3(b) in 2014—was "nevertheless clear."[171]

Pause to reflect on this outcome. Had Mr. Lucero waited ten months, he may have faced a different regulation: the Clean Water Rule. Had he waited a little more after that, a still different regulation would have governed.

But set aside how the regulation had been substantially "revised several times" since Mr. Lucero's criminal act.[172] His void-for-vagueness argument failed, not because the statute was clear, but because the regulation in effect at the time of the act (but later replaced) was clear.[173]

Perhaps administrative regulations may sufficiently narrow potentially vague statutes.[174] But even when allowed, courts will extrapolate the statute's meaning from a regulation only "to some degree."[175] Agencies faced with an unconstitutionally standardless delegation of power cannot cure Congress's violation "by adopting in its discretion a limiting construction of the statute."[176] Nor can an agency cure the violation by declining to exercise some of that delegated legislative power.[177] Nor should courts allow agencies to cure an unconstitutionally vague statute through regulation—especially in the criminal context.[178] Allowing agencies to save the unconstitutional statute in this way risks ad hoc, subjective, arbitrary, and discriminatory enforcement.[179] Deferring to agency interpretations of an unconstitutionally vague statute is all the more troubling when the agency interpretations lack any "consistency with earlier and later pronouncements."[180]

Having batted around for decades many competing regulations that interpret a vague Clean Water Act, one wonders why courts would extrapolate to *any* degree a statute's meaning from a regulation to cure a void-for-vagueness challenge. In *Lucero*, the Ninth Circuit avoided the challenge of interpreting "waters of the United States" by considering exclu-

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[171] Lucero, 989 F.3d at 1102.

[172] *Id.* at 1104.

[173] *Id*. at 1101-02.

[174] *See* Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 504 (1982) ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance.").

[175] Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

[176] Whitman v. Am. Trucking Associations, 531 U.S. 457, 472 (2001).

[177] *Id.* at 473.

[178] See George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812, 816 (7th Cir. 2012) (finding that the Secretary of Labor has no delegated rulemaking or adjudicative authority when interpreting statutes they are enforcing as its prosecutor).

[179] Grayned, 408 U.S. at 108–09.

[180] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

sively the agencies' regulations and not the statutory language.[181] This type of back-door *Chevron* analysis avoids the court's constitutional duty to say what the law is.[182] "Whether the Government interprets a criminal statute too broadly . . . or too narrowly . . . a court has an obligation to correct its error."[183]

For now, courts have punted on their obligation to correct the constitutional violation happening with the Clean Water Act. And the resulting regulatory changes between each successive administration invites the question: *What fair notice does the law provide if its jurisdictional reach is subject to major changes with each new administration?* Because Congress impermissibly delegated to the executive branch the basic policy decision of what waters the Act regulates, the Act's "navigable waters" definition violates the void-for-vagueness doctrine.

V. Synthesis: A Sustained Resolution Demands a Legislative Compromise

There is significant overlap and redundancy between the nondelegation and void-for-vagueness doctrines. Each ensures that, when enacting a statute, Congress directs agencies in clear enough terms to provide the regulators and the regulated with adequate notice about what conduct that statute regulates. And each ensures accountability by requiring that the branch most accountable to the People—Congress—makes the tough policy decisions.

Congress failed to make that tough policy decision in 1972 with the Clean Water Act. The regulatory volleyball happening since is a symptom of an underlying problem with the statute. The substantial ambiguity and vagueness in the phrase "waters of the United States" provides significant discretion to the EPA and Army Corps to fashion their own definition about the Act's outer limits. This discretion violates the separation of powers and its related nondelegation and void-for vagueness doctrines.

While this article intends to explain why the Clean Water Act violates these two doctrines, it does not intend by implication to remove or diminish the tools our government requires to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[184] The Act's success despite its constitutional infirmities shows why a healthy country needs effective water quality control. This article thus

[181] United States v. Lucero, 989 F.3d 1088, 1101-05 (9th Cir. 2021).
[182] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[183] Abramski v. United States, 573 U.S. 169, 191 (2014).
[184] 33 U.S.C. § 1251.

aims to show that the Act must be improved. And for now, that task of improvement is for Congress, and only for Congress.

Of course, Congress's attempt at a solution might not resolve the problem. A lack of consensus or uncertainty may remain after Congress amends the Act. And the next Congress may undo the amendment with an amendment of its own, creating a game of legislative volleyball much like the regulatory volleyball of old. In other words, the synthesis (legislative action) may become a new thesis (legislative uncertainty), and the dialectic starts anew.[185] After all, Publius forewarned of the "internal effects of a mutable policy" out of concern for Congress's—rather than the Executive's—constant repealing and revising of laws.[186]

But a legislative volleyball outcome is still more constitutionally sound than the status quo because the elected members of Congress—rather than agency officials—will have made the policy choice about what the Clean Water Act regulates. Moreover, that outcome may seem unlikely as it assumes a responsive Congress that produces legislation with the breakneck frequency of less politically accountable agencies. The problem our Nation faces is not a reactive Congress, but one that does not act at all.

Continued intransigence among our representatives and senators has laid substantial uncertainty upon the regulated community. To know what the law requires, go ask your local lawyer or hydrologist. Though be forewarned: Their good advice will expire with the next court case or next presidential election. This same uncertainty also undermines effective stewardship of our environment. When technology or case law exposes a regulatory gap, neither agencies nor courts can fill the resulting void easily when no statute allows them.

So, in a word, this article is a warning. Having harmed both the environment and regulated community through avoidable uncertainty, Congress must act. It must seek the input of hydrologists, biologists, and other scientists; consider how federal jurisdiction affects states and regulated entities alike; and heed the institutional knowledge of the enforcing federal and state agencies. Our members of Congress must compromise and forge legislation with clear bounds about what the law requires. And in the end, despite its existing defects, we may have a Clean Water Act still. But only if we can keep it.

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[185] *Hegelian Reflections*, *supra* note 12, at 188 (the dialectic reconciles the thesis and antithesis "in a 'synthesis' which becomes another 'thesis' and the process starts again.").

[186] THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison).

IS AN INJUNCTION THE RIGHT VEHICLE TO COMBAT CLIMATE CHANGE?: GREENWASHING AND THE IMPORTANCE OF INCREASING CONSUMER CHOICE IN FOSSIL FUEL ALTERNATIVES

CAESARIA KIM[1]

I. INTRODUCTION

Human activities that release greenhouse gasses ("GHG"), especially the burning of fossil fuels, contribute substantially to global warming and climate change.[2] With a warming climate comes numerous adverse impacts, including extreme weather events, rising sea levels, drought, and increased exposure to infections.[3] The consequences of climate change have affected and will continue to affect communities on every continent, with some vulnerable populations, such as children in poor countries and the elderly, at greater risk of harm.[4] A recent World Health Organization ("WHO") assessment concluded that climate change is expected to cause an increase of approximately 250,000 deaths per year between 2030 and 2050.[5] GHG emissions continued to increase from 1970 to 2010, with carbon dioxide emissions from fossil fuel com-

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[2] *Climate Change and Health*, WORLD HEALTH ORGANIZATION (Feb. 1, 2018), https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health.

[3] *Id.*

[4] *Id.*

[5] *Id.*

bustion and industrial processes contributing around seventy-eight percent of the total GHG emission increase.[6]

In the face of the climate crisis, people are increasingly interested in more sustainable and eco-conscious alternatives to fossil fuels. As a result, companies associated with fossil fuel industries are under pressure to conform to this trend among consumers by marketing themselves as leaders in developing sustainable alternatives.[7] However, instead of changing their practices in an effort to mitigate climate change, some companies only promote the appearance of change by engaging in "greenwashing."[8] Greenwashing is defined as the "practice of misleading people to believe that a company is engaging in virtuous practices so as to cover up poor practices" or relying on appearances instead of reality; i.e., relying on good marketing instead of actual change.[9]

One company accused of greenwashing their image is Exxon Mobil, Inc. ("Exxon"), the oil and gas producer.[10] Their recent marketing strategy and advertisements feature new research purporting to make a difference by developing biofuels from algae as an alternative to fossil fuels.[11] These claims are now being called into question in multiple lawsuits alleging that Exxon is deliberately misleading the public to greenwash their image.[12]

On the surface, biofuels research sounds like a promising step towards sustainability, as the fuels would be created from algae rather than fossil fuels.[13] Biofuels from algae are considered to be a prime candidate for alternative fuels, because atmospheric GHG is decreased during the process, as the cultivation of algae uses up a large amount of carbon dioxide.[14] Exxon prominently displays their biofuels research in their

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[6] International Governmental Panel on Climate Change (IPCC), *Summary for Policy Makers*, Climate Change 2014: Mitigation of Climate Change 8 (O. Edenhofer et al. eds., 2014), https://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf.

[7] Emily Plec & Mary Pettenger, *Greenwashing Consumption: The Didactic Framing of ExxonMobil's Energy Solutions,* 6 Env't Commc'n 459, 459-60, 465 (2012).

[8] Francesco Bassetti, *Is Greenwashing a Sign of Real Change?*, Foresight: The CMCC Observatory on Climate Policies and Futures (Feb. 26, 2020), https://www.climateforesight.eu/global-policy/greenwashing-a-signal-of-change-to-come/.

[9] *Id.*

[10] Emily Holden, *How the Oil Industry has Spent Billions to Control the Climate Change Conversation,* Nat'l Observer (Jan. 9, 2020), https://www.nationalobserver.com/2020/01/09/news/how-oil-industry-has-spent-billions-control-climate-change-conversation.

[11] *Id.*

[12] Geoffrey Supran & Naomi Oreskes, *Big Oil Is the New Big Tobacco. Congress Must Use Its Power to Investigate*, Guardian (Jan. 20, 2020), https://www.theguardian.com/commentisfree/2020/jan/20/big-oil-congress-climate-change.

[13] Plec & Pettenger, *supra* note 7, at 467-68.

[14] Anoop Singh et al., *Mechanism and Challenges in Commercialisation of Algal Biofuels*, 102 Bioresource Tech. 26, 26 (2011).

marketing materials, including the front page of their corporate website.[15]

However, the algae research program at Exxon actually accounts for only a very small portion of the corporation's available budget.[16] In 2016, Exxon spent less than one percent of its annual revenue on alternative energy research.[17] By failing to mention that the company's contribution to alternative energy is relatively miniscule in comparison to its fossil fuel products, Exxon's biofuels advertisements mislead consumers into believing that they are making responsible choices for the environment when buying Exxon's products.[18] But this discrepancy only scrapes the surface of the extent of Exxon's deceptive marketing tactics in relation to global climate change.

Recently uncovered internal documents revealed that Exxon's scientists had knowledge that their products had the potential to the change the climate since the 1950s.[19] By the late 1970s and early 1980s, Exxon was "explicitly aware that burning fossil fuels" could lead to "catastrophic global warming."[20] Exxon not only failed to disclose this information to the public but continued to promote their products.[21] As awareness of climate change became more mainstream in the late 1980s and early 1990s, Exxon went further and began to publish advertisements that denied the existence of anthropogenic climate change and global warming.[22] For example, in 2000, Exxon published an advertorial in the *New York Times*, calling climate change an "*Unsettled Science*."[23] In the advertorial, Exxon falsely stated that scientists have not been able to confirm that human activity is causing global warming — despite the fact that scientists had formed a consensus that human activity was causing global warming in the 1990s.[24]

In response to these disclosures, three public plaintiffs — Connecticut, District of Columbia, and Massachusetts — are now bringing legal

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[15] Exxon Mobil, *ExxonMobil and Porsche Are Testing Advanced Biofuels and Renewable, Lower-Carbon eFuels*, https://corporate.exxonmobil.com (last visited April 2, 2021).

[16] Holden, *supra* note 10.

[17] Complaint at 48, District of Columbia, v. Exxon Mobil Corp. (D.C. Super. Ct. June 25, 2020) (No. 2020 CA 002892 B) [hereinafter D.C. Complaint].

[18] Complaint at 34, Connecticut v. Exxon Mobil Corp. (Conn. Super. Ct. Sept. 14, 2020) (No. HHDCV206132568S), 2020 WL 5522920 [hereinafter Connecticut Complaint].

[19] Supran & Oreskes, *supra* note 12.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] John Cook et al., America Misled: How the Fossil Fuel Industry Deliberately Misled Americans About Climate Change 8, Geo. Mason Univ. Ctr. for Climate Change Commc'n (2019), https://www.climatechangecommunication.org/wp-content/uploads/2019/10/America_Misled.pdf.

[24] *Id.* at 5.

actions against Exxon to stop these deceptive practices by suing under their respective consumer protection laws.[25] All three complaints ("the Complaints") outline prayers for relief seeking monetary damages for the alleged injuries Exxon inflicted on consumers.[26] The alleged injuries listed in the Complaints include misleading consumers by telling them climate change and global warming are not real risks, and subsequently, asserting that Exxon is not a contributor to these 'fictional' dangers.[27] All three complaints also seek to enjoin Exxon from continuing its greenwashing practices, which is the focus of this comment.[28]

Notably, all three complaints argue for the necessity of an injunction to stop Exxon's greenwashing by drawing comparisons between the oil industry's deceptive practices and those made infamous by the tobacco industry. Like the tobacco industry, they argue, the oil industry knew of the harmful effects of their activities but failed to publicly reveal this information and denied the effects externally.[29] The Complaints further allege that Exxon's greenwashing has influenced consumers' actions in a manner similar to the way tobacco companies used deceptive advertising to encourage consumers to buy their products by denying and downplaying the negative effects of these products.[30] By asking for injunctive relief and an education program to inform the public of the negative effects of petroleum products, the Complaints seek to restrict the deceptive advertising of oil products in a manner similar to the way tobacco advertising was restricted in order to change consumer behavior.[31]

This comment will explore the implications of these cases with respect to a key difference between Big Oil and Big Tobacco, which is that, unlike tobacco, many aspects of our society still depend on oil and gas. Responsible advertising, like that which helped curtail the use and sales of cigarettes, may not be as effective when it comes to oil. Many

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[25] Connecticut v. Exxon Mobil Corp., No. HHD-CV-206132568S (Conn. Super. Ct. Sept. 14, 2020); District of Columbia, v. Exxon Mobil Corp., No. 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020); Commonwealth v. Exxon Mobil Corp., No. 1984-CV-03333 (Mass. Super. Ct. Oct. 24, 2019).

[26] Connecticut Complaint, *supra* note 18, at 44; D.C. Complaint, *supra* note 17, at 77; Complaint at 204-05, Commonwealth v. Exxon Mobil Corp., No. 1984-CV-03333 (Mass. Super. Ct. Oct. 24, 2019) [hereinafter Massachusetts Complaint].

[27] Connecticut Complaint, *supra* note 18, at 2; D.C. Complaint, *supra* note 17, at 32-34; Massachusetts Complaint, *supra* note 26, at 28-29.

[28] Connecticut Complaint, *supra* note 18, at 44; D.C. Complaint, *supra* note 17, at 77; Massachusetts Complaint, *supra* note 26, at 205.

[29] Justine Calma, *To Take Down Big Oil, Opponents are Following the Big Tobacco Playbook*, VERGE (Oct. 23, 2019, 9:50 am EDT), https://www.theverge.com/2019/10/23/20927522/exxonmobil-trial-big-oil-big-tobacco-investors-environmental-regulations.

[30] Connecticut Complaint, *supra* note 18, at 7; D.C. Complaint, *supra* note 17, at 4; Complaint at 12-13, Massachusetts Complaint, *supra* note 26, at 5.

[31] *See e.g.,* Connecticut Complaint, *supra* note 18, at 45.

people still have little personal choice as to whether to participate in the oil economy because they rely on oil for fueling cars and homes and many other uses. Therefore, in order to be effective in the fight against climate change, an injunction prohibiting Exxon's greenwashing should be paired with government efforts to develop alternatives to petroleum products that will give consumers a real choice. Alternatives can include increasing access to greener transportation such as electric vehicles, as well as public transit and active travel.

This comment begins with an overview of the deceptive advertising practices that were used by the tobacco industry and those used more recently by the oil and gas industry, focusing on Exxon in particular. It then takes a closer look at the relief sought in these cases and considers how the differences between these industries might limit the effectiveness of restricting greenwashing. Finally, the comment recommends additional government actions to enhance the impact of the current lawsuits in addressing climate change.

II. BACKGROUND

In order to understand the limitations of the proposed analogy between the deceptive advertising by big tobacco and the alleged greenwashing by Exxon, an overview of their respective practices is necessary.

A. THE DECEPTIONS OF THE TOBACCO INDUSTRY

In the early 1950s, almost half of all Americans were regularly consuming tobacco products.[32] The allure of the cigarette was influenced by the prevalence of smoking in popular films, as well as promotions of smoking on billboards, in magazines, and on the radio, often by athletes and celebrities.[33] However, this changed in 1952 after *Reader's Digest* reported that research showed a statistical link between smoking and lung cancer.[34] These research results changed the public perception of cigarettes, and over the next two years, cigarette consumption rates decreased for the first time.[35] Around the same time, "the tobacco industry's own research began to find carcinogens in smoke and began to

[32] Martin Olszynski et al., *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 GEO. ENV'T L. REV. 1, 9-10 (2017) (discussing how tobacco norms evolved over time).

[33] Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 855 (1992) (discussing the popularity of cigarette smoking and the lack of tobacco related product injury lawsuits in the 1950s).

[34] Olszynski et al., *supra* note 32, at 10.

[35] *Id.*

confirm the relationship between smoking and cancer."[36] However, the tobacco industry did not publish these results or disclose the mounting evidence indicating that cigarettes caused lung cancer.[37] Instead, the tobacco industry began "creating doubt and controversy surrounding the health risks,"[38] and responded "to the growing public concern by putting filters on cigarettes and promising research into the health effects of smoking."[39]

As a result of the industry's tactics, individual plaintiffs in the first wave of litigation against the tobacco industry, starting with *Lowe v. R.J. Reynolds Tobacco Co.* in 1954,[40] had difficulty proving that "tobacco-related harms were reasonably foreseeable" at the time.[41] The tobacco industry argued that the foreseeability of adverse health impacts could not be established unless the connection between "smoking and disease became irrefutable."[42] In time, the evidence became increasingly undeniable with the publication of the U.S. Surgeon General's report on "Smoking and Health" in 1964, which concluded by stating that "[c]igarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors."[43] Thus, public perception of smoking had begun to change.

Throughout the 1960s, the tobacco industry tried to mitigate the blow to their industry by using advertisements to deny that their products caused cancer.[44] During this time, Congress passed the Federal Cigarette Labeling and Advertising Act of 1965, which required cigarette manufacturers to place health warnings on cigarette packets, and warnings in their broadcast advertising.[45] However, tobacco companies were not deterred from their efforts to popularize smoking. In 1989, at a hearing of the U.S. Subcommittee of the Committee on Energy and Commerce of the House of Representatives, it was disclosed that cigarette companies had also worked to "spread their message" by paying to have cigarettes

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[36] Clive Bates & Andy Rowell, *Tobacco Explained*, ACTION ON SMOKING AND HEALTH (ASH) 1 (2004), https://www.who.int/tobacco/media/en/TobaccoExplained.pdf (last visited Dec. 16, 2020).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] § 18:2. Historical Overview of Tobacco Litigation—The First Phase of Tobacco Litigation, 2 TOXIC TORTS LITIGATION GUIDE § 18:2 (2020) (noting *Lowe* was voluntarily discontinued by the plaintiff).

[41] Olszynski et al., *supra* note 32, at 10-11.

[42] *Id.*

[43] Bates & Rowell, *supra* note 36, at 6.

[44] *Id.* at 40.

[45] § 18:3. Historical Overview of Tobacco Litigation—The Second Phase of Tobacco Litigation, TOXIC TORTS LITIGATION GUIDE § 18:3 (2020).

appear in mediums such as movies, which did not appear to be advertisements at first glance.[46] For example, Philip Morris, a tobacco company, paid "$42,000 in 1979 to have Marlboro cigarettes appear in the movie '*Superman II*' and paid $350,000 [in 1988] to have the Lark cigarette appear in the new James Bond movie '*License to Kill*.'"[47]

In addition, tobacco companies began to (and continue to) market "light" and "low tar" cigarettes, accompanied by advertisements promoting these as healthier alternatives to traditional cigarettes.[48] But tobacco companies knew that there was virtually no change in the products, and light cigarettes could deliver more tar and nicotine than advertised.[49] In this way, tobacco companies continued to deceive consumers as to the harmful nature of their products, by convincing consumers that light and low tar cigarettes are safe alternatives to smoking regular cigarettes.[50]

The Master Settlement Agreement ("MSA") of 1999 came from the culmination of states suing the tobacco industry for recovery of Medicaid costs due to smoking-related illnesses.[51] The MSA limited advertising, including a ban on the use of characters and limitations on tobacco industry sponsorship of sports events.[52] Notably, the MSA required payments of: (1) 206 billion dollars to the states spread out over a twenty-five year period; (2) a 1.5 billion dollar payment to support state antismoking measures over a ten year time period; and (3) a 250 million dollar payment to fund research into reducing youth smoking.[53] In the wake of the MSA, some states implemented tobacco control programs with the MSA funds in order to reduce tobacco consumption.[54] These tobacco control programs generally included: public education campaigns, school based tobacco prevention programs, and enforcement of "existing policies aimed at curbing exposure to smoke in public places and youth access to tobacco."[55]

In sum, the tobacco companies were well aware of the harmful effects of their products, but they continued to promote their products anyway without disclosing their research to their consumers. When the link

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[46] Bates & Rowell, *supra* note 36, at 47.

[47] *Id.*

[48] World Health Organization, Tobacco: Deadly in Any Form or Disguise 29 (2006), https://www.who.int/tobacco/communications/events/wntd/2006/Report_v8_4May06.pdf.

[49] *Id.*

[50] *Id.*

[51] Walter J. Jones & Gerard A. Silvestri, *The Master Settlement Agreement and its Impact on Tobacco Use 10 Years Later,* 137 Chest 692, 692-93 (2010).

[52] *Id.* at 698 (e.g., use of characters such as Joe Camel).

[53] *Id.*

[54] Matthew C. Farrelly, et al., *The Impact of Tobacco Control Program Expenditures on Aggregate Cigarette Sales: 1981-2000,* 22 J. Health Econ. 843, 845 (2003).

[55] *Id.*

between smoking and lung cancer became publicly widespread, tobacco companies switched tactics and published advertisements that denied the fact that tobacco caused cancer. Eventually legislation was passed that required cigarettes to be labeled with health warnings and banned cigarette advertisements on television. However, the tobacco companies continued to subtly advertise by sponsoring their way into feature films. Undeterred, tobacco companies are still deceiving consumers by continuing to market light and low tar cigarettes.

B. History Repeats Itself with the Oil Industry

Archival documents show that Exxon knew their products had the potential to change the climate as early as the 1950s.[56] In 1954, geochemist Harrison Brown proposed research to the American Petroleum Institute ("API"), the petroleum industry's main trade association.[57] Brown's research proposal informed the API that fossil fuels had caused atmospheric carbon dioxide levels to rise about five percent over the last hundred years.[58] "By the late 1970s and early 1980s, Exxon scientists were explicitly aware that burning fossil fuels could lead to what they called 'catastrophic' global warming."[59] However, like the tobacco companies, Exxon decided to conceal this information and continued to promote their products instead of informing their customers.[60]

Exxon actively fought against the concern for climate change, echoing the actions of the tobacco industry. For example, Exxon became a member of the Global Climate Coalition ("GCC") along with several other fossil fuel companies in 1989.[61] The GCC is an organization that was founded to "coordinate business participation in the scientific and policy debate on the global climate change issue."[62] The Coalition opposed governmental action that was designed to address the emerging scientific studies on global warming.[63] In 1997, in light of the Kyoto Protocol, other leading oil companies such as BP and Shell changed their stance on climate change and abandoned the GCC.[64] Exxon decided to

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[56] Benjamin Franta, *Early Oil industry Knowledge of CO_2 and Global Warming,* 8 Nature Climate Change 1024, 1024 (2018).

[57] *Id.*

[58] *Id.*

[59] Supran & Oreskes, *supra* note 12.

[60] *Id.*

[61] Union of Concerned Scientists, Smoke, Mirrors, & Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science 9 (2007), https://www.ucsusa.org/sites/default/files/2019-09/exxon_report.pdf.

[62] Connecticut Complaint, *supra* note 18, at 22.

[63] Union of Concerned Scientists, *supra* note 61, at 9.

[64] *Id.*

double down instead, and helped to create a task force called the Global Climate Science Team ("GCST") to create a disinformation campaign similar to that of Big Tobacco.[65] An internal memo of GCC revealed that the goal of the team was to ensure that average citizens recognized the uncertainties in climate science.[66]

As the science of climate change became less deniable, Exxon switched tactics to greenwashing.[67] Enter Exxon's new marketing strategy: to emphasize their research into algae-based biofuels in their advertising and thereby promote an image of corporate commitment to developing low-carbon, more environmentally friendly fuels.[68] Exxon has "flooded the United States television market with advertisements" about their efforts to research and promote alternative sources of energy.[69] Exxon has also continued with their tried and true greenwashing tactics by continuing to pay for advertorials. For example, in 2018,[70] Exxon published an article entitled "*The Future of Energy? It May Come from Where You Least Expect*"[71] that lays out Exxon's research into algae biofuels with clear graphs and bright colors.[72] Additionally, the article mentions how alternative fuel sources like biofuels seemed "poised to enter the market" in the 2000s.[73] Of course, there is no mention of how Exxon contributed to fossil fuel production or GHG emissions during this time. Exxon also shares specific numbers for how many barrels of biofuel it hopes to produce (10,000 barrels per day by 2025), but makes no mention of how many barrels of oil it plans to produce from fossil fuels at that time. Instead, the article emphasizes how Exxon wants to create the "next generation of biofuels" and "make the future of energy literally green."[74]

Like the tobacco industry, Exxon knew that their products were harming consumers, and further, the global environment. Exxon decided to stay silent and continue to promote their products, while denying climate change. Once confronted with undeniable evidence, Exxon

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[65] *Id.* at 10.

[66] *Id.*

[67] D.C. Complaint, *supra* note 17, at 59-60.

[68] Plec & Pettenger, et al., *supra* note 7, at 460.

[69] *Id.*

[70] Tristan Bove, *The Fossil Fuel Industry's Influence on Environmental Journalism*, EARTH.ORG (Dec. 15, 2020), https://earth.org/fossil-fuel-industrys-influence-on-environmental-journalism/.

[71] Paid Post by ExxonMobil, *The Future of Energy? It May Come From Where You Least Expect,* N.Y. TIMES, https://www.nytimes.com/paidpost/exxonmobil/the-future-of-energy-it-may-come-from-where-you-least-expect.html (last visited Apr. 10, 2021).

[72] *Id.*

[73] *Id.*

[74] *Id.*

switched tactics from denial to greenwashing to continue to sell their products while creating a false, greener image.

III. The Complaints

The Commonwealth of Massachusetts brought the first of the three complaints against Exxon's greenwashing. The attorney general brought the suit, acting as the Commonwealth, against Exxon, which is registered to do business in Massachusetts as a foreign corporation.[75] The suit alleges that Exxon deceived, and continues to deceive, Massachusetts investors by (1) misrepresenting and failing to disclose material facts about climate change;[76] and (2) making materially false and misleading statements to Massachusetts investors about its use of a proxy cost of carbon.[77] Additionally, Massachusetts alleges that Exxon deceived and continues to deceive consumers by (3) misrepresenting the environmental benefit of its "green" products and failing to disclose the risks of climate change caused by Exxon products;[78] and (4) promoting false and misleading greenwashing campaigns.[79] Amongst other remedies, Massachusetts is requesting that the court: (a) determine that Exxon has violated and is continuing to violate the Massachusetts Consumer Protection Act ("CPA"); (b) grant comprehensive injunctive relief; and (c) award Massachusetts penalties against Exxon in the amount of $5,000 for each violation of the Massachusetts CPA.[80]

The District of Columbia took their claim a step further than Massachusetts and brought suit against three other petroleum companies in addition to Exxon, including Shell, BP, and Chevron.[81] The District of Columbia is represented by the Attorney General for the District of Columbia.[82] The suit alleges that Exxon has violated section 28-3904 of the D.C. Consumer Protection Procedures Act ("CPPA"), which prohibits unfair and deceptive practices when offering, selling, and supplying consumer goods and services.[83] D.C. alleges that Exxon violated section 28-3904 by: (1) using a long-term advertising and communications campaign relying on climate change denialism to influence consumer demand for their fossil fuel products; (2) making misleading or incomplete

[75] Massachusetts Complaint, *supra* note 26, at 15.
[76] *Id.* at 195.
[77] *Id.* at 197.
[78] *Id.* at 200.
[79] *Id.* at 202.
[80] *Id.* at 204-205.
[81] D.C. Complaint, *supra* note 17, at 1.
[82] *Id.* at 4.
[83] *Id.* at 68.

claims about their commitment to environmental sustainability; and (3) aggressively marketing its fossil fuel products with misleading representations about the products' environmental benefits.[84] D.C. is requesting that the court: (a) permanently enjoin the defendants from violating the CPPA; (b) order the defendants to pay restitution or damages; and (c) award civil penalties in an amount to be proven at trial.[85]

Lastly, Connecticut brought action against Exxon pursuant to section 42-110 of Connecticut General Statutes, which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."[86] The attorney general brought the suit at the request of the commissioner of the Department of Consumer Protection.[87] Connecticut alleges that Exxon violated section 42-110b by: (1) misleading consumers about the existence of climate change, and whether human activity contributed to it when Exxon knew otherwise;[88] and (2) engaging in deceptive greenwashing campaigns to depict Exxon as environmentally conscious to sell petroleum products to Connecticut consumers.[89]

Out of the three Complaints, Connecticut has the most robust and diversified prayer for relief. Similar to Massachusetts and D.C., Connecticut is requesting that the court: (1) find that Exxon engaged in unfair and deceptive acts and practices; (2) enforce an injunction against Exxon from engaging in any acts that violate Connecticut's Unfair Trade Practices Act; (3) grant equitable relief "for past, present and future deceptive acts and practices that will require future climate change mitigation, adaptation, and resiliency;" and (4) order Exxon to pay civil penalties and (5) to pay restitution to the State for all expenditures attributable to Exxon that the State has and will have to make to counter the effects of climate change.[90] Additionally, Connecticut goes further by asking the court to direct Exxon to: (6) yield revenue, profit, and gain achieved through unfair acts or practices; (7) disclose all research and studies relating to climate change in its possession; and (8) fund a "corrective education campaign to remedy the harm inflicted by decades of disinformation" that would be either controlled by the state of Connecticut, or another independent third party.[91]

The Complaints argue that Exxon is currently greenwashing by overemphasizing its commitment to biofuels, and harming consumers

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[84] *Id.* at 68-69.
[85] *Id.* at 77.
[86] CT Gen. Stat. § 42-110b (2012).
[87] Connecticut Complaint, *supra* note 18, at 8.
[88] *Id.* at 36-38.
[89] *Id.* at 40-41.
[90] *Id.* at 44.
[91] *Id.* at 44-45.

with this deception.[92] According to its own promotional materials, Exxon's goal is to provide 10,000 barrels of algae biofuel per day by 2025.[93] But Connecticut argued that if Exxon was able to achieve this goal, the algae biofuels would only occupy approximately 0.2 percent of its current refinery capacity,[94] meaning that 99.8 percent of Exxon's refinery capacity would still consist of fossil fuels. Therefore, almost 100 percent of Exxon's refineries would still consist of fossil fuels, while they prominently promote their biofuels to paint themselves as a greener company. D.C. landed on similar numbers, alleging that, in 2016, "Exxon earned $198 billion in revenue but invested less than 1% of that in alternative energy research, including algae."[95]

IV. Analysis

The oil industry's history of sitting on known risks, and using deceptive advertising is substantially similar to the tobacco industry's history, and the states draw on these similarities in their complaints. However, there are also major differences between the two industries. Whereas cigarette smoking is largely a matter of personal choice, widespread reliance on oil and gas for fuel and other products makes consumers more restricted in their choices about whether to engage in the oil economy.

A. The Tobacco Industry's Deceptions are Not a Good Predictor for Big Oil's Greenwashing Practice

The restrictions implemented on tobacco advertising have been largely successful.[96] The tobacco control programs resulting from the MSA have reduced smoking rates over an extended period of time.[97] Additionally, the health warnings on cigarette packaging have been shown to decrease cigarette consumption.[98]

The prevalent misconceptions about light and low-tar cigarettes led Congress to enact the Family Smoking Prevention and Tobacco Control Act of 2009, which prohibited tobacco companies from producing and

[92] Connecticut Complaint, *supra* note 18, at 33-34; D.C. Complaint, *supra* note 17, at 47-49; Massachusetts Complaint, *supra* note 26, at 173-79.

[93] Connecticut Complaint, *supra* note 18, at 33.

[94] *Id.* at 33.

[95] D.C. Complaint, *supra* note 17, at 48.

[96] Ali Palali & Jan C. van Ours, *The Impact of Tobacco Control Policies on Smoking Initiation in Eleven European Countries*, 20 Eur. J. Health Econ. 1287, 1289 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6856042/.

[97] Jones & Silvestri, *supra* note 51, at 697.

[98] Palali & van Ours, *supra* note 96, at 1289.

distributing any products labeled or advertised as "light" or "low" unless the companies can meet rigorous criteria established by the Food and Drug Administration ("FDA").[99] If the company can meet the criteria, a Modified Risk Tobacco Product order is issued from the FDA, which allows companies to use the "light" and "low" terms in their labeling or advertising; but if companies use those terms without the FDA order, the claims can be considered health fraud.[100] Exxon's greenwashing of their fossil fuel products has been compared to the tobacco industry's adoption of light and low-tar cigarettes, and if adopted, an injunction against Exxon's greenwashing of their biofuels could most likely look similar to the criteria that is required of tobacco companies.

But does the tobacco industry provide a good model for determining what measures to take in the oil industry? Despite the similarities in the actions of the tobacco and oil industries, consumer reliance on the oil industry for basic needs is a major difference between oil and tobacco. Petroleum products are part of American consumers' everyday lives, including transportation fuels, and feedstocks for making the chemicals, plastics, and synthetic materials that are in almost everything.[101] In 2019, 7.5 billion barrels of petroleum were consumed in the United States.[102] Out of the 7.5 billion barrels, forty-five percent was used for motor gasoline,[103] meaning almost half of petroleum consumption was due to gasoline powered transportation.

Although buying a cigarette has little societal benefit outside of economic benefit, oil and gas have become an integral part of our society from transportation to heating homes. There is no question that both industries cause harm, but widespread reliance on the products of the oil industry makes it different than the tobacco industry. The current reliance on oil limits consumer choice in deciding whether or not to use it. An injunction against Exxon's greenwashing thus would not necessarily provide consumers with a better option. In order to achieve results like those in the tobacco industry, an injunction would have to be paired with something else, such as government intervention and policies. If Massachusetts, D.C., and Connecticut, or other states, succeed in restricting deceptive advertising, they may also need to enact additional government

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[99] U.S. Food & Drug Admin., *Light, Low, Mild or Similar Descriptors*, (Jan. 19, 2018), https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/light-low-mild-or-similar-descriptors.

[100] *Id.*

[101] *What Are Petroleum Products, and What Is Petroleum Used For?* U.S. Energy Info. Admin. (Sept. 2020), https://www.eia.gov/tools/faqs/faq.php?id=41&t=6 (last visited Apr. 10, 2021).

[102] *Id.*

[103] *Id.*

programs and policies to provide consumers with options for decreasing dependency on petroleum products.

B. An Injunction Against Exxon's Alleged Greenwashing of Biofuels by Itself Is Not an Effective Way to Mitigate Climate Change

An injunction against Exxon's greenwashing practices may not be an effective way to improve informed consumer decisions about their fossil fuel consumption if no alternatives to petroleum products are available to consumers. Therefore, governments should also implement policies to increase the availability of alternative energy products. This section explores how states can produce viable alternatives to petroleum products by increasing access to electric vehicles and related infrastructure.

1. An Injunction by Itself Would Not Significantly Change Consumer Behavior

Connecticut argues in its complaint that Exxon's advertisements about biofuels misled reasonable consumers into believing that Exxon's products are "environmentally sound," which deprived Connecticut consumers of accurate information about their purchasing decisions.[104] Similarly, D.C. claims that if consumers understood the "full degree" of the harm that Exxon's products contribute to climate change, they would have chosen not to purchase from Exxon, or at least would have purchased less.[105] In other words, both complaints argue that consumers would have behaved differently had they known the truth.

But would a change in advertising practices influence consumers in a significant way? Because buying gas is a routine part of millions of Americans' lives, it seems doubtful that fewer consumers would buy Exxon products if they hadn't seen advertisements about biofuels. According to a report by CNBC, as of July 2020, approximately 280 million cars, trucks, and SUVs were registered with U.S. motor vehicle departments.[106] However, just 1.4 million plug-in electric vehicles ("PEVs") have been sold in the United States,[107] which suggests that there are still

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[104] Connecticut Complaint, *supra* note 18, at 34.

[105] D.C. Complaint, *supra* note 17, at 61.

[106] Phil LeBeau, *25% of Cars in the U.S. are at Least Sixteen Years Old as Vehicle Age Hits Record High*, CNBC, (July 28, 2020, 7:00 AM), https://www.cnbc.com/2020/07/28/25percent-of-cars-in-us-are-at-least-sixteen-years-old----record-high.html.

[107] *How Many Electric Cars are on the Road in the United States?* USA Facts (Oct. 22, 2020, 10:17 AM), https://usafacts.org/articles/how-many-electric-cars-in-united-states/.

over 278 million cars in the United States that rely at least partly on gas or diesel. Therefore, a significant majority of consumers who drive cars, regardless of whether they see an advertisement from Exxon or not, still have to buy gas for their vehicles (whether from Exxon or another company).

Climate change is a serious issue that needs to be addressed immediately. Unfortunately, filing for an injunction to stop current greenwashing practices for a product that is a necessity in consumers' lives does not seem like an effective way to combat climate change unless there are accessible alternatives to fossil fuels. Consumers cannot make environmentally friendly choices without an oil substitute in place when they rely on petroleum daily, which is why the government should step in by creating more incentives and infrastructure to promote electric vehicles.

2. Government Policies Need to Provide Consumer Choice

While choice of fuels seems very limited, consumers arguably do have choice in deciding whether to buy electric cars over fossil-fuel powered cars. In addition, there are already some incentive programs in place to promote buying an electric car. For example, at the federal level, a program administered by the U.S. Department of Energy provides that "[a]ll-electric and plug-in hybrid cars purchased new in or after 2010 may be eligible for a federal income tax credit of $7,500."[108] States can also develop incentive programs.

However, there are still many other obstacles, like the lack of charging stations in many areas, that deter consumers from purchasing electric cars that run entirely without gas. Despite the growing popularity of electric cars, critics argue that "governments, regulators, and utilities aren't doing enough" to accommodate or encourage the acceleration of this growth.[109] In addition, because "40 percent of Americans don't live in single-family homes where [they] could have a personal charger," the feasibility of owning and using an electric car can be more difficult for some people than others.[110] Without accessible public charging stations for individuals without their own parking spaces with charging ports, the decision to buy an electric car is not practical. Consequently, many con-

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[108] *Federal Tax Credits for New All-Electric and Plug-in Hybrid Vehicles,* U.S. DEP'T OF ENERGY (Feb. 2021), https://www.fueleconomy.gov/feg/taxevb.shtml.

[109] Lawrence Ulrich, *Charger Desert in Big Cities Keeps Electric Cars from Mainstream*, N.Y. TIMES (Apr. 16, 2020), https://www.nytimes.com/2020/04/16/business/electric-cars-cities-chargers.html.

[110] *Id.*

sumers have limited power to exercise their preferences for electric cars and cleaner, safer fuels. In order to effectively combat climate change and give consumers meaningful choices, governments need to increase the availability of electric cars and charging stations.

In California, Governor Gavin Newsom issued an executive order in September 2020 that aims to increase the availability of electric vehicles. Executive Order N-79-20 directs the state to reduce reliance on fossil fuels by requiring the sales of "all new passenger vehicles to be zero-emission by 2035."[111] Newsom is pushing the state to make electric cars the new normal. The order also requires state agencies and private companies to "accelerate deployment of affordable fueling and charging options."[112] Increasing the number of electric cars and charging stations available, at least in California, could help eliminate two of the key barriers that prevent consumers from purchasing electric cars. Other states should adopt similar measures to push the availability of PEV cars and charging stations. Ceasing the sales of fossil fuel cars by 2035 is an ambitious goal, and while some states may not find this to be feasible, they could still adopt similar policies to accelerate the deployment of affordable fueling and charging stations.

Connecticut and Massachusetts have both started initiatives similar to California to increase the number and accessibility of electric cars.[113] Connecticut has established a state goal for 500,000 vehicles to be PEVs by 2030.[114] Additionally, Connecticut plans to implement policies to educate consumers on the costs and benefits of owning an electric vehicle ("EV").[115] The suggested policies also include methods of marketing, education, and outreach to engage Connecticut consumers through "experiential opportunities such as ride-and-drive events," as well as encouraging leaders at the forefront of the EV movement to establish credibility

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[111] OFFICE OF GOVERNOR GAVIN NEWSOM, *Governor Newsom Announces California Will Phase Out Gasoline-Powered Cars & Drastically Reduce Demand for Fossil Fuel in California's Fight Against Climate Change* (Sept. 23, 2020), https://www.gov.ca.gov/2020/09/23/governor-newsom-announces-california-will-phase-out-gasoline-powered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/.

[112] *Id.*

[113] CONN. DEP'T OF ENERGY & ENV'T PROT. (DEEP), Press Release: DEEP Launches Electric Vehicle Roadmap (Apr. 22, 2020), https://portal.ct.gov/DEEP/News-Releases/News-Releases---2020/DEEP-Launches-Electric-Vehicle-Roadmap; MASS. COMM'N ON THE FUTURE OF TRANSP. IN THE COMMONWEALTH, *Choices for Stewardship: Recommendations to Meet the Transportation Future*, https://www.mass.gov/lists/choices-for-stewardship-recommendations-to-meet-the-transportation-future (last visited Apr. 9, 2021).

[114] CONN. DEEP, ELECTRIC VEHICLE ROADMAP FOR CONNECTICUT 12 (2020), http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/f7ed4932eec438d0852585520001c81b/$FILE/EV%20Roadmap%20for%20Connecticut.pdf.

[115] *Id.* at 92-93.

with consumers.[116] Massachusetts, on the other hand, has established a commission to advise the governor's office on implementing new technology initiatives, including strategies for providing the infrastructure necessary for the increased deployment of PEVs.[117] By creating policies that allow charging stations to become more accessible to more people, states can eliminate a key barrier to buying an electric car and thereby give consumers more choices in deciding how they engage with the fossil fuel industry.

Another potential barrier to buying an electric car is the cost. Currently, the up-front cost of buying an electric car can be higher than that of buying a fossil fuel burning vehicle.[118] However, by 2035, "zero-emission vehicles will almost certainly be cheaper and better than the traditional fossil fuel powered cars," as the upfront cost of electric cars are projected to be similar to conventional cars in "just a matter of years."[119] Additionally, the costs of maintaining and powering an electric car, mile by mile, are "far less" than a fossil fuel burning vehicle.[120] It is also important to consider that not everyone who is buying a car is going to buy new. In fact, on average, a quarter of cars and trucks on American roads are at least sixteen years old.[121] Therefore, new policies implemented to encourage the sale of EVs may not persuade everyone to immediately purchase an EV and will not completely eliminate the use of gasoline powered vehicles. This gradual change could be both a benefit and a detriment. It would be detrimental to the environment to delay the elimination of fossil fueled powered cars, but it could be beneficial to consumers if they are able to educate themselves more on the topic of EVs in order to make informed choices when deciding whether to buy an EV.

Although this paper has focused on expanding the accessibility of EVs, governments can also introduce other policies to encourage greener transportation. For example, in their 2020 Emissions Gap Report, the United Nations Environment Programme ("UNEP") recommended increasing public transport and active travel (such as bicycling and walking) through public policies and infrastructure.[122] Policy suggestions include subsidized public transport and incentives for cycling and bicycle

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[116] *Id.*

[117] Alternative Fuels Data Ctr., *Support for Plug-In Electric Vehicles (PEVs) and Autonomous Vehicles (AVs)*, U.S. DEP'T OF ENERGY, https://afdc.energy.gov/laws/11935 (last visited Apr. 9, 2021).

[118] OFFICE OF GOVERNOR GAVIN NEWSOM, *supra* note 111.

[119] *Id.*

[120] *Id.*

[121] LeBeau, *supra* note 106.

[122] UNITED NATIONS ENV'T PROGRAMME (UNEP), Emissions Gap Report 2020, at 66 (2020).

purchases.[123] Suggested infrastructure included opening dedicated cycling lanes and expanding cycle networks, as well as implementing car-free residential zones.[124] With these types of changes to policy and infrastructure, local governments can further promote greener transportation alternatives in addition to increased EV access.

Government has an important role in ensuring that consumers have choices when engaging in commerce with the fossil fuel industry. Although an injunction would affect Exxon's actions, consumer behavior would not change significantly if there are not ready alternatives to fossil fuels. Consumers' options can be expanded by increasing the accessibility of EVs and EV charging infrastructure, as well as through outreach and education about the EV industry to inform consumers of their choices. Governments can also encourage more environmentally friendly transportation options by increasing public transport and active travel. An injunction against Exxon's greenwashing must work in tandem with government policy for the injunction to be effective in changing consumer behavior.

C. What Could an Injunction with Government Policy Look Like?

An injunction against Exxon to prevent further greenwashing, if modeled after the tobacco industry, could utilize restrictions similar to those that were applied to restrict deceptive advertising of tobacco products and require labeling of light and low-tar cigarettes. A look at how tobacco advertising is restricted could therefore be useful for envisioning how a similar injunction might apply in the case of fossil fuels.

Under the federal Food, Drug, and Cosmetic Act, tobacco companies must meet rigorous criteria and receive an order for a Modified Risk Tobacco Product (MRTP) from the FDA before they can use the terms *light* or *low tar* in their advertising and labelling.[125] In order for an MRTP application to be successful, the applicant must "demonstrate that the product will or is expected to benefit the health of the population as a whole."[126] The FDA must also consider the following factors, among others, when reviewing an application:

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[123] *Id.*

[124] *Id.*

[125] U.S. Food & Drug Admin. *Light, Low, Mild or Similar Descriptors*, *supra* note 99.

[126] U.S. Food & Drug Admin., *Modified Risk Tobacco Products*, https://www.fda.gov/tobacco-products/advertising-and-promotion/modified-risk-tobacco-products (last visited Apr. 9, 2021).

- The relative health risks to individuals of the tobacco product that is the subject of the application;
- The increased or decreased likelihood that existing users of tobacco products who would otherwise stop using such products will switch to the tobacco product that is the subject of the application;
- The increased or decreased likelihood that persons who do not use tobacco products will start using the tobacco product that is the subject of the application.[127]

In other words, the FDA must consider the product's potential health risks and how the advertising is likely to influence the behavior of existing tobacco users as well as non-users.

This regulatory structure could work for Exxon's biofuels to ensure that there is potential change before allowing Exxon to advertise about their green products. If a similar regulatory structure were applied to Exxon, the company would first have to demonstrate that their product is expected to benefit the entire population. This would require Exxon to show that its claims of benefiting the environment through the development of algae biofuel have merit before they can use those claims in their marketing. Admittedly, under the broad question of benefiting the population, Exxon's greenwashing would probably still be permitted, because the research they are conducting, though minimal, is beneficial. This is where the additional factors would come in to evaluate the health risks associated with Exxon's products, and the likelihood that existing oil consumers would switch to using Exxon biofuel. If there is an increased likelihood that oil consumers would switch to biofuel, it seems likely that Exxon biofuel would be approved. In contrast, if the product is likely to influence non-consumers to start using biofuel or Exxon products in general, including petroleum products, there could be less likelihood of approval. It would be contradictory if Exxon's application to advertise greener fuels actually led to an increase in the purchase of their petroleum products. Thus, an application and approval process modeled after the tobacco industry would only be the first step.

The next step would be to adopt additional measures to promote increased consumer choice in deciding to participate in the economy of fossil fuels. If Exxon's biofuel application is denied because they are greenwashing rather than offering healthy and viable options for consumers, consumer choice would continue to be limited with respect to buying petroleum products. Although this might prevent Exxon from deceiving consumers, unless additional steps were taken to eliminate obstacles and provide incentives for purchasing electric cars, little change

[127] 21 U.S.C. § 387k(g)(4).

would result from the restrictions. But if the government implements programs to make EVs and charging stations cheaper and more available, this could encourage more people to purchase them. Additionally, it would be important to educate consumers about EVs and their accompanying infrastructure, as well as other alternatives, to enable consumers to make informed decisions. Eliminating greenwashing narratives, to be successful in addressing climate change, must therefore work in conjunction with other programs to advance meaningful alternatives to fossil fuel powered cars.

V. Conclusion

In conclusion, an injunction against Exxon's greenwashing is not going to be effective without further government action to increase viable fossil fuel alternatives. Currently, consumers do not have a choice in participating in the fossil fuel industry. There is no denying the harm that Exxon has caused by misleading the public about climate change. Further, Exxon's greenwashing of products is continuing to deceive consumers about the harm caused by Exxon's products, and this must be stopped. But preventative measures, like regulatory restrictions that worked for the tobacco industry, may not be an exact fit when applied to the oil industry. This is because of American consumers' reliance on oil in their everyday lives.

The states filing for injunctions against Exxon's alleged greenwashing are engaged in a noble cause, but an injunction is unlikely to be very effective without further actions from the government to give consumers actual choices in whether or not they want to participate in the fossil fuel economy. Though some state governments are already providing incentives for purchasing EVs, governments must do more to make these alternatives more accessible by increasing availability of PEVs and charging structures, and educating consumers about the EV industry. Ultimately, states that pursue lawsuits similar to Connecticut, D.C., and Massachusetts, should consider implementing such measures in conjunction with an injunction, to make the alternatives to fossil fuels more accessible.

Consumers are more conscientious than ever in the fight against climate change, but they need the government to create accessible alternatives to fossil fuels in order to have a choice in green transportation.

THE FUTURE OF THE SAFE RULE AND ACHIEVING MORE CLIMATE-FRIENDLY CAFE REGULATIONS

MAXIMO LACERCA-DESROSIERS[1]

I. INTRODUCTION

On April 30, 2020, the Environmental Protection Agency ("EPA") and the National Highway Traffic Safety Administration ("NHTSA") issued a final rule called the "Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger and Light Trucks" ("SAFE Rule") to amend the Corporate Average Fuel Economy ("CAFE") ratings.[2] CAFE standards are regulations first enacted nearly fifty years ago to promote greater fuel efficiency in car manufacturing through a system of incentives and penalties.[3] While the CAFE standards have been revised many times over the years, the SAFE Rule rolled back the more stringent 2012 CAFE standards that sought to align fuel efficiency with broader strategies to reduce greenhouse gas ("GHG") emissions to address global climate change.[4] Now that President Biden has taken office, the SAFE Rule is undergoing review, which may result in a return to more stringent standards.[5] However, even with a regulatory fix, the

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[2] The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (April 30, 2020) [hereinafter SAFE Vehicles Rule].

[3] UNION OF CONCERNED SCIENTISTS, *A Brief History of US Fuel Efficiency Standards* (Dec. 6, 2017), https://www.ucsusa.org/resources/brief-history-us-fuel-efficiency.

[4] 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed Reg. 62,624 (Oct. 15, 2012) [hereinafter 2012 CAFE Standards].

[5] *See* Press Release, The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

use of CAFE standards to combat climate change is likely to remain problematic.

The impact of the CAFE standards relates to how they work. In a nutshell, CAFE standards regulate vehicle manufacturers based on the average fuel economy of the entire fleet of vehicles they produce in a given year rather than regulating individual cars or even specific models.[6] As long as the average fuel efficiency of a car manufacturer's fleet (as weighted by sales in a given year) meets the CAFE standards, the manufacturer is deemed compliant.[7] If the average fuel efficiency of the fleet exceeds the standard, the offending manufacturer must pay a penalty proportionate to its divergence from the standard.[8] While this description omits much of the nuance that makes the standards complex, it is sufficient to convey a basic understanding of how the regulatory scheme uses incentives and penalties to influence the automobile industry to improve fuel efficiency.

The CAFE regulations also have profound secondary impacts, beyond just fuel economy.[9] For example, more stringent standards can speed up the rate of technological innovation by incentivizing greater investment in research and development of green technologies.[10] This in turn can reduce GHG emissions and reduce consumer demand for oil and gas.[11] Additionally, changing technologies can also affect the number and types of jobs in the automotive industry. Due to the far-reaching consequences of the regulation, it is important to understand why CAFE was enacted and how specific standards like those in the new SAFE Rule are likely to influence the complex nexus of CAFE objectives and secondary outcomes.

The SAFE Rule is controversial for a variety of reasons.[12] First, the SAFE Rule proposed to weaken the standards and reduce vehicle fuel economy, based on the rationale that the previous rule had set the maxi-

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[6] SAFE Vehicles Rule, 85 Fed. Reg. at 24,181.

[7] UNION OF CONCERNED SCIENTISTS, *supra* note 3.

[8] NHTSA, Corporate Average Fuel Economy, https://www.nhtsa.gov/laws-regulations/corporate-average-fuel-economy (last visited Apr. 4, 2021).

[9] Kenneth Small, *The Elusive effects of CAFE standard*, SCIENCE DIRECT, (2018) https://www.sciencedirect.com/science/article/pii/B9780128126202000110.

[10] U.S. DEP'T OF TRANSP., *Corporate Average Fuel Economy (CAFE) Standards* (Aug. 11, 2014), https://www.transportation.gov/mission/sustainability/corporate-average-fuel-economy-cafe-standards (last visited Apr. 4, 2021).

[11] *Id.*

[12] *See* Benjamin J. Hulac & Jessica Wehrman, *Final Rule on Fuel Economy Rollback Opens Door for Lawsuits*, ROLL CALL (Mar. 31, 2020, 1:37 PM), https://www.rollcall.com/2020/03/31/final-rule-on-fuel-economy-rollback-opens-door-for-lawsuits/; Julia Stein, *Still Not SAFE*, LEGAL PLANET (Mar. 28, 2020), https://legal-planet.org/2020/03/28/still-not-safe/.

mum feasible standards too high for car manufacturers to meet.[13] The SAFE Rule also eliminated a longstanding waiver program under the Clean Air Act that had authorized California to establish more stringent standards that other states could adopt as an alternative to the federal standards.[14]

The rule can also be seen as a politically motivated move by the Trump administration to undo a key policy of the Obama administration and to pander to the political influence of the fossil fuel industry. The 2012 CAFE standards were one of President Trump's first targets for deregulation when he took office. On March 22, 2017, newly appointed EPA Administrator Scott Pruitt and Secretary of Transportation Elaine Chao issued a public notice that the EPA would re-examine its Mid-term Determination concerning the continued adequacy of the 2012 standards because NHTSA had not completed its evaluation.[15] After a notice and comment period, the EPA formally withdrew the previous Mid-term Determination in April 2018, stating that the 2012 standards had been based on "outdated information" and were "not appropriate."[16] The controversial move to suddenly switch course on CAFE under the auspices of a president who openly challenged the validity of climate change sent shockwaves through the environmental community.[17]

The Notice of Proposed Rulemaking that introduced SAFE in August 2018 received more than 750,000 public comments—more comments than any other vehicle emissions rule had ever received.[18] One of the key reasons that the proposal received so much attention was that it announced a plan to freeze the CAFE ratings for model years 2021-2026, allowing car manufacturers to remain at current levels of average fuel efficiency indefinitely.[19] Not only was this a significant departure from

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[13] Proposed Rule, SAFE Vehicles Rule for Model Years 2021-2026, 835 Fed. Reg. 42,986, 42,990-91 [hereinafter Proposed SAFE Vehicles Rule]; SABIN CENTER FOR CLIMATE CHANGE LAW, *Five Important Points About the EPA's "SAFE Vehicle Rule*," EARTH INSTITUTE (August 7, 2018), https://blogs.ei.columbia.edu/2018/08/07/five-points-epa-safe-vehicle-rule/.

[14] The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 [hereinafter One National Program Rule].

[15] Notice of Intention to Reconsider the Final Determination of the Mid-term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (March 22, 2017). The original Mid-Term Evaluation was finalized on January 12, 2017, just before President Obama left office, after EPA completed an extensive technical report that included a notice and comment period. California v. EPA, 940 F.3d 1342, 1347 (D.C. Cir. 2019).

[16] Withdrawal Notice, Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077.

[17] Hulac & Wehrman, *supra* note 12; Miranda Green, *EPA submits final controversial car emissions rule to the White House,* THE HILL (Aug. 5, 2019), https://thehill.com/policy/energy-environment/456206-epa-submits-final-controversial-car-emissions-rule-to-the-white.

[18] SAFE Vehicles Rule, 85 Fed. Reg. at 24,181.

[19] Proposed SAFE Vehicles Rule, 83 Fed. Reg. at 42,988.

the previous CAFE standards that aimed to increase vehicle fuel efficiency, it also obstructed efforts to address climate change by reducing GHG emissions from vehicles.[20] The final rule, however, did not include this controversial CAFE freeze but instead required a modest annual increase of 1.5 mpg, a figure the NHTSA and EPA claimed was much more reasonable than the previous standards.[21]

While frustrating, it is possible that this move by the EPA and NHTSA is completely legal. A recent case challenging the withdrawal of the Mid-term Determination, *California v. EPA,* was dismissed by the D.C. Circuit because it determined that the withdrawal was not a final agency action and thus not ripe for judicial review.[22] The EPA's decision to withdraw its prior "final" determination did not set new standards but simply reopened the analysis to determine what the EPA deemed would be more appropriate CAFE standards.[23] Meanwhile, the guidelines that the NHTSA follows when determining CAFE standards are defined by statute,[24] and nothing directs the agency to consider environmental impacts as a primary factor in its analysis. Additional legal challenges are ongoing and it remains to be seen whether the current SAFE standards will be set aside or upheld.[25]

With President Biden in office, a future where SAFE remains in place seems increasingly unlikely. Recently, President Biden announced that his administration will look into replacing SAFE.[26] However, until the administration takes action, the SAFE Rule will remain in place. Whether car manufacturers will take advantage of this and slow their efforts to improve vehicle efficiency remains unknown, but the rate at which fossil fuels are consumed could easily see an uptick as compared to projections under the Obama CAFE standards.[27] Although this might pose less of a problem if the states were still allowed to set their own, more-stringent fuel economy and emissions standards, the SAFE Rule expressly preempts state standards and rescinds California's Clean Air Act waiver[28]—a waiver that allowed California to set stronger standards

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[20] Sabin Center For Climate Change Law, *supra* note 13.

[21] SAFE Vehicles Rule, 85 Fed. Reg. at 24,188.

[22] California v. EPA, 940 F.3d 1342, 1353 (D.C. Cir. 2019).

[23] *Id.*

[24] 49 U.S.C. § 32902.

[25] *E.g.,* Petition for Review, Union of Concerned Scientists et al. v. NTHSA, Case No. 19-1230 (D.C. Cir. Oct. 28, 2019).

[26] Jennifer A. Dlouhy & Stephan Lee, *EPA Chief Vows Tougher Tailpipes Rules by July, Unwinding Trumps*, Bloomberg Law (April 6, 2021), https://news.bloomberglaw.com/environment-and-energy/epa-chief-vows-tougher-tailpipe-rules-by-july-unwinding-trumps.

[27] Sabin Center For Climate Change Law, *supra* note 13.

[28] One National Program Rule, 84 Fed. Reg. 51,310.

that other states could then adopt.[29] While the new EPA can perhaps change the rules and re-issue that waiver, there is no guarantee that it will last under a different presidential administration. For these reasons, the future of SAFE has far broader implications than whether cars will be more fuel-efficient in the years to come.

This comment will explore the history of the CAFE standards and the SAFE Rule as they relate to efforts to promote fuel efficient vehicles and reduce GHG emissions. This begins with a brief overview of the CAFE standards, including the roles of the EPA and the NHTSA in administering the standards, why the CAFE standards were created, and how this relates to the regulation of GHG emissions to address climate change. Next, this comment will evaluate how past legal challenges have influenced the CAFE regulations and how the SAFE Rule fits into the resulting regulatory and legal framework. Finally, this comment will discuss how the Biden administration can respond to the SAFE Rule, and what this might mean for the future of fuel-efficient vehicles and the increasingly urgent need to reduce GHG emissions to address climate change.

II. Background

In order to understand the implications and legality of the SAFE Rule, some background on the origin and purpose of the CAFE program is necessary. This section will explore the distinct mandates of the two federal agencies responsible for the program, how this relates to the government's stance on climate change, and how the CAFE standards have changed during the four decades since their creation. This section will also explore the history of the Clean Air Act waiver and the origins of the new One National Program introduced by the SAFE Rule.

A. The EPA, NHTSA, and the Federal Government's Stance on Climate Change

The story of the CAFE standards begins with an explanation of how the program came to be administered by two distinct agencies with very different mandates. The program has gradually changed over the years as new administrations updated the regulations, and in response to legal challenges and new laws enacted by Congress.

[29] U.S. EPA, *Vehicle Emissions California Waivers and Authorizations*, https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations (last visited Apr. 6, 2021).

1. EPA Origins

The EPA was created in 1970 with the purpose of establishing a federal agency dedicated to taking on the federal government's environmental responsibilities.[30] This initiated a new era of government regulation aimed at protecting the environment. With the passage of the Clean Air Act of 1970, Congress directed the EPA "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[31] This gave the agency power to regulate and prevent air pollution. Initially, the Clean Air Act's regulation of vehicle emissions was more limited in scope and covered only some of the air pollutants that are now recognized as harmful.[32] But the Act's expansive mandate also empowered the EPA Administrator to revise the standards "from time to time" to address such additional pollutants and types of vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[33] The Act also defined key elements of the regulatory structure that would be incorporated into the future CAFE standards.[34] This regulatory structure would change somewhat in the decades that followed as a result of amendments, court decisions, new research, and changing conditions that gradually expanded the scope of the Act.[35]

Under section 202(a)(1) of the Clean Air Act, the EPA Administrator is required to regulate and prescribe standards for any "air pollutant" from motor vehicles.[36] According to the Act, an air pollutant is "any physical, chemical, biological, radioactive . . . substance or material which is emitted into or otherwise enters the ambient air."[37] Additionally, section 209 of the Clean Air Act permits the EPA to grant waivers authorizing states whose regulatory programs predated the act to continue setting their own standards.[38] The only state that qualified was

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[30] President Richard Nixon, Reorganization Plan No. 3 of 1970 (July 9, 1970); William D. Ruckelshaus, Initial Organization of the EPA, EPA Order 1110.2, (Dec. 4, 1970).

[31] Clean Air Amendments (Clean Air Act) of 1970 § 101(b)(1), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7590).

[32] 42 U.S.C. § 7521(b).

[33] 42 U.S.C. § 7521(a).

[34] *See* 42 U.S.C. § 7521 (e.g., regulating manufacturers' fleet-wide averages for model years).

[35] *E.g.,* Clean Air Act Amendments, Nov. 15, 1990, Pub. L. 101-549, 104 Stat. 2399 (expanding requirements for new vehicles and promoting use of cleaner fuels).

[36] 42 U.S.C. § 7521(a)(1).

[37] 42 U.S.C. § 7602(g).

[38] 42 U.S.C. § 7543(b)(1).

California,[39] which in 1966 had established the nation's first program to regulate tailpipe emissions.[40]

Until the late 1990s, regulation of vehicle emissions was primarily concerned with reducing smog, acid rain, and toxic pollution from leaded gasoline and other chemical additives.[41] This changed in the wake of the 1997 Kyoto Protocol, which brought widespread attention to the role of increasing GHG emissions as a key driver of climate change.[42] Then a dispute arose over whether GHG emissions constituted an air pollutant under the Clean Air Act.[43] The issue came to a head in 2007 with *Massachusetts v. EPA*, where the Court found that GHG emissions did meet the definition of an air pollutant as defined by the Clean Air Act, and that the EPA was therefore obligated to establish appropriate regulations to prevent harm to the public welfare.[44] As a result of *Massachusetts v. EPA*, the EPA became more involved in regulating the GHG released by tailpipe emissions.

2. NHTSA Origins

The National Highway Transportation Safety Administration was established in 1970 for the purpose of ensuring vehicle safety on the nation's highways.[45] Housed within the Department of Transportation ("DOT"), NHTSA's first order of business was investigating safety defects in motor vehicles.[46] Over time, NHTSA's duties expanded as the DOT delegated additional responsibilities, including the CAFE program, to its subagency.[47]

The CAFE program was created in 1975 by the Energy Policy and Conservation Act ("EPCA")[48] "to provide for improved energy efficiency of motor vehicles."[49] As discussed below, the purpose of the legislation was to promote increased vehicle fuel efficiency as a means to

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[39] *See* Chamber of Commerce of the U.S. v. EPA, 642 F.3d 192, 196 (D.C. Cir. 2011).

[40] California Air Resources Board, *History*, https://ww2.arb.ca.gov/about/history (last visited Apr. 9, 2021).

[41] Robert V. Percival et. al., Environmental Regulation: Law, Science and Policy 526 (8th ed. 2018).

[42] *Id*. at 531-32.

[43] *Id.*

[44] Massachusetts v. EPA, 549 U.S. 497, 507 (2007).

[45] Highway Safety Act of 1970 § 201(a), Pub. L. 91-605, 84 Stat. 1740 (codified at 23 U.S.C. §§ 401-412).

[46] NHTSA, *A Drive Through Time*, https://one.nhtsa.gov/nhtsa/timeline/index.html (last visited Mar. 7, 2021).

[47] *Id.*

[48] 42 U.S.C. §§ 6201-6422; Energy Policy Conservation Act (EPCA) §§ 501-503, Pub. L. 94-163, 89 Stat. 872 (Dec. 22, 1975).

[49] 42 U.S.C. § 6201(5).

prevent gas shortages.[50] Pursuant to EPCA, the Department of Transportation, through NHTSA, is responsible for determining the "maximum feasible" standards for CAFE as part of its effort to establish a regulatory "floor."[51] This simply means that the federal government sets the minimum bar that vehicle manufacturers must meet, but requires this target to be feasible.[52] DOT delegates this responsibility to NHTSA,[53] which is required by statute to consider four specific factors when making CAFE determinations:

> [The Agency] shall consider [1] technological feasibility, [2] economic practicability, [3] the effect of other motor vehicle standards of the Government on fuel economy, and [4] the need of the United States to conserve energy.[54]

Notably, environmental protection is not among the factors that Congress enumerated for consideration in setting CAFE standards. This is also evident in the text of the SAFE Rule, which states that the new rules "represent a reasonable balance . . . given the foreseeable state of the global oil market and minimal effect on the climate between finalizing [the implemented standard] versus more stringent standards."[55]

In short, CAFE standards were never about protecting the environment—they were about protecting the U.S. from facing additional fuel shortages. This directive expanded over time as CAFE has evolved into a more complex regulatory scheme, but the language found in the SAFE Rule indicates where NHTSA's mission really lies. Although EPA has a duty to regulate GHG emissions pursuant to *Massachusetts v. EPA*, this duty is not shared by NHTSA and not encompassed by the scope of the CAFE regulatory scheme.

3. Federal Climate Change Policies

Unlike gas shortages and exhaust fumes, the issue of climate change did not emerge as a matter of broad public concern until the late 1980s.[56] And even then, policy emerged slowly in an era of increasingly divisive

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[50] *See* discussion *infra* at section II. B.

[51] 49 U.S.C. § 32902(a).

[52] Baruch Feigenbaum & Julian Morris, *CAFE Standards in Plain English,* REASON (Jan. 13, 2017), https://reason.org/e-brief/cafe-standards-in-plain-english/.

[53] U.S. DEP'T OF TRANSP., *supra* note 10.

[54] 49 U.S.C. § 32902(f).

[55] SAFE Vehicles Rule, 85 Fed. Reg. at 24,176.

[56] Patrick J. Egan & Megan Mullin, *Climate Change: US Public Opinion*, 20 ANN. REV. POL. SCIENCE 209, 210-11 (May 2017), https://doi.org/10.1146/annurev-polisci-051215-022857.

politics and growing backlash against environmental regulations.[57] These historical factors have continued to influence the federal response to climate change, which helps explain the government's stance on climate change.[58]

While the majority of people in the U.S. recognize climate change as an important issue, there remains a significant number of Americans who deny the veracity of climate change science for various reasons.[59] Despite a broad scientific consensus on the facts and causes of climate change, as well as the urgently increasing risks from the effects of climate change, some have refused to recognize this critical issue. Science aside, the government's position has been deeply influenced by partisan politics and resistance of different kinds, depending on the political makeup of Congress and the sitting president.[60] Notably, the fossil fuel industry has helped fuel doubts and encouraged politicians to resist taking action that could limit extraction and consumption of fossil fuels.[61]

Scientists have reported a steady rise in the average temperature of the earth for decades.[62] For example, a study released by the National Academy of Sciences in North America in 2006 showed that the average global surface temperature of the earth increased by one degree Celsius in the last 150 years,[63] which, if continued, would lead to catastrophic consequences unless the leading countries in the world were to undertake immediate action. A decade later, 196 countries stepped up to the challenge by signing onto the "Paris Agreement," an international treaty aimed at coordinating GHG emissions reductions across every continent in an effort to stabilize the climate.[64]

In short, the EPA and NHTSA each have independent reasons to regulate tailpipe emissions that originated long before the Trump administration. After GHG emissions were recognized as an air pollutant, the EPA had its own reasons for increasing fuel efficiency that were not

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[57] *Id.* at 217-18, 221.

[58] Percival, Robert V., Regulatory Evolution and the Future of Environmental Policy, UNIV. CHI. LEGAL F. 159, 164-65 (1997).

[59] Cary Funk & Brian Kennedy, *How Americans See Climate Change and the Environment in 7 Charts*, PEW RESEARCH CTR. (Apr. 21, 2020), https://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts/.

[60] Egan & Mullin, *supra* note 56, at 219-20.

[61] Emily Holden, *How the oil industry has spent billions to control the climate change conversation*, GUARDIAN, (Jan. 8, 2020). https://www.theguardian.com/business/2020/jan/08/oil-companies-climate-crisis-pr-spending.

[62] James Hansen et. al., *Global temperature change*, 103 PNAS 14288-93 (2006), https://www.pnas.org/content/103/39/14288.short.

[63] *Id.*

[64] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

encompassed by the purpose of the CAFE program. Additionally, the government's stance on climate change has been strongly influenced by political divisions. Understanding these agencies and the government's stance helps us better understand how SAFE came to be.

B. A Brief History of the CAFE Standards

As noted above, the CAFE standards were originally a Congressional response to a severe gas shortage that brought the U.S. economy to a standstill in the 1970s. Midway through the fall of 1973, the Organization of Petroleum Exporting Countries ("OPEC") placed an embargo on oil exports to the United States and other allies.[65] This embargo on oil was the first of several in the years to come, and it fundamentally changed the landscape of the global economy in both the short and long term.[66] The embargo caused the price of oil to quadruple within a year and led to acute gasoline shortages.[67] In many places, rationing was introduced that limited drivers to odd or even days (depending on the last digit of their license plate) as the only days that they could pump gas.[68] Lines around the corner were not uncommon, and many gas stations began the practice of flying green, yellow, or red flags to broadcast the corresponding amount of gasoline they had left.[69] Gas was so difficult to come by that a national speed limit of fifty-five miles per hour was established in an attempt to conserve precious fuel.[70]

In the wake of the crisis there was a broad national demand for the federal government to take action to prevent another dire episode.[71] This was also a period of environmental concern and tolerance for increased regulation to protect shared resources and public health.[72] These factors set the stage for national legislation to address the crisis.

As noted above, the CAFE standards were created by Congress when it enacted EPCA in 1975 with the primary goal to improve fuel

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[65] Union of Concerned Scientists, *supra* note 3.

[66] Office of the Historian, U.S. Dep't of State, *Oil Embargo, 1973-1974*, https://history.state.gov/milestones/1969-1976/oil-embargo (last visited Mar. 12, 2021).

[67] Michael Corbett, *Oil Shock of 1973-74,* Federal Reserve History, https://www.federalreservehistory.org/essays/oil-shock-of-1973-74.

[68] Greg Myre, *Gas Lines Evoke Memories of Oil Crises in the 1970s*, NPR (Nov. 10, 2012, 5:19 PM), https://www.npr.org/sections/pictureshow/2012/11/10/164792293/gas-lines-evoke-memories-oil-crises-in-the-1970s.

[69] *Id.*

[70] *Id*.

[71] Office of the Historian, supra note 66.

[72] Percival, Robert V., *Regulatory Evolution and the Future of Environmental Policy*, Univ. Chi. Legal F. 159, 164-65 (1997).

efficiency to prevent or ameliorate the risk of future acute shortages.[73] The first standards, implemented in 1978, placed requirements on passenger vehicles and light trucks were included a year later.[74] These CAFE ratings were designed to act as a floor, establishing the maximum feasible threshold for car manufacturers, but otherwise allowing more fuel-efficient vehicles to be sold in the U.S.[75]

The first decade of the program saw a steady improvement in CAFE ratings until 1986, when minimum CAFE requirements were frozen at 26 miles per gallon.[76] They were then improved to 27.5 miles per gallon four years later in 1990 during the first Bush administration.[77] However, the CAFE requirements would remain dormant at this level for the next twenty years during both the Clinton and Bush II administrations.[78] While the standards were still reviewed from time to time, there was no requirement to change them unless the NHTSA determined new standards were needed.[79]

In 2006, the NHTSA issued new standards that introduced the concept of a vehicle footprint to adjust standards for different size categories of vehicles.[80] These regulations were ultimately set aside for procedural reasons as the result of a legal challenge,[81] but the new footprint approach would resurface in the next iteration.[82] Meanwhile, in 2007, a shift in the balance of Congress led to the passage of the Energy Independence and Security Act ("EISA"), which amended the CAFE program as part of a sweeping effort to promote renewable energy.[83] This was around the same time that *Massachusetts v. EPA* was decided, giving the EPA a new directive to regulate vehicle GHG emissions.[84] Under EISA, the NHTSA was directed to consult with EPA and the De-

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[73] UNION OF CONCERNED SCIENTISTS, *supra* note 3.

[74] *Id.*

[75] SAFE Vehicles Rule, 85 Fed. Reg. at 24,181.

[76] U.S. DEP'T OF TRANSP,, *Summary of Fuel Economy Performance* (Dec. 15, 2014), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/performance-summary-report-12152014-v2.pdf.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17,566 (Apr. 6, 2006).

[81] Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008) (finding NHTSA failed to conduct an adequate environmental analysis under the Nat'l Env't Policy Act (NEPA) and failed to comply with CAFE requirements at 49 USCS § 32902).

[82] Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011-2015, 73 Fed. Reg. 24,351 (July 1, 2008).

[83] Energy Independence and Security Act (EISA) of 2007, 110 P.L. 140, 121 Stat. 1492 (codified as amended at 42 U.S.C. §§ 17001-17386 (2007)).

[84] Massachusetts v. EPA, 549 U.S. 497, 507 (2007).

partment of Energy when implementing new CAFE standards.[85] This is also when aligning agency goals to reduce the burden on vehicle manufacturers of having to follow multiple standards emerged as an issue.

In the meantime, opposition to CAFE regulations had begun to grow during the 1980s and 1990s. Opponents worried that more-stringent standards would result in greater compliance costs, and those costs would be defrayed to customers who would have to pay higher prices for more fuel-efficient cars.[86] Due to the nature of car manufacturing, any type of regulation that aims to set rules for how cars can be produced must give enough lead time for the car manufacturers to reasonably make changes and achieve compliance. This means retooling factories and sinking money into research and development in order to make more fuel-efficient cars.[87] Or it means producing fewer big cars that are less fuel-efficient and a greater number of smaller cars that are more fuel-efficient. Because new standards place a burden on the industry to adjust, new CAFE regulations must be published at least eighteen months in advance of the affected model year to provide car manufacturers with time to achieve compliance.[88]

During President Obama's first year in office, he was tasked with completing the Bush administration's 2008 CAFE requirements, as well as reconciling various problems that had arisen with the introduction of the footprint model and the passage of EISA.[89] Originally, CAFE ratings were formulated using a simple mathematical equation,[90] but with the introduction of the footprint model with different standards for different sizes of vehicles, calculating fuel efficiency became more complicated.[91] There was also the issue of dealing with the three separate standards for fuel emission regulation established by the EPA, the NHTSA, and the state of California.[92] Having three separate guidelines made compliance and enforcement more difficult for agencies and car manufacturers.

In 2009, the Obama administration responded to these challenges by announcing a new joint rulemaking that would seek to resolve many of these issues. The EPA and NHTSA issued a Notice of Intent for an up-

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[85] EISA § 102 (b).

[86] Jerry Taylor & Peter Van Doren, *Don't Raise CAFE standards,* CATO INSTITUTE (Aug. 1, 2007), https://www.cato.org/commentary/dont-raise-cafe-standards.

[87] Feigenbaum & Morris, *supra* note 52.

[88] 49 U.S.C. § 32902(a).

[89] Energy Independence and Security Act (EISA) of 2007, 110 P.L. 140, 121 Stat. 1492 (codified as amended at 42 U.S.C. §§ 17001-17386 (2007)).

[90] *Id.*

[91] *Id.*

[92] The Bush EPA had denied California's request for a new waiver in 2005, but in 2009 Obama's EPA granted the waiver. *See* Chamber of Commerce v. EPA, 642 F.3d 192, 197 (D.C. Cir. 2011).

coming joint rulemaking, by which the agencies would collaborate on the next iteration of CAFE standards.[93] This effort culminated in the 2010 CAFE standards, which represented a first attempt to integrate the regulation of fuel efficiency and GHG emissions in a single standard.[94] These regulations also introduced a new *national program* to provide a single set of standards that aligned state and federal regulations.[95]

In 2012, the Obama Administration further refined these standards.[96] President Obama's new guidelines for car manufacturers raised the CAFE ratings from 27.5 miles per gallon to 38.5 miles per gallon over the course of seven years.[97] The 2012 rule also projected raising fuel economy standards in phased increments through the year 2025 to as high as 50 MPG and eliminated the need for compliance with three separate standards by negotiating a single national standard.[98] It also reaffirmed California's Clean Air Act waiver, allowing the state to create more-stringent guidelines if it so desired.[99] The 2012 standards were in effect when President Trump took office in January 2017.

Early in 2017, the Trump administration began taking steps to reverse course and reduce the stringency of the Obama Era guidelines in an effort to promote fuel consumption, protect jobs in the automotive industry, and ostensibly make cars "safer."[100] After declaring the intent to freeze the 2012 Rule, President Trump announced the proposed SAFE Rule for model years 2021-2026,[101] which, as noted above, was highly controversial. Litigation was initially focused on the rescission of the Clean Air Act waivers, and then on the SAFE Rule once it was issued.

In light of the history of CAFE, it is easier to understand why the EPA and NHTSA are jointly responsible for the SAFE Rule. Under EISA the agencies were required to consult before NHTSA issued new standards, which encouraged them to work together to release one rule covering both agency mandates to make compliance less burdensome on

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[93] Notice of Upcoming Joint Rulemaking To Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007 (May 22, 2009).

[94] Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; 75 Fed. Reg. 25,324 (May 7, 2010).

[95] *See* 75 Fed. Reg. at 25,326-29.

[96] 2012 CAFE Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012).

[97] Press Release, White House Office of the Press Sec'y, Obama Administration Finalizes Historic 54.5 MPG Fuel Efficiency Standards, WHITE HOUSE (Aug. 28, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard.

[98] *Id.*

[99] *Id.*

[100] Notice of Intention to Reconsider the Final Determination of the Mid-term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (Mar. 22, 2017).

[101] *Id*.

manufacturers. This would enable car manufacturers to meet the requirement for improving fuel economy and the requirement for reducing GHG emissions through compliance with a single set of standards.[102]

C. One National Program and Waiver

As mentioned earlier, the effort to align agency standards into a single national program emerged after the enactment of EISA in 2007 and became an element of the Obama administration's 2010 CAFE Rule.[103] Under the 2010 Rule and subsequent 2012 Rule, the alignment of standards was negotiated between the agencies and several states that had previously adopted more stringent standards.[104] To understand how the SAFE Rule impacts state standards requires understanding one more chapter of CAFE history.

When the Clean Air Act was adopted in 1970, there was one state in the union that had already developed its own air pollution regulatory program for tailpipe emissions – California. Under section 209 of the Clean Air Act, the EPA can allow California to continue these independent efforts so long as its standards are not weaker than the new federal standards.[105] In addition, section 177 of the Act allows other states to adopt California's more stringent standards as an alternative to the federal standards.[106]

Clean Air Act section 209 requires California to request a new waiver each time it modifies its standards.[107] Beginning in 2005, California undertook an ambitious effort to review all of its state programs to develop a comprehensive strategy to respond to climate change.[108] This led the state to realize that vehicle emissions accounted for approximately forty percent of GHG emissions, which made reducing emissions a major priority for the state.[109] However, when the state applied for a waiver from the Bush administration, it was denied.[110] The state sued,

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[102] One National Program Rule, 84 Fed. Reg. 51,310.

[103] Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; 75 Fed. Reg. 25,324 (May 7, 2010).

[104] 2012 CAFE Standards, 77 Fed. Reg. 62,624, 62,624.

[105] 42 U.S.C. § 7543(b).

[106] 42 U.S.C. § 7507.

[107] 42 U.S.C. § 7543(b).

[108] *See* California Gov. Arnold Schwarzenegger, Exec. Order No. S-3-05 (June 1, 2005); AB 32: The California Global Warming Solutions Act of 2006. 2006 Cal. Stat. 488.

[109] Chamber of Commerce v. EPA, 642 F.3d 192, 197 (D.C. Cir. 2011).

[110] *Id.*

but after Obama was elected, the EPA granted the waiver in 2009.[111] This enabled other states to adopt California's ambitious new standards.[112] In 2011, California was granted another waiver to set its own fuel economy and zero emission vehicle (ZEV) standards under the Clean Air Act.[113]

In the meantime, California also began facing legal challenges by parties opposed to "stricter" emissions regulations. For example, in *Central Valley Chrysler-Jeep v. Goldstene*, car manufacturers sued the state of California in an effort to repeal its more stringent standards, which they feared would result in higher compliance costs and slimmer profit margins.[114] The car manufacturers argued unsuccessfully that California was preempted from establishing its own standards under the Energy Policy and Conservation Act (EPCA).[115] The court disagreed, however, holding that once a state had been granted a valid waiver by the EPA Administrator, that state had the power to set its own vehicle emissions standards.[116] The court thus reaffirmed the proposition that California and other states that adopt California's standards had the legal authority to issue their own vehicle emissions standards.[117]

However, the Trump EPA reversed course again and rescinded the waiver as part of the new SAFE Rule. The One National Program, a subrule within the SAFE Rule, expressly preempted California and section 177 states from setting their own standards.[118] This purported to be an effort to promote compliance with the SAFE Rule but was likely done to enjoin states from setting more rigorous vehicle emissions standards.

This series of reversals highlights the precarious nature of Clean Air Act waivers, by which state authority to regulate vehicle emissions is subject to the discretion of the current EPA administrator. Without a valid section 209 waiver, California cannot set its own vehicle emissions standards, even when its standards would achieve greater fuel economy

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[111] California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32744 (July 8, 2009).

[112] 42 U.S.C. § 7507.

[113] California State Motor Vehicle Pollution Control Standards; Within the Scope Determination and Waiver of Preemption Decision for Amendments to California's Zero-Emission Vehicle (ZEV) Standards, 76 Fed. Reg. 61095 (Oct. 3, 2011). .

[114] Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

[115] Energy Policy Conservation Act (EPCA) §§ 501-03, Pub. L. 94-163, 89 Stat. 872 (Dec. 22, 1975).

[116] Cent. Valley Chrysler-Jeep, 529 F. Supp. 2d at 1189.

[117] *Id*.

[118] One National Program Rule, 84 Fed. Reg. 51,310, 51,361-62 (codified at 49 C.F.R. § 531.7 and 49 C.F.R. pt. 531 app. B).

than the federal standards.[119] Without California standards, other states have no alternative to the federal standards.[120] This poses an obstacle for states who are positioned and willing to take the lead in the fight against climate change but are held back by regressive policies that force compliance with national standards that preempt state regulations. For this reason, establishing uniform standards for fuel efficiency without a place for state regulation has had a huge impact on states' efforts to reduce GHG emissions.

III. The SAFE Rule May Be Legal But That Doesn't Make It Environmentally Sound Law

Simply put, the SAFE Rule amends CAFE by setting new standards. The scope of this rule can be divided into three broad areas: (i) greenhouse gas emissions regulation, (ii) corporate average fuel economy regulation, and (iii) the creation of a nationalized and uniform CAFE regulation that rescinds California's Clean Air Act waiver.[121]

The reason this rule was jointly proposed by both EPA and the NHTSA goes back to the Energy Security and Independence Act of 2007 ("EISA"),[122] and the watershed case *Massachusetts v. EPA* that was decided that same year.[123] EISA mandated the creation of CAFE standards until the year 2030.[124] EISA also called for the agencies to make a greater effort to harmonize their distinct and independent efforts to regulate air pollution and fuel efficiency.[125]

Prior to 2007, the EPA was tasked with determining standards for regulating the emission of "air pollutants" from motor vehicles under the Clean Air Act,[126] while the NHTSA was tasked with determining fuel efficiency under the CAFE program.[127] Additionally, section 209 of the Clean Air Act allowed the EPA to grant California a waiver allowing it to set more stringent state regulatory standards,[128] which other states could then adopt pursuant to section 177.[129]

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[119] 42 U.S.C. § 7543.

[120] 42 U.S.C. § 7507.

[121] SAFE Vehicles Rule, 85 Fed. Reg. at 24,181.

[122] Energy Independence and Security Act (EISA) of 2007, § 102, Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended at 42 U.S.C. §§ 17001-17386); 49 U.S.C. § 32902(b)(2)(B).

[123] Massachusetts v. EPA, 549 U.S. 497 (2007).

[124] EISA § 102(b)(2)(B) (codified at 49 U.S.C. § 32902(b)(2)(B))

[125] EISA § 102(b)(1) (codified at 49 U.S.C. § 32902(b)(1)) (requiring DOT (NHTSA) to consult with Department of Energy and EPA prior to prescribing new CAFE standards).

[126] 42 U.S.C. § 7521(a).

[127] 49 U.S.C. § 32902.

[128] 49 U.S.C. § 7543.

[129] 49 U.S.C. § 7507.

When the SAFE Rule is viewed against this backdrop of regulatory history, its overall impact on the CAFE program and efforts to address climate change can be assessed more readily. This section will consider the implications of the SAFE Rule on both these objectives. It will also consider how the outcome of past legal challenges to the CAFE standards might inform potential legal challenges to SAFE. Finally, this section will also evaluate possible actions that the Biden administration could take to respond to SAFE and address climate change.

A. SAFE Revisited: Four Factors & the Litigation Option

An understanding of the legal challenges that SAFE and CAFE have faced are crucial to evaluating and determining the efficacy of each of these options. This begins with a recap of how CAFE works and where some of its shortcomings lie.

Under the federal fuel economy program, Congress directs the NHTSA and the EPA to issue CAFE ratings according to a list of four factors: technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and need of the U.S. to conserve fuel.[130] The key to understanding these factors is recognizing that they are aimed at conserving fuel to ween America off of its oil dependency on foreign nations. This design reflects primarily economic concerns by weighing economic factors heavily, while ignoring associated effects, such as environmental, social, and health costs. For example, while CAFE regulations are tasked with considering how much fuel is forecasted to cost in the next decade, little weight is given to considering how many Americans will risk suffering some kind of respiratory illness from increased carbon pollution resulting from weak CAFE regulations that promote greater fuel consumption. This illustrates that while CAFE's purpose is laser focused on economics, its impact is felt far beyond the economy and has consequences on the lives of all Americans. The statute implicitly relegates such impacts to secondary status, as incidental or unrelated to the purpose of CAFE, thus limiting the program's usefulness as a tool for addressing climate change and public health.

Almost from the beginning, opponents have attacked government efforts to regulate GHG emissions. Even before this affected new CAFE standards, opponents argued that the EPA lacked authority under the Clean Air Act to regulate GHG emissions—a major byproduct of fuel consumption—as an "*air pollutant*."[131] At first, the opponents of regu-

[130] 49 U.S.C. § 32902(f).
[131] 42 U.S.C. § 7521(b).

lating GHG emissions had some success in arguing that the Clean Air Act did not encompass GHG emissions,[132] however this would change after the Supreme Court's decision in the now famous case of *Massachusetts v. EPA.*[133]

In *Massachusetts v. EPA,* the Court found that the administrator of the EPA had a duty to regulate GHG emissions if these were determined to be an "air pollutant" as defined by the Clean Air Act.[134] The Court found that EPA had determined that GHG emissions were clearly an air pollutant that had a strong likelihood of harming the welfare of Americans in strong enough concentrations.[135] Though the 5-4 decision was a close one, the Court ultimately did not allow the EPA to disregard evidence of the harmful consequences of GHG pollution.[136] The case also established that Massachusetts, and potentially other states, had a material interest in trying to mitigate the effects of climate change where failure to do so would result in tangible harm to the state's property.[137] While critics of *Massachusetts v. EPA* may have worried that the majority was inappropriately taking a stance on climate change, the actual decision was narrowly tailored and only reinforced EPA's duty to comply with its Congressional mandate.[138]

After *Massachusetts v. EPA*, the CAFE regulatory scheme gained in importance and power as a means to address GHG emissions. But increasing standards also placed a heavier burden on car manufacturers.[139] Car manufacturers found an ally in President Trump who, in a bid to temporarily bolster the automotive industry, issued the less stringent SAFE standards.[140] Trump's actions were a little victory for car manufacturers, who stood to save millions of dollars in compliance costs from new standards that were easier to meet. While the SAFE Rule may obstruct the EPA from aggressively regulating GHG emissions, it does not thereby conflict with the four factors of the CAFE statute.

Earlier legal challenges to CAFE standards are also informative. One of the first major legal challenges to CAFE standards was *Center for Auto Safety v. NHTSA,* decided in 1986 by the United States Court of

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[132] Massachusetts v. EPA*,* 549 U.S. 497, 510-14 (2007) (describing EPA's denial of petitions to regulate GHG emissions and prior success in litigation upholding this decision).

[133] *Id.* at 533-34.

[134] *Id*. at 528.

[135] *Id.* at 532.

[136] *Id.* at 526.

[137] *Id.* at 533-34.

[138] *Id*. at 534-35.

[139] 2012 CAFE Standards, 77 Fed. Reg. at 62,624.

[140] SAFE Vehicles Rule, 85 Fed. Reg. 24,174.

Appeals for the District of Columbia Court.[141] In this case, the court found that the NHTSA did not have to weigh consumer demand any greater than other factors in its analysis when determining appropriate CAFE standards.[142] Notably, this decision came just two years after the Court established *Chevron* deference,[143] which made it more difficult for petitioners to prevail in challenging the NHTSA's actions. In *Chevron U.S.A. v. NRDC*, the Court held that courts must defer to an agency's reasonable interpretation of a statute if the intent of Congress was ambiguous in that statute.[144] As a result, agencies like the NHTSA have a great deal of authority when deciding how to interpret statutes, including where to set the standards and how to weigh each of its statutorily mandated factors.

The NHTSA's authority in setting CAFE standards was further elaborated in 1990 by a subsequent case, *Competitive Enterprise Institution v. NHTSA*.[145] In this case, appellants sought judicial review of the agency's decision to lower CAFE standards after Congress "set the maximum feasible standard to 28 mpg."[146] The court ruled that NHTSA acted reasonably and within its authority when it reduced the maximum feasible standards for specific model years, and the agency's decision to lower the CAFE standard was not "arbitrary or capricious."[147] The court went on to reject an additional claim brought under the National Environmental Policy Act (NEPA), finding that appellants lacked standing because the alleged environmental harm they had suffered from NHTSA's lowering of the standards was merely speculative.[148]

Competitive Enterprise and *Center for Auto Safety* both demonstrate that CAFE standards are difficult to challenge in light of *Chevron* deference—which requires courts to grant the agencies considerable leeway in their decision-making. The fact that CAFE requires the agency to balance many factors of a technical nature further underscores the importance of agency expertise and strengthens the rationale for deference. In addition, balancing competing interests will almost always result in one or more parties being unhappy with the outcome. To allow legal challenges to influence how the agency interprets its duty to make CAFE

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[141] Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 793 F.2d 1322 (D.C. Cir. 1986).

[142] *Id.* 1338.

[143] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984).

[144] *Id.*

[145] Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin., 901 F.2d 107 (D.C. Cir. 1990).

[146] *Id.* at 110-11.

[147] *Id.* at 111, 121-22.

[148] *Id.* at 124.

determinations could have profound implications on NHTSA's authority to make such decisions. To address this, courts must consider separation of powers issues and refrain from intruding on the domain of the executive and legislative branches. For these reasons, there has not been a successful challenge to CAFE regulations on the basis of how the agency decides to balance its varied and often competing interests, even when the CAFE standards were lowered, as with the SAFE Rule.

While *Chevron* deference remains an important consideration in any judicial review of an agency action, there is an argument for a solution on the legislative side. If Congress directed the NHTSA to consider environmental costs as a primary factor alongside other factors, then NHTSA would have more of an incentive to do so, which could prevent CAFE standards from backsliding and a rule like SAFE might never be passed. As of this moment, the agency is free to revise its CAFE standards and continue to issue rules like SAFE that loosen restrictions and take regulatory power away from the states. Under the current statute, agency deference means that agencies like the NHTSA and the EPA might never be compelled to issue environmentally protective CAFE standards. A revision of the NHTSA's congressional mandate could thus be instrumental in requiring the agency to consider environmental and public health consequences in future CAFE rules.

While the SAFE Rule characterizes the move to preempt the states as a necessary step forward in ensuring CAFE compliance,[149] this move jeopardizes state autonomy in regulating GHG emissions and promoting green technologies. The One National Program is not the first deregulatory rule of its kind. In fact, the Trump administration was marked by an overall embrace of deregulation in the realm of environmental law.[150] The reason that SAFE is uniquely in a class of its own is because in seeking to harmonize CAFE standards it completely eliminates the regulatory power of the states to set stronger standards to protect the health and welfare of their citizens from the adverse impacts of vehicle emissions.

Most of the legal challenges to the SAFE Rule and the One National Program are still in progress.[151] One case that has been decided is *California v. EPA*, which sought to challenge the EPA's rollback of Obama's

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[149] One National Program, 84 Fed. Reg. 51,310, 51,311.

[150] *See* Center for Law, Energy & the Environment (CLEE), *Reversing Environmental Rollbacks*, BERKELEY L., https://www.law.berkeley.edu/research/clee/rollback-tracker/ (last visited Apr. 10, 2021).

[151] *See, e.g.*, Union of Concerned Scientists v. Nat'l Highway Traffic Safety Admin., No. 19-1230, (D.C. Cir. Oct. 28, 2019); Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin., No. 20-1145 (D.C. Cir. May 1, 2020).

2012 CAFE Rule.[152] In this case, California and other states challenged the Trump EPA's decision to withdraw and revise the previous administration's Midterm Determination that the 2012 Rule should remain in effect, arguing that the agency acted in an arbitrary and capricious manner.[153] Ultimately, California and the other states lost because the D.C. Circuit Court of Appeals found that the agency's withdrawal and reopening of its prior determination did not constitute a "judicially reviewable final action."[154] In sum, the EPA acted within its power when it reopened its determination and subsequently found that the 2012 CAFE standards were no longer feasible.

The jury is still out on whether other recent legal challenges to the SAFE Rule will be more successful. Because the EPA Administrator has considerable discretion in determining whether to grant Clean Air Act waivers,[155] EPA's decision to rescind California's waiver could be difficult to challenge. However, there is no question that both the One National Program Rule and SAFE Rule are final agency actions, so that at least is unlikely to be a barrier to a decision on the merits. Whatever the outcome, it's clear that California and the section 177 states will remain in a precarious position, subject to the whim of a federal agency to determine their powers, even when the administration is willing to cooperate.

With a new president in office, there is some hope that the federal government will return regulatory power to the states. For all of these reasons, President Biden is under pressure to take action on the SAFE Rule to address its shortcomings.

B. Potential Actions

Newly elected President Biden has an opportunity to rectify some of the outstanding issues with CAFE, such as restoring the Clean Air Act waiver and placing stricter standards on fuel efficiency to reduce GHG emissions. This section will outline three of the possible avenues that the president can take: (1) President Biden can choose to do nothing and allow the SAFE Rule to remain in place until it runs out in 2026; (2) President Biden can overturn the SAFE Rule by enacting a new CAFE standard while leaving the CAFE regulatory scheme mostly untouched; or (3) President Biden can scrap the whole CAFE regulatory scheme in favor of a new regulatory scheme.

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[152] California v. EPA, 940 F.3d 1342, 1353 (D.C. Cir. 2019).

[153] *Id.* at 1349.

[154] *Id.* at 1353.

[155] 42 U.S.C. § 7543.

First, if President Biden chooses to do nothing about SAFE, this will clearly be the path of least action. Here, President Biden need not do anything during the duration of his term as the SAFE Rule will expire in 2026 when the last model year standard becomes obsolete.[156] Proponents for this course of inaction may argue that the NHTSA and the EPA have used their best judgement in determining feasible CAFE standards and that a yearly increase of 1.5 MPG is reasonable. However, President Biden would be wise to look beyond the arguments about the reasonableness of this modest increase because the One National Program's impact on states and the SAFE Rule's regressive stance on climate change both make it untenable.

Fortunately, the no action approach seems unlikely given that President Biden has already begun to take action to stay litigation in a case challenging the SAFE Rule.[157] In a recent development in a case currently before the D.C. Circuit, *Competitive Enterprise Institute v. NHTSA*, the federal defendant filed and was granted motion to stay litigation to reassess its position.[158] This litigation is an effort to overturn the SAFE Rule on grounds that the agencies improperly weakened the CAFE standards.[159] Thus, it appears safe to assume that President Biden's administration will not simply stand back and allow the rule to expire. If the Biden Administration's initial action in this litigation is any indication of what is to come, then a course of inaction in regard to SAFE seems unlikely.

Second, the Biden administration can choose to undo SAFE while leaving the CAFE regulatory scheme intact. Much like the EPA did with their redetermination of the 2012 standards, President Biden's EPA can reverse course and reconsider the SAFE Rule. This will have additional procedural requirements now that a final agency action has issued, but the agency may be able to suspend the rule while it formulates a new one.[160] The automotive and fossil fuel industries will likely push back on this course of action, as they are generally opposed to more stringent CAFE standards and the SAFE Rule is much more favorable to car manufacturers than the previous 2012 rule.

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[156] 49 U.S.C. § 32902(b)(3)(B) (limiting particular CAFE regulations to a maximum of five model years).

[157] Thomas Richichi et. al., *D.C. Circuit Stays Litigation over EPA Recission of California Waiver to Regulate Vehicle Emissions,* JDSUPRA (Feb. 11, 2021), https://www.jdsupra.com/legalnews/d-c-circuit-stays-litigation-over-epa-1845485/.

[158] Order [Granting Motion to Hold in Abeyance], Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin., No. 20-1145 (D.C. Cir. Apr. 2, 2012).

[159] Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin., No. 20-1145 (D.C. Cir. May 1, 2020).

[160] 5 U.S.C. §§ 704-706.

Because CAFE is a regulatory scheme that promotes greater fuel conservation, it necessarily militates against the consumption of fuel. Thus, the automotive industry and other industries promoting fossil fuel consumption will likely continue to lobby against any regulatory scheme that takes money out of their pockets and forces compliance on them.

President Biden could also modify the One National Program to eliminate the preemption policy but keep the joint rulemaking approach intact. This would be more like Obama's National Program where a unified regulatory approach was achieved by negotiating a standard that the states and the vehicle manufacturers could all agree on.[161] Recent statements by the new EPA Administrator, Michael Regan, make this approach seem quite possible.[162] Regan not only endorsed consensus-building, but said he was "a firm believer in the state's statutory authority to lead, in California being the leader."[163] He also indicated that the EPA will be proposing a new CAFE Rule as early as July 2021.[164] This news appears to confirm that Biden will not allow the SAFE Rule or preemption policy to remain in place for long.

Lastly, the most extreme course of action, and perhaps the least plausible of President Biden's options, involves scrapping the CAFE regulations in favor of developing another framework with Congress's cooperation. While this may seem unlikely, former President Trump's efforts to roll back environmental regulations during his presidential term[165] opens up the possibility that President Biden will seek to foreclose such maneuvers by amending the statutory framework of CAFE. While this course of action is the most work, and not without risk, there are some arguments for a new regulatory scheme that cannot be perfunctorily dismissed.

For starters, the CAFE regulatory scheme is primarily focused on reducing fuel consumption, but does not aim to eliminate fuel consumption altogether. This can be inferred from the fact that if fuel prices are forecasted to fall, the CAFE factors allow for less stringent fuel economy standards, as was the case with SAFE. Additionally, CAFE's failure to recognize adverse impacts on the environment sometimes puts it at odds with efforts to mitigate climate change. As with SAFE, less stringent

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[161] *See* Chamber of Commerce v. EPA, 642 F.3d 192, 198 (D.C. Cir. 2011) (describing how the 2010 Rule arrived at a single standard by reaching an agreement between the federal government, California, and the major automobile manufacturers).

[162] Dlouhy & Lee, *supra* note 26.

[163] *Id.*

[164] *Id.*

[165] Cayli Baker, *The Trump administration's major environmental deregulations,* BROOKINGS (Dec. 15, 2020), https://www.brookings.edu/blog/up-front/2020/12/15/the-trump-administrations-major-environmental-deregulations/.

fuel economy standards are likely to have the secondary effect of greater fuel consumption, and thus greater quantities of GHG emissions. The failure of CAFE to address environmental impacts and adverse health effects is a serious shortcoming that speaks to the possible benefit of undertaking a whole new approach. Alternatively, an amendment to the four factors might offer a middle ground. In sum, while this course of action seems extreme, it is not completely out of the picture, and it is not unthinkable that, by the end of President Biden's term, a new regulatory scheme could be well on its way to replacing CAFE.

Figuring out the future of CAFE is a tricky problem. On one hand, CAFE's laser focus on the economy makes it a useful tool for conserving fuel and nudging car manufacturers in a more environmentally sustainable direction. On the other hand, as a regulatory scheme that does not consider the environment as a primary factor in its analysis, CAFE can take less stringent approaches, such as the one taken by SAFE, without having to worry about environmental impact. Ultimately, regulating car manufacturers, creating an environmentally sustainable America, and balancing these two major counterpoints is an area of rulemaking that is far too complex to be resolved by any one president or administration. Perhaps CAFE's issues will never be resolved, or perhaps CAFE will give way to another regulatory scheme. What is clear is that SAFE was not built on sound reasoning and does not agree with the values and objectives of the NHTSA and EPA which is to promote the greatest achievable level of fuel conservation and to protect Americans from GHG emissions. President Biden and his administration will have to make the tough decision of deciding whether to replace SAFE, do nothing at all, or perhaps choose a middle ground that restores the California waiver and strengthens the standards without a major overhaul of the whole program.

IV. Conclusion

The SAFE Vehicles Rule was an attempt to reconcile stringent 2012 CAFE standards with an automotive industry that did not want to face steep compliance costs. The former presidential administration allied itself with car manufacturers and challenged the notion that the government should be involved in regulating climate change, which produced the SAFE Rule. Now that a new president has taken office, the future of SAFE is in serious question.

The debate over how best to regulate the automotive industry is an important question that will not be easily resolved, nor should it be resolved by the mere election of a new president. The circumstances that

inform CAFE regulatory decisions are constantly changing and a strong regulatory scheme must be able to respond to an ever-adapting world. As climate change becomes an increasingly important concern, regulatory schemes like CAFE will take on greater importance, as their outcomes not only effect economy but also the environment. Already, CAFE is a powerful tool for encouraging car manufacturers to reduce fuel consumption with an incidental effect of potentially promoting the adoption of greener technologies in an effort to remain compliant. A rule like SAFE backslides on this mission in an effort to make compliance easier for car manufacturers, which is part of the problem. SAFE's proponents unabashedly flaunt that it will result in greater fuel consumption, more car sales, and more jobs in the automotive industry.[166] They hardly mention that it will result in more pollution, no autonomy for the states to regulate emissions standards, and reduced incentives to produce more fuel-efficient vehicles.

But the solution might not be as simple as replacing the SAFE Rule and restoring the states' Clean Air Act waivers. A long-term solution could require reimagining SAFE or replacing it wholesale. Given the back and forth, Congressional action might be needed to really solve the problem. Whether that is possible remains to be seen.

President Biden and his team will have to weigh the benefits and costs of replacing the SAFE Rule and how best to go about it. He should also consult with allies in Congress and the leadership of the states. While the best avenue forward may not be clear, it is certain is that the future of SAFE will reveal how the United States approaches the issue of climate change, and how far it is willing to go in ensuring a sustainable future. Ultimately, it is the responsibility of the people to ensure that every step is taken to preserve the environment for future generations, even if it economically disadvantages industries dependent on the consumption of fossil fuels. Economic benefits and outdated frameworks must not stand in the way of responsibly evaluating the environmental consequences of future CAFE standards.

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[166] Press Release, NHTSA, U.S. DOT and EPA Put Safety and American Families First with Final Rule on Fuel Economy Standards (March 31, 2020), https://www.nhtsa.gov/press-releases/safe-final-rule.