I. INTRODUCTION

Federal and state agency regulatory actions, and litigation challenging them, are key drivers of environmental law and policy in the United States. Many of the most important court decisions in environmental law—Massachusetts v. EPA, Chevron U.S.A. v. Natural Resources Defense Council, Whitman v. American Trucking Ass’n, to name a few—are the result of such suits. Decisions such as these set the rules of the road for agency decision-making, with regard both to substantive implementation of environmental statutes and to the procedures agencies must follow. Indeed, most major environmental regulatory decisions at the federal level are challenged in court, and agency decisions accordingly are made with an eye to both past and potential future litigation.

This chapter provides a high-level, practitioner-oriented overview of such litigation, using a mix of landmark and recent court decisions to illustrate some of the central issues. (Given the breadth of the subject matter, our treatment of these issues is necessarily limited. Readers seeking a deeper exploration should refer to appropriate treatises or handbooks on administrative and environmental law.) We refer primarily to the major statutes administered by the U.S. Environmental Protection Agency (EPA), but similar issues arise in connection with agency decisions under conservation, natural resource management, and energy-related statutes administered by other federal agencies. We dedicate the bulk of our analysis to challenges to agency rulemaking, but also touch on issues related to permits, guidance documents, and other agency actions.

Section II provides an overview of the types of agency regulatory actions commonly challenged in court. Section III identifies threshold issues for judicial challenges to agency action. Section IV summarizes the types of claims typically raised
in suits challenging regulatory actions—both substantive and procedural—and the standards of judicial review corresponding to those claims. Section V discusses remedies available to successful challengers.

II. TYPES OF AGENCY REGULATORY ACTIONS SUBJECT TO JUDICIAL CHALLENGE

We begin with a brief survey of the relevant procedural landscape. The Administrative Procedure Act (APA) defines a “rule” broadly as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 1 The term “rule” is typically understood to mean an agency statement that governs a class of entities and situations, but the APA’s reference to “particular applicability” contemplates that “rulemaking” can be used to address individual entities or situations, such as the allocation of a license or permit.

The APA and the case law draw a distinction between “legislative rules” and “interpretative rules,” as well as policy statements and rules of agency procedure or organization. 2 A legislative rule involves the exercise of congressionally delegated authority to make rules binding upon the agency or third parties, whereas an interpretative rule reflects the agency’s reading of a statute but is not an exercise of delegated authority and is not binding. 3

The APA further distinguishes between “informal” and “formal” rulemaking. Informal rulemaking is typically referred to as “notice and comment” rulemaking because of the APA’s requirement that agencies provide public notice and an opportunity to comment on a proposed rule before it is finalized. Formal rulemaking—which is required only in limited circumstances where Congress expressly provides for rulemaking “on the record after opportunity for a hearing”—requires additional trial-type proceedings similar to those required in certain agency adjudication. 4

Most federal environmental regulations are legislative rules, and virtually all of these are promulgated through informal notice-and-comment rulemaking. The procedures for such rulemaking are governed either by the environmental statute under which the rule is issued, Section 553(b) of the APA (governing informal rulemaking), or some combination thereof. Agencies occasionally issue interpretive rules, but this is comparatively infrequent.

---

4. 5 U.S.C. § 553(c) (2012) (“When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.”).
Agencies also frequently issue “guidance” documents, which may be styled as policy statements, policy memoranda, manuals, advisories, Q&A documents, and so forth, as a means of policymaking. Unlike legislative rules, true guidance documents are not legally binding on the agency or other entities. Rather, they are intended to provide stakeholders and the public with information on agency views regarding statutory or regulatory interpretations, policies, or technical or procedural issues, and can play an important role in influencing behavior. Guidance is not subject to the APA’s notice-and-comment requirements, but agencies often do take comments on proposed guidance before issuing it in final form. Noting the growing impact of guidance, the White House Office of Management and Budget in 2007 issued a policy memorandum establishing policies and procedures for the development, issuance, and use of “significant” guidance documents by federal agencies—including notice-and-comment procedures for such documents.

Disputes sometimes arise as to whether a purported guidance document constitutes a legislative rule in disguise. In *National Mining Ass’n v. McCarthy*, for example, industry plaintiffs challenged an EPA guidance memorandum addressing Clean Water Act permitting for coal mines, arguing in part that the memorandum was a legislative rule promulgated without notice and comment. After acknowledging that distinguishing legislative rules, interpretive rules, and general statements of policy “turns out to be quite difficult and confused,” the D.C. Circuit held that the EPA memorandum was not a legislative rule because it had no binding effect on regulated entities or state permitting authorities and because the memorandum made clear that it did not impose legally binding requirements. In *Appalachian Power Co. v. EPA*, by contrast, the D.C. Circuit held that a Clean Air Act permitting memorandum characterized as “guidance” was a de facto legislative rule, “reflecting a settled agency position which has legal consequences” for state permitting agencies and regulated entities. And in *Iowa League of Cities v. EPA*, the Eighth Circuit held that two letters sent by EPA to a U.S. senator addressing certain Clean Water Act regulatory issues constituted de facto legislative rules issued without notice and comment, on the grounds that the letters had a binding effect on regulated entities.

In addition to rulemaking and guidance, environmental agencies also engage in adjudication, defined by the APA as an “agency process for the formulation of an order,” which is “a final disposition . . . of an agency in a matter other than rule making but including licensing.” Formal adjudication under the APA involves a
trial-like hearing before a decision maker not previously involved, and (like formal rulemaking) is required only where the underlying statute requires that the decision be made “on the record after opportunity for an agency hearing.” The APA does not prescribe requirements for informal adjudication. The most common types of environmental regulatory actions that can be classified as adjudications involve the issuance of enforcement orders, permits for facilities, and licenses or registrations for products (such as pesticide registrations).

Environmental statutes drive the scope and nature of agency regulatory actions. EPA administers the Clean Air Act (CAA), the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), the Toxic Substances Control Act (TSCA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), among others. The scope and pace of action under these laws is driven by their particular characteristics. EPA issues on the order of 500 final rules per year, around 150 of which are typically signed at the level of the EPA administrator—with others signed by regional administrators, assistant administrators, or other officials. The CAA accounts for the majority of EPA rulemaking, owing to that statute’s comprehensive and detailed requirements and deadlines. EPA also issues permits under the CAA, CWA, and other statutes for activities in some areas of the country, but in most areas states or tribes have delegated permitting authority.

In addition to EPA, the U.S. Department of the Interior and the U.S. Department of Agriculture (which includes the U.S. Forest Service) manage vast tracts of land, subsurface mineral resources, and offshore resources. These agencies take a broad array of regulatory actions—including rulemakings—under their key statutes of jurisdiction, including the Endangered Species Act, the Federal Land Policy and Management Act, the Mineral Leasing Act, the Coastal Zone Management Act, the Migratory Bird Treaty Act, the Surface Mining Control and Reclamation Act, and the Outer Continental Shelf Lands Act, among others. These and other agencies frequently issue environmental review documentation in connection with federal actions under the National Environmental Policy Act.

Each of these statutes is unique, though many have common elements. Each includes distinct judicial review provisions, typically establishing deadlines and proper venue for judicial challenges to different types of agency actions. Most include “citizen suit” provisions that authorize nongovernmental entities to bring suit to enforce against violations of the statute, or to compel federal agencies to

undertake nondiscretionary duties under the statute. Many define what actions
are to be deemed “final” for purposes of judicial review, whether particular types
of actions are or are not judicially reviewable, and requirements for administrative
remedies that must be exhausted prior to challenging an action in court. Some
specify standards of review for some types of actions, which may differ from those
under the APA. This variation in key statutory provisions underscores that statute-
specific knowledge is critical when challenging agency actions.

While this chapter focuses on judicial challenges to federal regulatory actions,
it is important to recognize that state and tribal governments are responsible for a
substantial proportion of environmental regulatory decisions in the United States.
States, for example, have delegated authority to administer many of the major fed-
eral statutes, including the CAA, CWA, SDWA, and RCRA in particular. States do
so pursuant to state implementing statutes, and in many cases, they also admin-
ister additional state laws covering the same or related issues. Implementation of
state environmental laws typically is governed by state administrative procedure.
Accordingly, suits challenging state environmental regulatory actions are likely to
raise state law issues that are analogous to those addressed here.

III. REQUISITES OF JUDICIAL CHALLENGES
to AGENCY ACTION

Regulated entities, nongovernmental organizations, state and local governments,
and others frequently bring court challenges to agency regulations, permits, and
other types of agency action outlined in section II. In principle, a party might
respond to regulatory action or inaction it considers undesirable by appealing to
any of the three branches of government. Such a party might seek some kind of
relief from Congress, or seek to appeal to the White House or to senior agency
officials, or instead may challenge the legality of the agency’s action in court—the
focus of this chapter. But whereas a party can pursue political or policy disagree-
ments through the political branches freely, getting a challenge heard by a court in
the first place—making it through the proverbial courthouse door—requires first
satisfying several conditions that limit the very availability of judicial review.

Those conditions can be usefully organized into four sets, addressing the fol-
lowing questions: (1) Over what kinds of agency action are courts authorized to
exercise their review authority at all? (2) Who may bring an authorized challenge?
(3) When may such a case be brought? (4) And in what judicial forum? The answers
to these questions overlap significantly; many of the relevant legal doctrines
address more than one of these questions, and furthermore those doctrines have
been characterized by courts in varying ways as well. For example, whether a court
has authority to hear a claim at all depends, in part, on who is bringing that claim,
and may depend also on when the party does so and where. For another example,
whether a party has a legally cognizable claim might depend, among other things,
on when the party raises that claim. Even so, these what-who-when-and-where
questions provide a practical lens for understanding the essential requirements of judicial review. The following discussion unpacks these questions and notes how they are related, highlighting examples from environmental law.

A. What: Threshold Conditions of Judicial Authority

One set of conditions for judicial review of agency action focuses most centrally on the scope and limits of judicial authority. For starters, challenging federal agency action requires the government’s consent through waiver of its sovereign immunity from suit, an immunity from having to answer before courts at all. In addition, judicial review must rest on some grant of jurisdiction by Congress for federal courts to hear a challenge to agency action; courts do not possess that power inherently. Further, courts may entertain judicial challenges to agency action only where Congress has established that certain legal claims are to be recognized. The exercise of judicial authority is also subject to certain inherent constitutional limits as well, which include among others a requirement that a challenge to agency action present a question appropriate for judicial resolution. A failure to satisfy any of these threshold requirements means a would-be challenger will not have its case heard in court.

1. Sovereign Immunity

A claim that a federal official or federal administrative body has acted illegally in some way warranting judicial intervention necessarily subjects the legal propriety of the government’s action to judicial scrutiny. But the sovereign United States, embodied by its officials and component agencies, cannot be sued in court, absent its consent.16 Thus, one preliminary condition of judicial review is a waiver of the sovereign’s immunity from suit. As waiving the sovereign’s immunity is no small matter, courts have long required that any such waiver be clear and they interpret such waivers narrowly.17

Though critical, this condition is easily satisfied in the typical challenge to agency action as the United States has waived its sovereign immunity in the APA itself. APA Section 702 provides that a case stating a claim arising out of the actions of a federal agency or an officer or employee of an agency “shall not be dismissed . . . on the ground that it is against the United States.”18 Thus, whereas sovereign immunity posed a serious obstacle to contesting federal agency action prior

to the APA’s passage in 1946,19 the APA waives the government’s immunity from suit unambiguously. Importantly, however, this waiver by its terms extends only to actions “seeking relief other than money damages”—that is, to claims seeking declaratory and injunctive relief against federal agencies. Because parties seeking to enforce environmental statutes or otherwise to contest the actions of environmental regulators do not generally seek monetary damages, this limitation is not important in many environmental contexts.

That said, there are some circumstances in which parties bringing environmental litigation may seek monetary payments from the government. One example is for cases alleging a violation of CERCLA, which imposes monetary liability for the environmental cleanup costs of hazardous waste sites and other contaminants at certain sites. CERCLA expressly waives the government’s sovereign immunity even for monetary claims, allowing claims against any agency of the federal government “in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity.”20 For another example, and more generally, parties who prevail in cases against a federal agency may be awarded costs and attorneys’ fees from the government under the Equal Access to Justice Act, which authorizes the recovery of monetary payments,21 or under other statutes authorizing fees. Most environmental statutes include provisions specifically authorizing fees.22 The recovery of costs and fees can be important in particular for some nongovernmental organizations that bring suit to enforce environmental statutes.

2. Federal Jurisdiction

That the government has waived its immunity from suit does not itself mean that the courts can hear a claim alleging the illegality of government action. Rather, the federal courts must be given jurisdiction over such a claim; unlike state courts, they lack jurisdiction except where it is affirmatively conferred.23 Here again, federal subject-matter jurisdiction does not pose a difficult obstacle to challenging agency action today, though, as with sovereign immunity, matters were not always so simple. Section 1331 of Title 28 (not the APA) provides for federal jurisdiction “of all civil actions arising under the Constitution, laws, or treaties of the United States.”

19. Previously, actions challenging federal agency decisions rested, more precariously, on an ultra vires claim according to which a federal officer who acted outside of his or her authority was separate from the government itself. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689–90 (1949); United States v. Lee, 106 U.S. 196, 215 (1882). See generally URBAN A. LESTER & MICHAEL F. NOONE, JR., LITIGATION WITH THE FEDERAL GOVERNMENT 102–07 (3d ed. 1994). Section 702 of the APA was amended to avoid the strictures of Larson. GREGORY SISK, LITIGATION WITH THE GOVERNMENT 608 (2000).


States," thus covering in general all actions contesting the validity of agency action or inaction under federal law.\textsuperscript{24}

Some regulatory statutes confer jurisdiction—or otherwise condition jurisdiction—over challenges to specified agency actions, however, while explicitly barring review of other agency actions under Section 1331. In other words, while Section 1331 usefully provides a general grant of jurisdiction where there is no other, it does not override more restrictive grants of or limitations on jurisdiction to review agency action. For example, many environmental statutes include “citizen suit” provisions that give district courts jurisdiction over suits to enforce against violations of the statute, but require the plaintiff to have submitted a notice of intent to sue in advance of filing a complaint (typically 60 days beforehand). The Endangered Species Act (ESA), for instance, authorizes “any person” to bring a judicial challenge for violation of the ESA and provides for “jurisdiction” over such suits in the “district courts.”\textsuperscript{25} The statute requires a potential challenger, before a suit is filed, to provide written notice of the alleged violation to the government and the alleged violator, stating that “no action may be commenced” prior to that notice.\textsuperscript{26} A party bringing an ESA challenge must satisfy this additional requirement; Section 1331 does not override the ESA’s 60-day notice requirement on which district court jurisdiction expressly depends for challenges under the ESA’s citizen-suit provision.

Indeed, wherever Congress confers jurisdiction that is limited to the satisfaction of certain predicate conditions, courts will not allow parties to invoke broader grants of jurisdiction wherever doing so would defeat the purposes of narrower jurisdictional grants. Thus, the D.C. Circuit, among other courts, has long held that parties cannot choose to seek review under a statute granting broad jurisdiction in a manner that would be inconsistent with a more restrictive jurisdictional statute simultaneously, as that would defeat the purposes of the more restrictive statute.\textsuperscript{27}

Also important, Section 1331 confers jurisdiction specifically on the “district courts.” Often, however, environmental statutes provide for judicial review of agency action in the courts of appeals, conferring jurisdiction there instead.

\textsuperscript{24} For the first few decades following the passage of the APA, Section 1331 conditioned its general federal-question jurisdiction also on a threshold dollar amount in controversy, such that parties could invoke federal-question jurisdiction only when their case raised monetary claims above a minimum amount. But this amount-in-controversy requirement was eliminated in 1976, allowing challenges to agency action to rest on federal jurisdiction granted in Section 1331. State courts, as courts of “general” rather than “limited” jurisdiction, already in some sense “have” federal-question jurisdiction. The federal removal statute, however, allows the government to remove all cases against the United States and its agencies and officers to federal court. 28 U.S.C. § 1442 (2012). Accordingly, litigation against federal agencies outside of the federal courts is rare.


\textsuperscript{26} Id.

\textsuperscript{27} See, e.g., City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979) (specialized judicial review procedures apply over generalized, as courts will assume Congress intended the former to be exclusive). Accord Am. Bird Conservancy v. FCC, 545 F.3d 1190, 1194 (9th Cir. 2008) (when two jurisdictional statutes provide different routes to the federal courts, the rule for courts is to require parties to follow the more specific route).
Judicial Challenges to Federal Agency Action

Jurisdiction in the courts of appeals is considered appropriate especially where the federal court functions in an appellate capacity by reviewing an already well-developed factual record. Most environmental statutes include provisions giving either the D.C. Circuit specifically, or the courts of appeals generally, jurisdiction over challenges to specified categories of agency actions, and some may direct challenges to other specific categories of agency actions to the district courts. (These provisions are discussed at greater length in section III.D.)

3. Cognizable Legal Claim

A waiver of sovereign immunity and an affirmative grant of jurisdiction are necessary but not sufficient conditions for challenging agency action in court. A party seeking judicial review must also advance a claim that is legally cognizable—that is, must allege a violation of law that the legal system recognizes—a legal harm the courts can consider and for which courts can provide a judicial remedy. Thus, a party cannot contest the abstract fairness of agency action, for example, or base its challenge solely on policy considerations or other extralegal grounds. Rather, the party must state a legal “cause of action,” expressed as one or more “counts” in the party’s pleading that states the legal theory for why or how the agency acted contrary to law.

Here again, the APA provides one starting point, as it establishes a cause of action for persons “adversely affected or aggrieved” by final agency action, and authorizes courts to “hold unlawful and set aside” agency action that is, among other things, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” In addition, many environmental statutes also expressly create one or more causes of action for alleged violations of their requirements. These fall into two general categories: “review” provisions creating claims to challenge various specified types of agency actions, and “citizen suit” provisions creating causes of action for claims by private citizens to enforce against specified violations of the statute or to compel the federal agency to undertake a nondiscretionary duty under the statute. The ESA’s citizen-suit provision is an example of the latter category, which the Supreme Court has characterized as “an authorization of remarkable breadth.” The National Environmental Policy Act (NEPA), by contrast, does not itself create a cause of action. Thus, parties challenging the alleged inadequacy of a federal agency’s consideration of the significant environmental consequences of major federal action—a common claim

---

brought under NEPA—rely instead on APA Section 702. Substantive claims typically raised in challenges to federal agency action are discussed at greater length in section IV.

4. Preclusion

One way a party may be unable to state a cause of action is where Congress has precluded judicial review. Preclusion is properly understood not as an independent criterion of judicial review, but rather an aspect of the requirement that a party have some cognizable cause of action: having a legally reviewable claim means such a claim is not precluded, and where a given claim is precluded, a party by definition has no cause of action for that claim. Preclusion merges with federal jurisdiction too. That is to say, where a claim is precluded, a court simply may not hear it. That said, judicial discussion of preclusion most often focuses on whether the would-be challenger has a claim that courts would recognize and for which a court could provide a judicial remedy. If so, the matter is commonly said to be “reviewable” by the court (as opposed to the court having “jurisdiction” over it).

Accordingly, preclusion and “reviewability” lend themselves to discussion separate from jurisdiction, and there is well-established jurisprudence concerning the preclusion of judicial review of agency action. A central premise of it is the presumed availability of judicial review. That is, the Supreme Court has repeatedly made clear that, as reflected in the APA itself, courts should presume Congress has intended for judicial review of alleged violations of law, and should not be quick to conclude the contrary barring clear evidence of such congressional intent. This presumption in favor of judicial review is overcome, however, in two types of circumstances, set forth in the APA itself.

First, judicial review is precluded where Congress has said so explicitly. Second, an action is precluded from judicial review where Congress implicitly

31. See, e.g., Norton v. S. Utah Wilderness All., 542 U.S. 55, 61 (2004); Friends of Tims Ford v. TVA, 585 F.3d 955, 964 (6th Cir. 2009); Biodiversity Conservation All. v. Jiron, 762 F.3d 1036, 1058–59 (10th Cir. 2014).

32. The overlapping relationship between the absence of preclusion and jurisdiction is underscored by the common practice of government attorneys to move to dismiss allegedly precluded claims—as well as claims over which the court lacks jurisdiction or claims against the government where the plaintiff has failed to exhaust—both under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and under 12(b)(6) for failure to state a claim on which relief can be granted. E.g., U.S. DEPT OF JUSTICE, EXEC. OFF. FOR U.S. ATTYS, FEDERAL CIVIL PRACTICE MANUAL § 25.5 (2003) (“[I]f plaintiff fails to allege a waiver of sovereign immunity, the complaint also fails to state a claim. In addition, other defenses such as limitations, failure to exhaust administrative remedies, and exclusive remedy may also warrant dismissal for failure to state a claim.”). Moreover, while drawing clear distinctions among the partially overlapping requirements of judicial review aids understanding of them, at times the differences may have little practical significance. At bottom, either a court can hear a claim, because all of the requirement of judicial review are met, or it cannot.


35. Id. § 701(a)(1).
intended the matter to be solely a matter of agency discretion.\textsuperscript{36} Here, the Supreme Court has held that courts should not review an agency’s action where there would be no legal criteria against which to evaluate it—“no law to apply” to the agency action in question.\textsuperscript{37} Otherwise, where Congress has not so implicitly (or explicitly) precluded judicial review of a given claim, that claim will be reviewable provided of course that all of the other criteria of judicial review are satisfied.\textsuperscript{38}

5. Justiciability: The Political Question Doctrine

Courts are empowered to hear only claims that are “justiciable” as well. Justiciability, considered independent of jurisdiction and other reasons why a court may not be able to hear a claim, focuses on the inherent fitness of the would-be challenge for judicial resolution, as opposed to “political questions” best suited to resolution by the political branches. While there is no formulaic jurisprudential test associated with the “political question doctrine,” the Supreme Court has identified several key considerations, including whether the issue raised implicates constitutional authority assigned to another branch, whether it is susceptible to judicially manageable standards, and whether it could be resolved by a court consistent with respect for the other branches of government.\textsuperscript{39}

The political question doctrine has arisen in environmental cases challenging government action, most notably in the context of litigation relating to contributions to climate change and the adequacy of government action to address climate change. In \textit{Juliana v. United States}, for example, the plaintiffs brought suit against numerous federal agencies for failing to take steps to reduce fossil fuel use, for which the plaintiffs stated numerous constitutional claims.\textsuperscript{40} The district court held that the plaintiffs’ claims were justiciable, rejecting the government’s argument that the case presented nonjusticiable political questions inappropriate for judicial resolution. In the court’s view, the case presented core legal questions, despite the fact that, should the plaintiffs prevail, any remedy would have to be framed carefully to avoid judicial interference with the political branches.\textsuperscript{41} \textit{Juliana} stands in contrast to cases like \textit{Native Village of Kivalina v. ExxonMobil}, brought by an Alaskan village for damage allegedly caused by the defendants’ greenhouse gas emissions.\textsuperscript{42} There, in the context of a case brought against a number of oil, energy, and utility companies, the district court concluded that the plaintiff’s claims raised

\begin{itemize}
\item \textsuperscript{36} Id. § 701(a)(2).
\item \textsuperscript{37} E.g., Heckler v. Chaney, 470 U.S. 821, 830 (1985).
\item \textsuperscript{38} An agency’s own regulations can provide “law to apply.” That is, where a party challenges the agency’s compliance with its own regulations, regulatory as opposed to statutory criteria may provide legal standards against which a court can measure the lawfulness of agency action. See, e.g., Ctr. for Auto Safety v. Dole, 846 F.2d 1532, 1534 (D.C. Cir. 1988); see generally Harold Krent, Reviewing Agency Action for Inconsistency with Prior Rules and Regulations, 72 Chi.-Kent L. Rev. 1187 (1997).
\item \textsuperscript{39} See, e.g., Baker v. Carr, 369 U.S. 186, 217 (1962).
\item \textsuperscript{40} 217 F. Supp. 3d 1224 (D. Or. 2016). At the time of this writing, an appeal of the district court’s decision was pending before the U.S. Court of Appeals for the Ninth Circuit.
\item \textsuperscript{41} Id. at 1235–42.
\item \textsuperscript{42} 663 F. Supp. 2d 863 (N.D. Cal. 2009).
\end{itemize}
nonjusticiiable questions. In particular, the court reasoned that adjudicating the case would require the court to determine the proper level of greenhouse gas emissions and how the costs of global warming are properly allocated, questions not suitable for judicial resolution but instead more properly addressed to the executive and legislative branches.

B. Who: Standing to Bring a Judicial Challenge

Even where the preceding threshold conditions are satisfied, the availability of judicial review depends also on whether the challenging party is one with “standing” to sue. The judicial tests for standing aim to ensure that the party bringing the claim is well positioned to advocate for its position (and thus that a court will have the benefit of able advocacy), that the remedy the court would grant to such a party if successful would address the legal injury alleged, and finally that the courts exercise authority within the bounds prescribed by Article III of the Constitution and congressionally enacted statutes.

Standing doctrine consists of two parallel inquiries: a “constitutional” analysis and a “prudential” one. As famously formulated by the Supreme Court in Lujan v. Defenders of Wildlife, the constitutional inquiry asks whether the party challenging agency action is genuinely injured by the agency’s alleged illegal action, that is, whether the would-be plaintiff’s injury is both “concrete and particularized” and “actual or imminent,” not “conjectural” or “hypothetical.” The former constitute sufficient “injury in fact” for a court to adjudicate the matter, while the latter do

43. Id. at 876–77. See also Am. Elec. Power v. Conn., 582 F.3d 309, 332 (2d Cir. 2009) (rejecting defendant’s argument that the case presented a nonjusticiable political question), rev’d on other grounds, 564 U.S. 410 (2011). The discussion in the preceding text is not to suggest, however, that in general courts will tend to conclude that cases concerning climate change are justiciable if brought against federal agencies, and nonjusticiable if brought against private parties. This issue seems likely to be addressed in future cases.

44. As with preclusion, justiciability shares common features both of the requirement that a challenger identify a legally cognizable cause of action, and of the boundaries of federal jurisdiction. Either way, a party seeking to challenge agency action will be unable to advance a claim that is not justiciable, and the court will not exercise its authority over it. A case like Kivalina, where again the defendants moved to dismiss under both Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), supports an understandings of justiciability that is not reducible to federal jurisdiction. Native Vill. of Kivalina, 663 F. Supp. 2d 863. There, the district court concluded that the plaintiffs could not state a claim based on federal common law for the defendants’ greenhouse gas emissions, given that the regulatory regime created through the CAA displaced common law claims—leaving open the possibility that where the CAA does not reach greenhouse gas emissions, parties like the plaintiffs would be able to bring a federal common law action. Id. In other words, the court did not conclude simply that it lacked jurisdiction altogether. Federal agency defendants also often move under both Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) when seeking to dismiss a claim on justiciability grounds.

Judicial Challenges to Federal Agency Action

not.46 In addition, the “injury in fact” that the plaintiff suffered must also be “fairly traceable” to the alleged unlawful action by the defendant, and furthermore that injury must be “likely” to be “redressed” by the remedy the court would grant were the plaintiff successful.47

Standing doctrine’s constitutional requirements overlap with federal jurisdiction. That is, the federal courts’ jurisdiction under Article III of the Constitution extends only to “cases” and “controversies,” and thus a party not injured sufficiently immediately or distinctly by agency action does not satisfy the case-or-controversy requirement on which the exercise of judicial authority depends.48 Even where Congress might seek to allow any party to bring a case alleging a violation of an environmental statute, as discussed shortly in the following, there are constitutional limits to Congress’s ability to create legal “injury” by bestowing upon a party a right to sue.49

That leaves the prudential, judicially imposed leg of standing. Here, courts further ask whether the party bringing the challenge is “arguably within the zone of interests” intended to be protected by the statute (or constitutional provision) the agency is alleged to have violated, or whether instead would-be challengers seek to bring merely a “generalized” or “widely shared” grievances, or to represent the interests only of others and not themselves.50 In these latter circumstances, or if those challenging agency action are not arguably within the “zone” of interests protected by the law that forms the basis of their claim, courts for prudential reasons will refrain from reviewing a case on standing grounds as well.51

With respect to this leg of standing analysis, though, Congress by legislation can shape the size of the “zone of interests” protected by statute, toward conferring greater standing so long as constitutional requirements are also met. For example,

46. The extent to which a probabilistic risk of harm can satisfy standing’s “injury in fact” requirement presents a somewhat complicated question that can be of special relevance in the environmental context. In general, the federal courts of appeals have found that an increased risk of harm can constitute sufficient injury for standing purposes, so long as that risk is not purely speculative but rather reflects substantial probabilities of harm. See Nat. Res. Def. Council v. FDA, 710 F.3d 71 (2d Cir. 2013) (exposure to potentially dangerous product sufficient to satisfy standing); Nat. Res. Def. Council v. EPA, 464 F.3d 1, 6 (D.C. Cir. 2006) (substantial probability that some organization members will be injured by EPA action, as opposed to purely speculative injuries, is sufficient to establish standing); Vill. of Elk Grove v. Evans, 997 F.2d 328, 329 (7th Cir. 1993) (alleged increased risk of flood arising out of Army Corps’ issuance of a permit in a flood plain sufficient to constitute injury).

47. Lujan, 504 U.S. at 560–61 (internal quotations omitted).

48. Sometimes courts link “justiciability” and this aspect of “standing” as well, stating that where the plaintiff lacks standing the case is not justiciable. See, e.g., Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 102 (1998) (“[S]tanding to sue is part of the common understanding of what it takes to make a justiciable case.”).

49. That said, and while Congress cannot legislate away constitutional standing requirements by deeming any violation of law a per se injury, the Supreme Court has held that the “redressability” component of constitutional standing/injury-in-fact, in particular, can be legislatively satisfied by a citizen suit to enforce an environmental statute even where the applicable judicial remedy is civil penalties paid to the government (not to the plaintiffs bringing the case). See Friends of the Earth, Inc. v. Laidlaw Env’tal Servs., 528 U.S. 167, 187 (2000).


when Congress adopts citizen-suit provisions in environmental statute that create causes of action to challenge agency action, Congress expands the “zone” and thereby reflects its intent that the laws be enforced through challenges to agency action or inaction, subject of course to the satisfaction of standing’s other requirements. Moreover, the “zone” test in application requires not that the challenger be a beneficiary of the statute in question but rather, more loosely, that the challenge be arguably within the zone of interests implicated by the statute in question. Economic competitors have been held to have standing when a regulation changes their competitive posture, even where the statute in question does not aim at promoting competition at all.

Standing analysis is well illustrated in the environmental case law. Indeed, much of contemporary standing jurisprudence originates in Supreme Court cases involving claims under the environmental statutes brought by environmental groups and other organizational plaintiffs, as claims by organizational plaintiffs may test the boundaries of both the constitutional and the prudential side of standing doctrine; where regulated parties seek to challenge agency action to contest the application of agency authority over them, in contrast, standing is often rather straightforward in that the challenger’s material injury resulting from alleged over-regulation is very likely to satisfy the requirements of standing.

The central lesson from the case law involving organizational plaintiffs is that plaintiffs must allege facts with some specificity, such as through affidavits or other forms of proof, explaining how the federal agency’s challenged action has affected their interests beyond or in addition to their purely ideological interests. Environmental organizations must allege that, for example, one or more of their members have used or intend to use certain natural resources allegedly harmed by agency action or inaction, in order to satisfy standing’s “injury in fact” requirement.

Massachusetts v. EPA provides an important recent articulation of standing’s requirements and illustrates the grounds on which parties seeking to prompt, rather than to limit, federal agency action may have standing to sue, in particular where a litigant seeks to enforce a “procedural right.” The case presented

52. For this reason, the “zone” test can be understood as a version of the question whether the plaintiff has a cause of action. See Lexmark Int’l Inc. v. Static Control Components, Inc., 572 U.S. 118, 128–30 (2014).
53. See, e.g., Honeywell Int’l Inc. v. EPA, 374 F.3d 1363, 1369–70 (D.C. Cir. 2004).
55. Environmental organizations can sue on their own behalf, if an organization as such satisfies the requirements of standing. Warth v. Seldin, 422 U.S. 490, 511 (1975); see generally NAACP v. Button, 371 U.S. 415 (1963). Or, environmental groups can challenge agency action on behalf of one or more of their members if at least one member satisfies standing’s requirements, the interests implicated by the suit are “germane” to the organization’s purpose, and the claim asserted and relief requested do not require the individual participation of the organizational member, as opposed to the organization instead. See Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333, 343 (1977). See, e.g., Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002) (applying the criteria).
the question whether a coalition of states, local governments, and environmental organizations had standing to challenge a decision by EPA to decline to regulate greenhouse gas emissions from motor vehicles under the CAA. The Supreme Court concluded that Massachusetts had standing to sue based on the state’s sovereign interest in protecting its territory against rising sea levels, adverse weather, and other consequences of global warming, which the coalition alleged were exacerbated by greenhouse gas emissions including those from motor vehicles. Although Massachusetts’ presence was central to the Court’s standing analysis, the Court’s decision still illustrates how standing requirements may be met in climate change litigation more generally—even though some lower courts have held that the causal link between private conduct that results in greenhouse gas emissions and weather-related injuries is too attenuated to support standing.57

C. When: The Timing of Judicial Review

If a claim satisfies all of the preceding requirements, the next question becomes when such a suit may be brought.

I. Statute of Limitations

One basic timing consideration concerns the applicable statute of limitations. For actions challenging federal agency decisions (indeed, claims against the United States generally), the statute of limitations ordinarily is six years.58 Thus, challengers have six years from the agency action in question to file suit, though usually parties challenging agency action are motivated for a variety of practical reasons to file suit much sooner than the statute of limitations requires.

Most environmental statutes, though, impose separate deadlines for judicial challenges to specified agency actions—notably in provisions that establish direct appellate review of regulations, permits, or other actions. Challenges to most regulations promulgated under the CAA, for example, are subject to a statutory filing deadline of 60 days after the rule’s publication in the Federal Register.59 The CAA further provides that if the challenge is based “solely on grounds arising after such sixtieth day,” a petition for review may be filed within 60 days after such grounds arise.60 Environmental cases often raise questions about whether an agency’s legal

57. E.g., Comer v. Murphy Oil USA, 585 F.3d 855, 860 (5th Cir. 2009) (connection between plaintiff landowners’ alleged injuries following Hurricane Katrina and defendant fossil fuel and chemical companies’ conduct not sufficiently traceable to satisfy standing).
59. CAA § 307, 42 U.S.C. § 7607(b) (2015); see also 40 C.F.R. § 23.3 (providing that for documents not published in the Federal Register, the date from which the CAA’s 60-day deadline is marked is two weeks after signature). For examples in other statutes, see, among others, CWA § 509, 33 U.S.C. § 1369(b)(1) (2011) (CWA establishes a 120-day deadline for challenges in the court of appeals to seven specified categories of agency actions); TSCA § 19, 15 U.S.C. § 2618 (2013) (TSCA establishes 60-day deadline for suits challenging specified types of rules or orders).
environmental Litigation interpretation was already adopted in an older regulation—such that challenge to that interpretation is now time-barred—or whether an issue has been “reopened” through more recent agency activity.

Where a party challenges a rule at the enforcement stage—that is to say, challenges the rule’s application to that party by raising claims about the rule’s legality—courts often allow such a challenge after the otherwise applicable statute of limitations. Indeed some even have allowed pre-enforcement challenges to a rule’s legal validity (as opposed to challenges to a rule’s factual, evidentiary, and discretionary bases) after the default statute has run.  

Many statutes expressly preclude such review, at least in certain circumstances, however. For example, Section 509(b)(2) of the CWA provides that specified actions for which court of appeals review is available under Section 509(b)(1) “shall not be subject to judicial review in any civil or criminal proceeding for enforcement.” The CAA includes similar language.

2. Final Agency Action

The APA imposes another timing requirement for causes of action that are based on it rather than on another statute specifically conferring a private right of action: a challenging party must wait until after the agency action is final. That is because the APA creates a cause of action for persons adversely affected or aggrieved specifically by “final agency action” (emphasis added). While the APA’s finality condition is commonly characterized as a question of timing, there is overlap here between what will constitute a cognizable claim under the APA—that is, a claim predicated on agency action that is final—and the time at which the challenge to agency action is brought—that is, after the agency has finished its decision making. For claims based on the APA that are not made reviewable by another statute, challenges to agency actions that are not yet final are for that reason not cognizable. They become cognizable, however, once an agency has completed its decision-making process. As the Supreme Court has explained, the purpose of requiring parties to give agencies an opportunity to see their decision-making processes through to completion is to ensure that agency actions that are merely tentative or reflect the judgment only of subordinate officials are not challenged prematurely.

61. E.g., Am. Rd. & Transp. Builders Ass’n v. EPA, 588 F.3d 1109, 1112 (D.C. Cir. 2009); Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997); Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).
3. Ripeness and Mootness

Other timing tests find root in the common law, though with a constitutional dimension as well. The “ripeness” doctrine limits judicial challenges to agency action that are brought in some important sense too early, while “mootness” similarly prevents judicial challenges that are brought too late. With respect to ripeness, the Supreme Court has developed a two-part test that considers the fitness of the issue for judicial resolution, on the one hand, and the hardship to the challenging party in the event that judicial review is postponed, on the other. The purpose of the ripeness requirement, as the doctrine’s name suggests, is to ensure that the facts or events giving rise to a potential challenge have matured sufficiently so that judicial resolution is not only appropriate but also can be calibrated to address the core controversy fully emerged.

Similarly, but from the other end of the temporal spectrum, the mootness doctrine aims to ensure that courts are called upon to adjudicate controversies that are still relevant and thus can provide meaningful remedies not already overtaken by events. As the Supreme Court has stated, courts must adjudicate disputes that remain “live.” As noted, both ripeness and mootness implicate the constitutional case-or-controversy requirement; they seek to extend judicial authority only to disputes that are well developed and thus suitable for judicial relief that is responsive to the dispute. At the same time, courts may, for prudential reasons, determine that a case that would satisfy Article III requirements is nevertheless moot. Where a potentially moot case may repeat itself on the facts such that it would evade review, however, or where a defendant alters its conduct after a case had been filed in a way that might render a case moot, courts have found exceptions to the mootness doctrine.

4. Exhaustion of Administrative Remedies

Another timing requirement that conditions the availability of judicial review and when a claim is brought, one with both common law and statutory variations, is exhaustion of administrative remedies. The doctrine of exhaustion of remedies requires a party that would seek judicial relief to press its claim first before the agency that has taken the action the party wants to challenge. In other words, the

---


68. Here again, Friends of the Earth, Inc. v. Laidlaw Environmental Services is illustrative. 528 U.S. 167, 193 (2000). There, the defendant began to comply with a wastewater discharge permit after an environmental group filed a citizen suit. The Court held the case not to be moot, as it presented a “disputed factual matter” that could affect the defendant’s future behavior. Id. at 193–94.
party must exercise all options available within the agency in question to contest or appeal the agency’s decision. As with the ripeness doctrine and the condition of finality, the exhaustion requirement also seeks to preserve judicial review for instances where judicial review would be meaningful and not wasteful. For parties that have not yet exhausted available administrative remedies, there remains the possibility that they might find relief by appealing their grievance administratively, rendering judicial review unnecessary. When imposing the requirement that parties exhaust available administrative remedies, courts have emphasized other purposes of this requirement as well, including giving agencies a chance to correct their own mistakes, and comity between the judicial and executive branches.

While courts may impose this requirement on their own, many environmental statutes and regulations establish independent exhaustion requirements. In some contexts, parties are required to exhaust statutorily imposed exhaustion, but the government can expressly or impliedly “waive” that requirement either through its actions or by failing to raise exhaustion as an objection to a judicial challenge of an agency’s action. In other contexts, however, Congress has conditioned subject-matter jurisdiction on the challenging party having first exhausted administrative remedies. In those settings, jurisdiction and exhaustion overlap, illustrating once again that the requirements of judicial review—presented separately here in the interest of exposition—are often interconnected. And the distinction between jurisdictional and nonjurisdictional statutory exhaustion carries practical significance as well. For where federal courts lack jurisdiction, the agency cannot confer jurisdiction, and thus jurisdictional exhaustion cannot be forgiven by an agency’s express or inadvertent waiver of the requirement.

One prominent example of the exhaustion requirement in environmental cases is the requirement under EPA regulations that certain permits under the CAA, CWA, and RCRA be appealed to EPA’s Environmental Appeals Board before being challenged in court. In addition, the CAA provides that only an objection that was raised with reasonable specificity during the public comment period can be raised during judicial review of certain regulations. It further provides that if the party can demonstrate that it was impracticable to raise the objection during the comment period or the grounds for the objection arose after the comment period

71. Finally, while the exhaustion doctrine focuses in large part on when a party challenging an agency decision may do so—that is, after having presented its claim to the agency—there is a procedural dimension to judicially required exhaustion, especially for parties who want to challenge agency rulemakings. For there, courts have at times imposed an “issue exhaustion” requirement, which prevents parties in the context of a rulemaking challenge from pressing objections not raised during notice and comment. E.g., Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 764–65 (2004) (challenge to adequacy of environmental assessment forfeited by not raising objections during public comment process). For a helpful review of issue exhaustion and its applicability, see Jeffrey Lubbers, Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?, 70 ADMIN. L. REV. 109 (2018).
Judicial Challenges to Federal Agency Action

D. Where: The Appropriate Forum for a Judicial Challenge

This leaves the question of where a challenge satisfying all of the preceding requirements is properly brought. Here again, the APA provides a starting point, complemented or altered as the case may be by more specific provisions prescribed by statute. In the absence of a statute-specific provision, APA Section 703 allows for judicial review in any court “of competent jurisdiction,” absent a “special statutory review proceeding.” The venue statute generally applicable to suits against federal government agencies (in the form of official capacity suits against agency officers) provides for suits in any judicial district where the defendant resides or the claim arises or any relevant real property is situated or, if no real property is involved, where the plaintiff resides.

Where to file a challenge to agency action may present a question not just of venue but—centrally—of jurisdiction. For as noted previously, most of the environmental statutes confer jurisdiction on particular courts to hear challenges to certain agency actions, such as the federal courts of appeals in general or the D.C. Circuit in particular. Unfortunately, sometimes that very issue is not itself clear. One compelling illustration of the potential complexity of forum-specific jurisdictional provisions is the litigation surrounding the 2015 Clean Water Rule promulgated jointly by EPA and the U.S. Army Corps of Engineers, which defined the scope of “waters of the United States” subject to regulation under the CWA. CWA Section 509(b)(1) identifies seven categories of EPA actions, challenges to which are properly brought in the courts of appeals. Other actions must instead be challenged under the APA in federal district court. Many parties challenged the Clean Water Rule in both district courts and courts of appeals, reflecting uncertainty over whether the rule fell within the purview of Section 509(b)(1). The Sixth Circuit requested briefing and heard argument on the question of its jurisdiction, issuing a decision in February 2016. The three-judge panel found that Section 509(b)(1) applied and

---

74. Id.
75. 5 U.S.C. § 703.
76. 28 U.S.C. § 1391(e).
it therefore had jurisdiction, but it did so on a fractured 1–1–1 basis. Industry challengers to the rule petitioned the Supreme Court for a writ of certiorari on the jurisdictional issue, and the Court granted review. In January 2018, in National Ass’n of Manufacturers v. Department of Defense, the Supreme Court reversed, holding in a unanimous decision that the rule did not fall within the purview of Section 509(b)(1) and, as a result, the district courts had jurisdiction over any challenges to the rule.81

FIFRA—which authorizes EPA to regulate the distribution, sale, and use of pesticides, and to issue licenses or “registrations” for pesticides that EPA determines may be sold—provides another useful example. FIFRA provides for district court jurisdiction over challenges to EPA’s refusal to cancel or suspend a pesticide registration if EPA’s refusal did not follow a “hearing” on the issue.82 FIFRA further provides, though, for “exclusive jurisdiction” in the courts of appeals over claims challenging a decision by EPA made “following a public hearing.”83 In other words, whether the federal district or the courts of appeals have jurisdiction over certain FIFRA claims depends on the administrative posture of the agency’s decision (that is, whether or not the decision followed a hearing). In a recent case against EPA, the D.C. Circuit held that FIFRA’s jurisdictional provisions requiring review in the courts of appeals of EPA decisions following a hearing required dismissal of the same challengers’ separate district court action under the ESA.84 In what the court characterized as the “dueling jurisdictional provisions of the ESA and of FIFRA,” the more specific provisions of FIFRA trump.85

In addition to allocating jurisdiction between the district courts and the courts of appeals, the judicial review provisions of most environmental statutes also establish the appropriate venue for challenges—that is, which district court or court of appeals is the appropriate forum in which to file the challenge, often based on the residence of the plaintiff or petitioner and/or the location of activity affected by the challenged action.86 The CAA, for example, provides for exclusive jurisdiction in the U.S. Court of Appeals for the D.C. Circuit for challenges to specified types of regulations and “any other nationally applicable regulations promulgated” under the CAA—while directing challenges to certain specified actions and actions that are “locally or regionally applicable” to the court of appeals for the “appropriate circuit.” To make things more complicated, even actions that would otherwise go to one of the other courts of appeals may be challenged in the D.C. Circuit if EPA’s action is “based on a determination of nationwide scope or effect”

80. Id.
82. FIFRA § 16, 7 U.S.C. § 136n(a) (2016).
83. Id. § 136n(b).
85. Id. at 185–88.
86. See, e.g., 33 U.S.C. § 1369(b)(1) (2011) (CWA provision directing review to the courts of appeals for the federal district in which the petitioner “resides or transacts business which is directly affected by” the challenged action).
and EPA, in taking the action, publishes a determination to that effect. Several recent court decisions have held that this provision grants jurisdiction generally to the courts of appeals, while allocating venue among the D.C. Circuit and the other courts of appeals; and these decisions have addressed which is the appropriate forum in which to challenge particular actions.

IV. CLAIMS AND STANDARDS OF JUDICIAL REVIEW

When preparing substantive challenges to agency environmental actions, two closely related considerations are critical: (1) what types of claims are available, and (2) what are the applicable standards of review. The APA establishes the default standards of review and types of claims applicable to challenges to agency action, but many environmental statutes also address these issues. And here too, when such an organic statute contains judicial review provisions or otherwise disavows the APA’s provisions, the organic statute’s provisions control. Often, however, the standards and claims set forth in environmental statutes largely mirror the standards in the APA. The APA thus provides a useful starting point when considering a challenge to agency action.

The APA authorizes reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed” and to “hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law. . . .” This core provision suggests a framework for the range of different types of claims available to parties challenging agency actions—including challenges to an agency’s legal interpretations (both of authorizing statutes and regulations), challenges to policy and factual determinations, constitutional claims, claims of procedural violations, and claims that the agency

88. See, e.g., Texas v. EPA, 829 F.3d 405, 418 (5th Cir. 2016) (distinguishing the jurisdictional and venue aspect of the provision and holding that the action challenged in that case was “locally or regionally applicable”); Dalton Trucking, Inc. v. EPA, 808 F.3d 875, 879, 882 (D.C. Cir. 2015) (distinguishing the jurisdictional and venue aspects of the provision and holding that EPA’s CAA waiver decision was not properly challenged in the D.C. Circuit because EPA had not published a determination that it was of “nationwide scope or effect”).
89. See, e.g., 42 U.S.C. § 7607(d)(9)(A) (2011) (“In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .”); 42 U.S.C. § 9613(j)(2) (2000) (“In considering objections raised in any judicial action under [CERCLA], the court shall uphold the President’s decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.”).
has failed to undertake a nondiscretionary duty under the law. As set forth in the following, distinct standards of review apply to each of these types of claims.

A. Challenging Agency Legal Interpretations

1. Interpretation of a Statute

Environmental litigation often centers on whether an agency’s reading of a statute is permissible. As a result, the degree of deference a court must give to an agency’s statutory interpretation plays a critical role in many challenges to agency action. The seminal case addressing the appropriate standard of review is *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* in which the Supreme Court considered “whether EPA’s decision to allow States to treat all the pollution-emitting devices within the same industrial grouping as though they were encased within a single bubble” was “based on a reasonable construction of the statutory term ‘stationary source’” in the CAA.

To answer that question, the Court had to decide whether, and to what extent, EPA’s interpretation of “stationary source” merited deference. The Court concluded that in situations where “Congress has directly spoken to the precise question at issue,” no deference is warranted because “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” But where “the statute is silent or ambiguous with respect to the specific issue, the question for the court” is not whether the agency’s interpretation is right but whether it “is based on a permissible construction of the statute.” Following *Chevron,* courts assessing an agency’s statutory interpretation engage in a two-step analysis, first determining whether the statutory text is clear and, if it is not, then determining whether the agency’s interpretation is reasonable.

Since *Chevron,* the Supreme Court has revised, refined, and narrowed the doctrine’s reach. Environmental law, in particular, has provided the Court with numerous opportunities to weigh in on *Chevron’s* application. A walk through the Court’s more recent notable decisions highlights the most fertile ground for challenges going forward.

In *Massachusetts v. EPA,* the statutory language at issue was the CAA’s requirement that EPA promulgate “standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” A group of states, local

---

92. Id. at 840.
93. Id. at 842–43.
94. Id. at 843.
95. See, e.g., Catskill Mountains Chapter of Trout Unlimited v. EPA, 846 F.3d 492, 506–08 (2d Cir. 2017); U.S. Sugar Corp. v. EPA, 830 F.3d 579, 605–06 (D.C. Cir. 2016).
governments, and private organizations challenged EPA’s denial of their rulemaking petition, which was based on its conclusion that it did not have authority to regulate greenhouse gas emissions because they are not “air pollutants.” When reviewing that challenge, the Supreme Court first noted the “extremely limited” and “highly deferential” review applicable to an agency’s refusal to promulgate a rule. Such review is limited, the Court explained, because “an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.” The Court nevertheless rejected EPA’s position, concluding that “[t]he statutory text foreclose[d] EPA’s reading.” According to the Court, the CAA’s “sweeping definition of ‘air pollutant’ . . . embraces all airborne compounds of whatever stripe.” But that was the view of only five justices. The other four justices viewed EPA’s interpretation of the statute as both “reasonable” and “the most natural reading of the text,” thereby meriting deference.

Less than ten years later, in Utility Air Regulatory Group v. EPA (hereafter UARG), the Supreme Court again considered EPA’s interpretation of “air pollutant” in the CAA, this time reviewing EPA’s conclusion that the Act’s reference to “any air pollutant” triggered permitting requirements for stationary sources that emit greenhouse gases. With the four Massachusetts dissenting justices now in the majority, the Court cautioned that “[e]ven under Chevron’s deferential framework, agencies must operate within the bounds of reasonable interpretation.” And, the Court went on, “reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.” “Thus,” the Court concluded, “an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference.”

The Court went on to conclude that EPA’s interpretation was inconsistent with the design and structure of the CAA and thus did not merit deference. “Massachusetts,” the Court explained, “does not foreclose the Agency’s use of statutory context to infer that certain of the Act’s provisions use ‘air pollutant’ to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program.” EPA was therefore “mistaken in thinking the Act compelled a greenhouse-gas-inclusive interpretation” of the

97. Massachusetts, 549 U.S. at 505–06, 513.
98. Id. at 527–28.
99. Id. at 527.
100. Id. at 528.
101. Id. at 528–29.
102. Id. at 552–53 (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas and Alito, JJ.).
104. Id. at 2442 (citation omitted).
105. Id. (citation omitted).
106. Id. (citation omitted).
107. Id. at 2441.
permitting requirements.\footnote{108} In the Court’s view, the Act was unambiguous and EPA was simply wrong. Two factors, in particular, led the Court to conclude that EPA’s interpretation was incorrect: (1) EPA’s interpretation placed “plainly excessive demands on limited governmental resources”—which was reason enough to reject EPA’s interpretation, and (2) EPA’s interpretation brought about “an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”\footnote{109} As in Massachusetts, however, this view commanded the votes of only five justices, with four others believing that EPA’s interpretation was entitled to deference under \textit{Chevron}.\footnote{110}

An important lesson from both Massachusetts and UARG is that there is almost always value in arguing that the statutory text an agency is interpreting is clear and unambiguous. As both cases show, what is clear to one judge or justice may be ambiguous to another. And since it is much harder to prevail at the second step of \textit{Chevron}, as noted in the following, it is important to try to avoid getting to that step by arguing that the statute is clear. The cases also suggest that if a court is convinced that an agency’s interpretation is incorrect, it can likely find a way to conclude that the statutory language is clear, even if that conclusion is open to debate.

The D.C. Circuit’s recent decision in \textit{Mexichem Fluor, Inc. v. EPA}\footnote{111} is illustrative. The statutory language at issue was the CAA’s requirement that manufacturers “replace” ozone-depleting substances with safe substances.\footnote{112} EPA interpreted that requirement as imposing a continual replacement obligation, allowing EPA to mandate the replacement of non-ozone-depleting substances if those substances are later deemed problematic.\footnote{113} The D.C. Circuit rejected EPA’s interpretation, concluding that EPA’s interpretation stretched the statute “beyond its ordinary meaning.”\footnote{114} But here, too, only two of the three judges believed that the statute was clear, with the third believing that \textit{Chevron} deference applied.\footnote{115} Perhaps contributing to this disagreement was the majority’s concern that EPA’s interpretation reflected a change in the agency’s long-standing position and would give EPA “indefinite authority to regulate a manufacturer’s use” of replacement substances, which the court described as a “boundless interpretation of EPA’s authority” under the statute.\footnote{116} \textit{Mexichem} reinforces that even when arguing that a statute is unambiguous and the agency’s interpretation is wrong in light of the statutory text, it is equally important to show why the agency’s interpretation leads to untenable
results. A court uncomfortable with the implications of an agency’s statutory interpretation will often find a way to conclude that the text requires a different result.

When a court proceeds to step two of the *Chevron* analysis, agencies almost always win. From 2003 through 2013, agencies won 93.8 percent of the time in cases where the court concluded that the statute was ambiguous and the only question was whether the agency’s interpretation was reasonable (*Chevron*’s step two).117 In contrast, agencies won only 39 percent of the time in cases where the court concluded that the statutory text was unambiguous (*Chevron*’s step one).118 These statistics indicate that successfully challenging an agency’s statutory interpretation usually requires convincing a court that the statute is clear and clearly shows that the agency is wrong.

In contrast to *Massachusetts, UARG*, and *Mexichem*, EPA’s statutory interpretation survived judicial scrutiny in *EPA v. EME Homer City Generation, L.P.*119 There, several states, along with industry and labor groups, petitioned for review of EPA’s Transport Rule, which required 27 states to reduce their emissions of nitrogen oxide and sulfur dioxide because those emissions traveled downwind to other states.120 In particular, they challenged EPA’s interpretation of the “Good Neighbor” provision in the CAA. The Court concluded that *Chevron* deference applied: “[T]he Good Neighbor provision delegates authority to EPA at least as certainly as the CAA provisions involved in *Chevron.*”121 In light of that delegation, the only question that remained was whether EPA’s interpretation was permissible—and, in the Court’s view, it was. In so concluding, however, the Court made two notable observations. First, the Court stated that “EPA must have leeway in fulfilling its statutory mandate.”122 Although the Court made that comment in reference to the agency’s need to balance possible undercontrol and overcontrol of emissions, one can imagine arguments for agency leeway reaching far beyond this context. Second, the Court observed: “The possibility that the rule, in uncommon particular applications, might exceed EPA’s statutory authority, does not warrant judicial condemnation of the rule in its entirety.”123 Parties challenging agency action would be well advised to keep in mind this seeming invitation to as-applied challenges, especially in situations where the problematic application of an agency rule is discrete and likely atypical.

Though deferential, the second step of the *Chevron* analysis is not toothless. *Michigan v. EPA*124 provides an example of an agency loss at step two. The question before the Court was whether EPA unreasonably interpreted the CAA when

---

118. *Id.*
120. *Id.* at 1598.
121. *Id.* at 1603.
122. *Id.* at 1609.
123. *Id.* at 1609.
it deemed cost irrelevant to its decision that it was “appropriate and necessary” (CAA Section 112) to regulate power plant mercury emissions. The Court concluded that it did. *Chevron*, the Court explained, “allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.” And, in the Court’s view, the Act required EPA to “consider cost . . . before deciding whether regulation is appropriate and necessary.” EPA’s contrary conclusion was thus “unreasonab[e].” Although purportedly a step two case, it could easily have been written as a step one decision. The Court seemed to think that the statute was clear and that EPA was clearly wrong.

In his concurring opinion, Justice Thomas used the *Michigan* decision to more broadly call into question the propriety of *Chevron*. In so doing, he joined a growing number of “judges, policymakers, and scholars” who “have advocated for eliminating or narrowing *Chevron* deference.” More recently, for example, Judge Janice Rogers Brown of the D.C. Circuit wrote separately in *Waterkeeper Alliance v. EPA* to express her concern that courts’ deference under *Chevron* has led to an abdication of the judicial role. Justice Gorsuch, while a judge on the Tenth Circuit, likewise aired his concerns about *Chevron* deference, observing that “[f]or whatever the agency may be doing under *Chevron*, the problem remains that courts are not fulfilling their duty to interpret the law.” And just before he retired, Justice Kennedy penned a concurrence in *Pereira v. Sessions* “to note [his] concern with the way in which the Court’s opinion in *Chevron* . . . has come to be understood and applied.”

An important constraint on *Chevron’s* application came in the Supreme Court’s 2001 *United States v. Mead Corp.* decision. Sometimes referred to as establishing “step zero” in the *Chevron* analysis, *Mead* held that *Chevron* applies only if Congress delegated interpretive authority to the agency with respect to the provision at issue and the agency approached its decision with a “lawmaking pretense.” Although *Mead* made clear that *Chevron* applies to agency interpretations beyond

---

125. Id. at 2704; see also 42 U.S.C. § 7412 (2009).
126. Id. at 2707.
127. Id. at 2711.
128. Id. at 2712.
129. See, e.g. id. at 2713 (“These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference.”).
131. 853 F.3d 527 (D.C. Cir. 2017).
132. See, e.g. 853 F.3d at 539 (“[If] *Chevron’s* two-step inquiry can be collapsed into one ‘reasonableness’ inquiry no different than current Step Two jurisprudence, there is yet another reason to question *Chevron’s* consistency with ‘the judicial department[s]’ ‘emphatic[]’ ‘province and duty . . . to say what the law is.’”) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).
136. Id. at 226–27, 233.
Judicial Challenges to Federal Agency Action

those following from a formal adjudication or notice-and-comment rulemaking, the Court did not specify the outer limits of *Chevron*’s reach. Instead, it left it to courts to assess Congress’s intent, observing that it can “be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.”137 On the other hand, as the Court has said more recently, “[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended” to implicitly delegate gap-filling authority to the agency.138 Thus, when an agency’s statutory interpretation goes to the heart of a legislative scheme—especially where the interpretation is outside of the agency’s area of expertise—parties may wish to consider arguing that *Chevron* has no role to play.

2. Interpretation of a Regulation

Many environmental cases involve an agency’s interpretation of its own regulations. The Supreme Court’s decisions in *Bowles v. Seminole Rock & Sand Co.*139 and *Auer v. Robbins*140 establish that such an interpretation is entitled to significant deference and is controlling unless “plainly erroneous or inconsistent with the regulation.”141 *Auer* also makes clear that, while an agency’s post hoc rationalization of an interpretation will not carry the day, an agency’s interpretation in a legal brief can warrant deference if it “reflect[s] the agency’s fair and considered judgment on the matter in question.”142

In *Decker v. Northwest Environmental Defense Center*,143 the Supreme Court had occasion to apply *Auer* to an EPA interpretation. There, the petitioner filed suit under the CWA’s citizen-suit provision,144 alleging that the defendants—firms involved in logging and paper-products operations—did not obtain the permits required under EPA’s CWA regulations for the discharge of stormwater runoff.145 EPA, however, interpreted its permitting regulation to exclude the type of stormwater discharges produced by the defendants.146 And that interpretation, the Court concluded, was entitled to deference because it was “a permissible one.”147 “[A]n agency’s interpretation,” the Court observed, “need not be the only possible reading of a regulation—or even the best one—to prevail.”148 Deference under *Auer* was appropriate, the Court concluded, because EPA’s interpretation was rational in

---

137. Id. at 229.
139. 325 U.S. 410 (1945).
140. 519 U.S. 452 (1997).
141. Id. at 461 (citation omitted).
142. Id. at 462.
144. 33 U.S.C. § 1365.
145. 568 U.S. at 606.
146. Id. at 601.
147. Id. at 613.
148. Id.
light of the language used in the regulation, and there was no indication that EPA’s current view was a change from prior practice or a post hoc justification adopted in response to litigation.  

While an agency’s interpretation of its regulation is ordinarily entitled to deference, an agency cannot avoid complying with a regulation based on an untenable interpretation. In National Environmental Development Ass’n’s Clean Air Project v. EPA, for example, the D.C. Circuit confronted EPA’s response to an adverse decision by the Sixth Circuit regarding CAA standards. To account for the adverse decision, EPA issued a directive requiring a different approach to the relevant standards in those areas covered by the Sixth Circuit. The problem for EPA, however, was that separate EPA regulations require regional consistency in the enforcement of the CAA. The court found unconvincing EPA’s attempt to argue that the regional consistency regulations did not in fact require consistency across the United States. Deference, the court noted, is required “unless an alternative reading is compelled by the regulation’s plain language or by other indications of the [agency’s] intent at the time of the regulation’s promulgation.” And here, the plain language of the regional consistency regulations prohibited EPA from adopting different standards in one region of the country, rendering its decision to do so arbitrary and capricious. The D.C. Circuit therefore vacated EPA’s directive.

B. Challenging Agency Policy and Factual Determinations

1. Arbitrary-and-Capricious Review

Agencies make factual findings and policy determinations in a variety of contexts. Unless an agency’s factual findings are made during a formal adjudication, those findings—along with the agency’s policy determinations and discretionary judgments—are generally subject to review under the APA’s arbitrary-and-capricious standard. Under that standard, an agency’s action “must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

149. Some recent opinions have called Auer’s vitality into question. In Decker, Chief Justice Roberts authored a concurrence, joined by Justice Alito, in which he invited challenges to the doctrine by noting that “it may be appropriate to reconsider th[e] principle [set forth in Seminole Rock and Auer] in an appropriate case.” 568 U.S. at 615. He went on to observe that “[t]he bar is now aware that there is some interest in reconsidering those cases, and has available to it a concise statement of the arguments on one side of the issue.” Id. at 616. That statement came in the form of Justice Scalia’s concurrence and dissent, in which he detailed the reasons why, in his view, Auer should be overruled. See, e.g., id. at 621 (“In any case, however great may be the efficiency gains derived from Auer deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”).

150. 752 F.3d 999 (D.C. Cir. 2014).

151. Id. at 1003.

152. Id. at 1004 (citing 40 C.F.R. § 56.3(a), (b) (2012)).

153. Id. at 1008 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).

154. Id. at 1011.

155. Id.
Judicial Challenges to Federal Agency Action

• 29

with law.’”156 As a result, any agency action subject to the APA or a comparable organic statute can be challenged as arbitrary and capricious, and such claims are a standard method of challenging agency rules and policy determinations.

In *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 157 the Supreme Court famously set forth the standard courts use to determine whether an agency action is arbitrary and capricious. “The scope of review under the ‘arbitrary and capricious’ standard,” the Court explained, “is narrow and a court is not to substitute its judgment for that of the agency.”158 Despite that narrowness, agencies must still “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”159 And courts reviewing that explanation “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”160 Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”161

Following *State Farm*, courts reviewing agency actions to determine whether they are arbitrary and capricious tend to consider whether the agency: (1) provided a logical explanation for its decision; (2) considered the potential problems presented by its proposed action; (3) explained any departure from past practice; (4) considered important alternative solutions to the problem being addressed; and (5) considered and addressed relevant and significant comments regarding the proposed action.162

Even when undertaking arbitrary-and-capricious review, courts take care not to encroach on areas within an agency’s expertise, especially in the environmental arena where scientific evidence abounds.163 In *Coalition for Responsible Regulation v. EPA*, 164 for example, states and regulated industries filed petitions for review of EPA’s greenhouse gas regulations, challenging EPA’s determination that greenhouse gases may “reasonably be anticipated to endanger public health or welfare.”165 In response, the court first recounted the exceedingly narrow nature

---

158. Id. at 43.
159. Id. (citation omitted).
160. Id. (citation omitted).
161. Id.
of its review: "[I]n reviewing the science-based decisions of agencies such as EPA, although we perform a searching and careful inquiry into the facts underlying the agency’s decisions, we will presume the validity of agency action as long as a rational basis for it is presented."166 “In so doing, [the court] give[s] an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.”167 Applying that standard, the court refused to “re-weigh the scientific evidence before EPA,” asking only whether EPA had taken the “scientific record into account in a rational manner.”168 The court concluded that EPA had.169

The deference EPA can often claim, however, does not insulate it from the need to provide a rational explanation for its decisions. In American Petroleum Institute v. EPA,170 for instance, the D.C. Circuit vacated an EPA rule because of EPA’s failure to provide a rational explanation. Although it may have been possible for EPA to reach the conclusion it did, the agency’s failure to “engage[] in reasoned decision-making” required it to reconsider the issue.171 American Petroleum also provides a good reminder that even if an agency’s statutory interpretation is entitled to deference under Chevron, actions based on that interpretation must nevertheless be rationally explained in the record.172

Although an agency’s change in policy is likewise subject to arbitrary-and-capricious review, when an agency changes policy, it often must often provide “a more detailed justification than what would suffice for a new policy created on a blank slate.”173 Such justification is required when a “new policy rests upon factual findings that contradict those which underlay [the agency’s] prior policy” as well as “when its prior policy has engendered serious reliance interests that must be taken into account.”174 In such cases, “in order to offer a satisfactory explanation for its action, including a rational connection between the facts found and the choice made,” courts require that agencies “give a reasoned explanation for disregarding the facts and circumstances that underlay or were engendered by the prior policy.”175

2. Substantial Evidence

Whereas challenges to notice-and-comment rulemaking turn largely on arbitrary-and-capricious review, challenges to agency adjudications and formal rulemaking

166. 684 F.3d at 120 (citation omitted).
167. Id.
168. Id. at 122 (citation omitted).
169. Id.
170. 216 F.3d 50 (D.C. Cir. 2000).
171. Id. at 57.
172. See id. (“The second step of Chevron analysis and State Farm arbitrary-and-capricious review overlap, but are not identical.”); see also Arent v. Shalala, 70 F.3d 610, 614–17 (D.C. Cir. 1995) (explaining the difference between a Chevron and arbitrary-and-capricious review).
174. Id.
175. Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 719 (D.C. Cir. 2016) (internal quotation marks and citations omitted).
proceedings are subject to substantial-evidence review under the APA. Several environmental statutes also prescribe this standard of review for challenges to specific agency actions. Under FIFRA, for example, a court reviewing EPA’s decision to register a new pesticide is directed to uphold the agency’s decision “if it is supported by substantial evidence when considered on the record as a whole.” And TSCA, as amended in 2016, provides that certain categories of final rules and orders under that statute must be set aside if “not supported by substantial evidence in the record taken as a whole.”

“Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Under this standard, courts will affirm an agency’s findings “where there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.” The primary difference between substantial-evidence review and arbitrary-and-capricious review is that the former “is limited to evidence developed in formal hearings” or as part of the formal rulemaking process, while the latter “is not so limited, but rather may consider the agency’s developed expertise and any evidence referenced by the agency or otherwise placed in the record.”

The Ninth Circuit’s decision in Natural Resources Defense Council v. EPA illustrates the threshold an agency must surpass to survive substantial-evidence review. At issue there was EPA’s conditional registration, following public notice and comment, of the pesticide NSP-L30SS (NSPW). To conditionally register a pesticide under FIFRA, EPA must find that “use of the pesticide is in the public interest.” The Natural Resources Defense Council (NRDC) challenged three of the factual findings underlying EPA’s conclusion that use of NSPW was in the public interest. The Ninth Circuit rejected NRDC’s first two challenges, concluding that “EPA need not present evidence to support an outcome with certainty; it only needs to present such relevant evidence as a reasonable mind might accept as

177. FIFRA § 2, 7 U.S.C. § 136n(b) (2016); see also, e.g., Pollinator Stewardship Council v. EPA, 806 F.3d 520, 532–33 (9th Cir. 2015) (vacating and remanding EPA’s registration of pesticide based on substantial-evidence review).
180. Nat. Res. Def. Council v. EPA, 857 F.3d 1030, 1036 (9th Cir. 2017) (citation omitted); see also Epsilon Elecs., Inc. v. U.S. Dep’t of Treas., Off. of Foreign Assets Control, 857 F.3d 913, 925 (D.C. Cir. 2017) (If the evidentiary threshold is met, courts “must uphold the agency’s judgment regarding the relevant facts, even if [they] think the evidence tends to weigh against the agency’s finding.” (citation omitted)).
181. Ethyl Corp. v. EPA, 541 F.2d 1, 37 n.79 (D.C. Cir. 1976).
182. 857 F.3d 1030 (9th Cir. 2017).
183. Id. at 1034.
185. 857 F.3d at 1038–39.
adequate to support a conclusion." The Ninth Circuit agreed with NRDC’s third challenge because “EPA cite[d] no evidence in the record to support” the assumption that underlay its decision and instead argued in its brief that its assumption was correct “as a ‘logical matter.’” The court refused to “accept appellate counsel’s post-hoc rationalizations for agency action,” concluding that “where an essential premise of [an agency’s] finding is only supported by bare assumptions, as in the present case, [the court] will find substantial evidence lacking.” *Natural Resources Defense Council v. EPA* shows that it takes more than an agency’s arguments and claimed justifications to survive substantial-evidence review. Instead, when an agency’s action is reviewed for substantial evidence, the agency must be able to point to specific material in the record and explain why that material supports its action.

C. Constitutional Claims

Agencies must of course also comply with the U.S. Constitution. The APA thus specifically provides that agency action will be set aside if it is “contrary to constitutional right, power, privilege, or immunity.” As a result, agency action is susceptible to constitutional challenges as well. For example, parties have used the Commerce Clause to challenge various environmental statutes, including CAA, CWA, the Endangered Species Act, and CERCLA. That said, such challenges are often unsuccessful, as the relevant constitutional terrain is by now generally well established. As a result, when pursuing a constitutional challenge, one should consider what other challenges to the agency action can be brought as well.

The Due Process Clause has also provided a basis for constitutional challenges to agency action. In *General Electric Co. v. Jackson*, for example, General Electric argued that the CERCLA provision allowing EPA to issue unilateral administrative orders (UAOs) directing the cleanup of hazardous waste violated the Due Process Clause because EPA issued the orders without a hearing before a neutral decision maker. The D.C. Circuit rejected the challenge, concluding that “[t]o the extent the UAO regime implicates constitutionally protected property interests by imposing compliance costs and threatening fines and punitive damages, it satisfies due process because UAO recipients may obtain a pre-deprivation hearing by refusing to comply and forcing EPA to sue in federal court.” Environmental actions that

---

186. *Id.* (citation omitted).
187. *Id.* at 1040.
188. *Id.* (citation omitted).
189. *Id.* at 1042.
195. 610 F.3d 110, 113 (D.C. Cir. 2010).
196. *Id.*
limit a person’s use of property can be subject to due process challenges as unconstitutional takings. In *Lucas v. South Carolina Coastal Council*, for example, the Supreme Court considered a takings challenge to a South Carolina law designed to protect the state’s coasts because it prevented the petitioner “from erecting any permanent habitable structures on his” parcels of land. The Court concluded that the challenge was ripe and sent the case back to the South Carolina Supreme Court, which awarded the landowner damages for the temporary taking effected by the law.

**D. Procedural Claims: Statutory and APA**

The APA as well as many environmental statutes prescribe procedural requirements for agency decision making as well. Under the APA, if an agency fails to comply with such requirements, its action must be set aside. Following is a brief discussion of frequently litigated procedural requirements.

**Notice and Comment.** As explained previously in section II, when an agency adopts a “legislative” rule the APA requires that notice of the proposed rulemaking be published in the *Federal Register*, that the public be allowed to comment during a specified time period, and that the agency take into account the public’s comments when promulgating the final rule. There is, however, an exception to the notice-and-comment requirements for “good cause,” which applies when compliance would be “impracticable, unnecessary, or contrary to the public interest.” Some environmental statutes, such as the CAA, provide their own requirements for formal rulemaking, but often those requirements largely mirror those in the APA. Unless an organic statute contains a clear expression of congressional intent to depart from the APA’s procedures, however, the APA applies. Agencies have run afoul of notice-and-comment requirements by trying to take advantage of the “good cause” exception to the requirements where the exception does not apply, by changing their practices in reliance on another agency’s changed practices, and by staying the effective date of an already-promulgated rule.

**Logical Outgrowth.** When an agency’s final regulation differs from the proposed regulation for which it provided notice and requested comment, the final rule

---

200. Id. § 553(b)(3)(B).
202. See Lake Carriers’ Ass’n v. EPA, 652 F.3d 1, 6 (D.C. Cir. 2011); see, e.g., 42 U.S.C. § 7607(d)(1)(V) (2015) (“The provisions of section 553 through 557 and section 706 of Title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies.”).
must be a “logical outgrowth” of the proposed rule. Otherwise, “affected parties would be deprived of notice and an opportunity to respond to the proposal.” The “logical outgrowth” test is thus applied to determine “whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.” If so, a second round of comment is necessary.

A final rule is a logical outgrowth of a proposed rule if commenters “should have anticipated” the final rule based on the provided notice. In City of Portland, Oregon v. EPA, for example, EPA proposed a rule that imposed different treatment requirements on potential drinking water. Under the proposed rule, “source water”—the water from a river or lake that becomes drinking water—had to be treated for a microbial contaminant known as Cryptosporidium, whereas “finished water”—water that goes directly to consumers—only had to be treated for viruses. In its final rule, EPA required that source water, as well as finished water stored in uncovered reservoirs, be treated for both viruses and Cryptosporidium. The cities of Portland and New York, which used uncovered reservoirs, challenged the rule. They argued that EPA did not provide adequate opportunity for notice and comment because the proposed rule did not require treating finished water in uncovered reservoirs for Cryptosporidium and, as a result, they did not know they needed to comment on the safety of uncovered reservoirs. The D.C. Circuit disagreed. According to the court, “EPA made clear that it ‘continue[d] to be concerned about contamination occurring in uncovered finished water storage facilities,’” including from Cryptosporidium, by seeking comments on whether uncovered reservoir water should be treated for Cryptosporidium. The court concluded that EPA’s notice was sufficient because the cities “should have known . . . that the final rule might require . . . treating [open reservoirs]” for Cryptosporidium.

In contrast, the EPA final rule reviewed in Daimler Trucks North America LLC v. EPA did not survive the “logical outgrowth” test. There, EPA’s notice of proposed rulemaking said that it was considering changes to the rules governing the upper limits of emissions from heavy-duty motor vehicles, and the emission standards for nonconformance penalties, which allow engines to be used even if they

209. Id.
210. 507 F.3d 706, 708–10 (D.C. Cir. 2007).
211. Id. at 710.
212. Id.
213. Id. at 715.
214. Id.
215. Id.
216. Id.
217. 737 F.3d 95 (D.C. Cir. 2013); see also Fertilizer Inst. v. EPA, 935 F.2d 1303 (D.C. Cir. 1991) (Regulation failed the “logical outgrowth” test because “EPA’s notice was not sufficient to advise interested parties that comments directed to the [new regulation] . . . should be made.”).
are temporarily unable to meet a new or revised emission standard.\textsuperscript{218} In the final rule, however, EPA also changed one of the eligibility criteria for nonconformance penalties, the “substantial work” requirement.\textsuperscript{219} When the rule was challenged, the court concluded that those covered by the rule could not have anticipated that change ex ante and, as a result, the new “substantial work” regulation did not satisfy the logical outgrowth test.\textsuperscript{220}

Reopener. The reopener doctrine allows courts to review an agency action even if the applicable statute of limitations has otherwise expired. The doctrine is thus “an exception to statutory limits on the time for seeking review of an agency decision.”\textsuperscript{221} It provides that “[i]f for any reason the agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on its merits, even though the agency merely reaffirms its original decision.”\textsuperscript{222} “Whether an agency has in fact reopened an issue is dependent upon the entire context of the rulemaking including all relevant proposals and reactions of the agency.”\textsuperscript{223} An agency’s response to a request to revise its existing regulations, for example, is not sufficient to trigger the reopener doctrine so long as the agency “gave no indication that it had undertaken a serious, substantive reconsideration of the rules in question.”\textsuperscript{224} But where an agency includes the preexisting regulation in a notice of proposed rulemaking and then responds to comments on the provisions later alleged to have been reopened, the reopener doctrine likely does apply.\textsuperscript{225}

E. Challenges to Agency Inaction

Challenges to agency \textit{inaction} play a major role in environmental litigation. The APA states that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.”\textsuperscript{226} The APA also expressly defines the term “agency action” to include “failure to act”\textsuperscript{227} and authorizes courts to “compel agency action unlawfully withheld or unreasonably delayed.”\textsuperscript{228} All of the major federal environmental statutes include directives requiring agency action, many with associated deadlines. Agencies frequently fail to comply with these directives and/or deadlines, however, which often leads to lawsuits intended to force action. Two general types

\footnotesize{218. Id. at 96.  
219. Id. at 100.  
220. Id. at 103 (“EPA ‘entirely failed’ to provide notice of its intention to amend its regulation in the [notice of proposed rulemaking], and offered no persuasive evidence that possible objections to its final rule have been given sufficient consideration, instead treating its revision as a clarification rather than a substantive change.”).  
222. 466 F. Supp. 3d at 144 (citation omitted).  
228. 5 U.S.C. § 706(1) (2012).}
of suits fall within this overall category of “mandatory duty” litigation: “deadline suits” involving claims that the agency has failed to undertake a nondiscretionary duty by a statutory deadline, and “unreasonable delay” suits, in which a plaintiff or petitioner alleges the agency has unreasonably delayed action that is not subject to a specific statutory deadline.

Several environmental statutes specifically authorize “mandatory duty” suits, and in many cases establish related procedural requirements, such as the filing of a “notice of intent” to sue 60 days prior to filing suit. Virtually all deadline suits and many unreasonable delay suits are filed in the district courts, pursuant to the citizen-suit provisions of the relevant statute and/or the APA. As explained in section III.D., the D.C. Circuit and other courts of appeals have long recognized that “[w]here a statute commits final agency action to review by [the courts of appeals, those courts] also retain exclusive jurisdiction to hear suits seeking relief that might affect [their] future statutory power of review. This includes mandamus actions challenging an agency’s unreasonable delay.”

**Deadline Suits.** Deadline suits are common under the CAA and CWA, for example, because of the extensive regime of deadlines and statutory triggers for action. Deadline suits are often resolved through settlement rather than litigation to judgment, because the statute typically clearly defines the agency’s obligations and deadline and the agency may view a negotiated timetable for action as preferable to the risks and uncertainty associated with litigating to a court-imposed deadline.

Most of the major environmental statutes include provisions that require the agency periodically to review and, if appropriate, revise existing regulations. Many also require federal agencies to take action within a specific time frame after receiving a specified submission—for example, to approve or disapprove a plan or other action submitted by a state or regulated entity. Parties have brought many suits against EPA over the years challenging failure to meet such deadlines, resulting in court-imposed deadlines for agency action.

**Unreasonable Delay Suits.** Unreasonable delay suits commonly arise in two scenarios. In one, the statute directs the agency to take a certain action but does not establish a specific deadline. In *In re Idaho Conservation League*, for example, the D.C. Circuit ordered EPA to issue financial assurance rules under CERCLA for the hardrock mining industry, and set deadlines for making final determinations as to

---

229. See, e.g., CAA § 304, 42 U.S.C. § 7604(a), (b) (2011) (CAA citizen-suit provision (1) authorizes suits “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under [the CAA] which is not discretionary with the Administrator,” (2) provides that the district suits shall have jurisdiction, and (3) requires a 60-day notice); CWA § 505, 33 U.S.C. § 1365 (2007) (CWA citizen-provision establishing similar requirements).


231. The CAA, for example, requires EPA to review and if appropriate revise the National Ambient Air Quality Standards (NAAQS) every five years, 42 U.S.C. § 7409(d)(1) (2012), and to review and, if appropriate, revise New Source Performance Standards every eight years, 42 U.S.C. § 7411(b)(1)(B) (2011).
whether to issue such rules for three other industrial sectors.232 Leading up to this order, the court noted that it had “been nearly thirty years since Congress charged EPA with issuing such rules” and “[t]here is a limit to how long a court will entertain an agency’s excuses for its inaction in the face of a congressional command to act.”233

A second scenario commonly giving rise to unreasonable delay suits is where an entity has filed a petition for rulemaking requesting a certain agency action and the agency has not yet responded. The APA authorizes “interested persons” to “petition for the issuance, amendment or repeal of a rule,”234 but does not specify any deadline for a response. Several of the environmental statutes also provide citizens with opportunities to petition EPA for specific rulemaking actions.235 Whereas the denial of such a petition is generally a final agency action subject to judicial review, an agency’s failure to respond generally must be challenged through an unreasonable delay suit.

The D.C. Circuit, in Telecommunications Research & Action Center v. FCC (hereafter TRAC), identified factors commonly applied by courts in deciding whether an agency has unreasonably delayed, including: whether Congress in the enabling statute provided “a timetable or other indication of the speed with which it expects the agency to proceed”; “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake”; “the effect of expediting delayed action on agency activities of a higher or competing priority”; and “the nature and extent of the interests prejudiced by the delay.”236

The Ninth Circuit recently applied the TRAC factors in In re A Community Voice, holding that EPA had unreasonably delayed by failing to initiate a rulemaking to address standards applicable to dust-lead hazards in housing, eight years after having granted a nongovernmental organization’s petition to do so.237 The court catalogued the Ninth Circuit and D.C. Circuit case law addressing unreasonable delay suits.

---

236. 750 F.2d 70, 80 (D.C. Cir. 1984); see also, e.g., Nat. Res. Def. Council, Inc. v. EPA, 798 F.3d 809, 813–15 (9th Cir. 2015) (applying TRAC factors to mandamus petition to require EPA to respond to an administrative petition requesting a ban on a pesticide).
delay claims, highlighting several decisions in which delays of six years or more were found to constitute an unreasonable delay.238

**F. A Note on Record Review**

As a general matter, challenges to agency action are limited to the record developed before the agency.239 That said, from time to time, courts do look outside the record in such cases. For example, in *San Luis & Delta-Mendota Water Authority v. Locke*, the Ninth Circuit explained that although “a court reviewing agency action under the APA must limit its review to the administrative record, . . . a reviewing court may consider extra-record evidence where admission of that evidence: (1) is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) is necessary to determine whether the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.”240 In this particular case, however, the Ninth Circuit concluded that the district court erred by considering extra-record evidence because it used the evidence—declarations—“as a basis for judging the wisdom of the agency’s scientific analysis.”241

In *Southern Forest Watch, Inc. v. Jewell*, the Sixth Circuit affirmed the district court’s denial of a motion for discovery beyond the administrative record.242 “Supplementation of the administrative record,” the court explained, “may be appropriate when an agency has deliberately or negligently excluded certain documents from the record, or when a court needs certain “background” information to determine whether the agency considered all the relevant factors.”243 But in this case, the court concluded, neither of those circumstances existed.244

---


239. *See Bos. Redevelopment Auth. v. NPS*, 838 F.3d 42, 48 (1st Cir. 2016) (“In a traditional APA case, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”) (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)).

240. 776 F.3d 971, 992 (9th Cir. 2014) (citations omitted).

241. *Id.* at 93; *see also Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (rejecting a petitioner’s attempt to supplement the record to show bad faith).

242. 817 F.3d 965 (6th Cir. 2016).

243. *Id.* at 977 (citation omitted).

244. *Id.* at 977–78.
V. REMEDIES

Following a successful judicial challenge to agency action, courts generally have authority to grant relief of the type the APA or other relevant statute has authorized. Courts in environmental suits in particular also may award attorneys’ fees or other costs to the extent authorized by statute, but most litigation challenging federal agency action focuses on injunctive or declaratory relief—that is, preventing enforcement or implementation of the challenged action in whole or in part, declaring the action to be contrary to law, and/or directing agency action consistent with the requirements of the law. Challenges to environmental regulatory actions raise a host of issues related to remedies, including standards for staying or preliminarily enjoining agency action pending litigation, whether and when an agency action should be vacated or instead left in place pending remand to the agency, and severability, among others.

Preliminary Injunctions/Stays of Agency Actions. It usually takes considerable time to litigate a challenge to agency regulatory action to final judgment, and such actions often impose binding requirements and/or have important effects on third parties long before the case is resolved. Accordingly, it is not uncommon for plaintiffs or petitioners to move a court to preliminarily enjoin or stay the challenged regulatory action, so as to maintain the status quo pending resolution of the suit. Such motions are governed by the familiar four-part test applicable to motions for preliminary injunctive relief: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants a stay; and (4) the public interest in granting a stay. The moving party bears the burden of demonstrating that a stay is warranted.

Although the bar is generally considered to be high, courts have granted stays in a number of high-profile environmental cases in recent years. In 2015, for example, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the Clean Water Rule, discussed earlier, which defined the scope of “waters of the United States” subject to regulation under the CWA. And in 2016, the Supreme Court stayed the Clean Power Plan—a CAA regulation addressing greenhouse gas emissions from existing power plants—pending final resolution of challenges to the rule. At the time, challenges to that rule were still pending before the D.C. Circuit, which had denied petitioners’ stay motion. The Supreme Court did not issue an opinion supporting its 5–4 decision to stay the rule, but the industry challengers who sought the stay focused on previous litigation challenging EPA’s Mercury and Air Toxics Standards (MATS) rule. Just the previous year, the Supreme Court

246. In re EPA & Dep’t of Def. Final Rule, 803 F.3d 804 (6th Cir. 2015). The Sixth Circuit’s stay was lifted following the Supreme Court’s decision in National Association of Manufacturers v. Department of Defense, 138 S. Ct. 617 (2018). Several district courts subsequently entered stays of the same rule, applicable in many but not all states across the country.
in *Michigan v. EPA*\(^{247}\) overturned a key threshold finding that was a legal predicate for the MATS rule; but by the time the Court handed down the decision, regulated entities had already largely complied with the rule.

In addition to judicial stays, agencies may seek to stay a rule administratively pending resolution of litigation or further agency action. The APA (5 U.S.C. § 705) provides that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” Some environmental statutes also include provisions authorizing such administrative stays.\(^{248}\) Several recent court decisions have interpreted the scope of these authorities. The district courts in *California v. U.S. Bureau of Land Management*\(^{249}\) and in *Becerra v. Department of Interior*\(^{250}\) held that 5 U.S.C. § 705 allows postponement of the effective date of a regulation only if that date has not already passed; the courts held that Section 705 does not permit extension of *compliance dates* after a rule has already become effective.

In *Sierra Club v. Jackson*, the D.C. District Court construed the scope of 5 U.S.C. § 705, holding (1) that EPA had authority to stay a CAA regulation under Section 705 notwithstanding its separate, narrower authority to stay a regulation pending reconsideration under CAA Section 307(d)(7)(B); (2) that a stay under Section 705 was not a substantive rule and therefore did not require notice and comment rulemaking; and (3) that EPA must justify a stay under Section 705 pursuant to the four-part preliminary injunction test set forth previously, which the court held EPA had failed to do in the case before it.\(^{251}\) And in *Clean Air Council v. Pruitt*,\(^{252}\) the D.C. Circuit vacated EPA’s use of CAA Section 307(d)(7)(B) to administratively stay a CAA regulation of methane emissions from oil and gas operations pending reconsideration of that rule. The D.C. Circuit held that this provision did not authorize EPA to stay a rule where, as in that instance, its reconsideration of the rule was not required by the statute.

**Vacatur versus Remand without Vacatur.** The APA also provides that “[t]he reviewing court shall . . . hold unlawful and set aside” agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law.”\(^{253}\) Judicial review provisions in some environmental statutes use similar language.\(^{254}\) “Setting aside” agency action here has often been thought to refer, at least as a default matter, to vacatur of the action—which effectively nullifies the action. That said, there

---

\(^{247}\) 135 S. Ct. 2699 (2015).

\(^{248}\) See, e.g., 42 U.S.C. § 7607(d)(7) (2015) (CAA provision authorizing stay of effectiveness of rule pending reconsideration, for three months or less).

\(^{249}\) 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

\(^{250}\) 276 F. Supp. 3d 953 (N.D. Cal. 2017).


\(^{252}\) 862 F.3d 1, 4 (D.C. Cir. 2017).

\(^{253}\) 5 U.S.C. § 706(2).

is a long-standing debate and ample case law in environmental litigation regarding whether and when a reviewing court, in lieu of vacating a regulatory action found to be legally infirm, may instead leave the action in place pending agency proceedings to cure the relevant defect.

The D.C. Circuit and several other courts have found that remand without vacatur is an appropriate remedy in some circumstances. The courts have looked both at the nature of the error in the agency’s action and how easily it can be cured, as well as the potential effects of vacatur. For example, the D.C. Circuit in *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission* stated that a court’s decision about whether to vacate, in addition to remanding, depends on “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.”255 In *Mississippi v. EPA*, the D.C. Circuit remanded without vacatur one of the CAA national ambient air quality standards under review.256 The court left the standard in place because EPA’s failure “to explain itself is in principle a curable defect” and “vacating a standard because it may be insufficiently protective would sacrifice such protection as it now provides, making the best an enemy of the good.”257

In its 2008 decision in *North Carolina v. EPA*, the D.C. Circuit initially vacated the Clean Air Interstate Rule based on fundamental flaws in EPA’s legal interpretation, but on rehearing changed its remedy to a remand without vacatur based on concerns with the impacts of vacatur on public health and state and industry plans with regard to regulatory implementation.258 Underscoring the controversy this issue can raise, the D.C. Circuit’s 2007 decision in *Natural Resources Defense Council v. EPA*—which vacated a CAA rule setting emission standards for boilers and waste incineration units—sparked both a concurring opinion from Judge Randolph and an opinion dissenting in part by Judge Rogers, addressing the circumstances in which vacatur or remand without vacatur are appropriate.259

**Voluntary Remands and Confession of Error.** It is not uncommon for an agency to request a voluntary remand where the agency decides to reconsider a challenged regulatory action. Courts generally have endorsed this approach in environmental cases.260 Although not an environmental case, the Federal Circuit’s decision in *SKF USA, Inc. v. United States* provides an extensive and widely cited judicial discussion

---

255. 988 F.2d 146, 150–51 (D.C. Cir. 1993) (citation omitted); see also Idaho Farm Bureau Fed’n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995) (remanding a Fish and Wildlife Service regulation to the agency with direction to follow required procedures while allowing the rule to remain in effect in the interim).

256. 744 F.3d 1334 (D.C. Cir. 2013).

257. Id. at 1362 (quoting Am. Farm Bureau Fed’n v. EPA, 559 F.3d 512, 528 (D.C. Cir. 2009)); see also Envtl. Def. Fund, Inc. v. EPA, 898 F.2d 183, 190 (D.C. Cir. 1990).

258. 550 F.3d 1176, 1178 (D.C. Cir. 2008).

259. 489 F.3d 1250, 1261–67 (D.C. Cir. 2007).

260. See, e.g., Ethyl Corp. v. Browner, 989 F.2d 522, 524 n.3 (D.C. Cir. 1993); Anchor Line Ltd. v. Fed. Mar. Comm’n, 299 F.2d 124, 125 (D.C. Cir. 1962) (“When an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency.”); Cal. Cmty. Against Toxics v. EPA, 688 F.3d 989, 992 (D.D.C. 2012) (“Generally courts only refuse voluntarily requested remand when the agency’s request is frivolous or made in bad faith.”).
of the law of voluntary remand.\textsuperscript{261} In \textit{SKF}, the court distinguished between three scenarios—cases in which voluntary remand is sought based on intervening events outside the agency’s control, those in which the agency seeks to reconsider its position without confessing error, and those in which the agency seeks to correct an acknowledged error—and opined that different standards should govern in each.\textsuperscript{262}

The D.C. Circuit in \textit{Limnia Inc. v. Department of Energy} recently clarified that although the agency need not confess error provided it does not seek vacatur of its action, voluntary remand is appropriate only where the agency professes an “intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.”\textsuperscript{263} The question whether a court may grant an agency’s motion for voluntary remand \textit{with vacatur} of a regulation—notwithstanding the general principle that an agency can only rescind an action by means of the same procedures (e.g., notice-and-comment rulemaking) it used to take the original action\textsuperscript{264}—is a source of continuing controversy.\textsuperscript{265}

\textbf{Severability.} Where a court finds that an element or provision of a rule or other regulatory action is contrary to law, it may be called on to determine whether this portion can be severed from the broader action of which it is a part. The Supreme Court in \textit{K Mart Corp. v. Cartier} applied to a Customs Service regulation virtually the same test it set forth for statutory severability analysis in \textit{Alaska Airlines v. Brock}:

\textsuperscript{266} First, would the agency have adopted the regulation but for the inclusion of the portion held to be infirm? And second, would severance of the offending regulatory provision impair the function of the regulation as a whole?\textsuperscript{267} In the environmental context, the D.C. Circuit applied this framework in \textit{Davis County Solid Waste Management v. EPA}, amending its initial opinion in the case to hold that the relevant CAA emission standards were severable and accordingly should be vacated only in part.\textsuperscript{268}

\begin{itemize}
  \item \textsuperscript{261} 254 F.3d 1022 (Fed. Cir. 2001). See generally Joshua Revesz, \textit{Voluntary Remands: A Critical Reassessment}, 70(2) \textit{Admin. L. Rev.} 361 (Spring 2018).
  \item \textsuperscript{262} 254 F.3d at 1027–29.
  \item \textsuperscript{263} 857 F.3d 379, 386–88 (D.C. Cir. 2017).
  \item \textsuperscript{266} 480 U.S. 678 (1987).
  \item \textsuperscript{267} 486 U.S. 281, 286–93 (2012).
\end{itemize}
VI. CONCLUSION

Suits challenging agency action have a uniquely consequential role in environmental law, shaping the interpretation of statutes and setting the parameters for agency decision making. These suits raise the same general types of issues encountered in other administrative law litigation—ranging from threshold jurisdictional and procedural issues to standards of review to remedies. But as the previous discussion makes clear, each statute establishes a unique framework, and environmental cases often raise special concerns—including those related to the standing of citizen groups to challenge agency action, the focus on protection of public health and the environment, and the deeply technical content of much environmental regulation. This chapter gives a 30,000-foot view of the landscape—a starting point for more in-depth inquiry into the myriad issues these important cases raise.