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As they say, “the devil is in the details.” This issue delves into the details—the licensing and permitting—that create the scaffolding used to implement and enforce the substantive laws in the natural resources, energy, and environment space. Permitting and licensing can make or break a project; stop or facilitate a project; provide protections or create roadblocks. The process of requiring licenses or permits can act as a gatekeeper; be used affirmatively as a sword or defensively as a shield. It can influence which agency—federal, state, or tribal—controls the process or project, or can provide input and influence. The articles in this issue offer numerous examples of such details.

The first article, by Carolyn McIntosh and Shoshana Schiller, explores the interplay between CERCLAs permit bar that preempts state and local permitting requirements when conducting federally approved remediations, and state and municipality attempts to use creative methods to obtain some level of local control and oversight over the process. Bryan Levey discusses state assumption (or lack thereof) of the CWA wetlands permitting process and the tension between what the states can assume versus what the federal Army Corps define as jurisdictional and retained waters. Author’s John Ruple and Heather Tanana look at NEPA, debunking the common criticism that the NEPA process is overused by environmentalists, causes excessive litigation and results in unreasonable delays in completing projects and issuing necessary permits. The fourth article, written by Nathan Eady, Christopher Kane, Christian Marsh, and Patrick Veasy, looks at how the FAST-41 process can be used to facilitate the successful processing and approval of important infrastructure projects by streamlining the NEPA process, increasing coordination between federal agencies and providing enhanced legal protection. Rounding out the articles on rules designed to create process efficiencies, Lauran Sturm and Elizabeth Hurst’s article discusses the recent EPA-proposed rule to streamline the Environmental Appeals Board’s permit review process.

The tension between state and federal control is explored in Charles Sensiba and Elizabeth McCormick’s piece on obtaining state certification under CWA § 401 for infrastructure projects requiring a federal permit or license regulated by the Federal Energy Regulatory Commission in the context of the recent Hoopa Valley Tribe D.C. Circuit decision and EPA’s June 1, 2020 final rule to clarify the governing regulations. Galen Schuler, Greg Corbin, and Lawson Fite discuss how candidate conservation agreements with assurances can be a helpful conservation tool for species being considered for listing under the Endangered Species Act. Mack McGuffey writes a primer on how EPA’s CAA New Source Review reform policy of project emissions accounting will allow sources to evaluate more consistently emissions from projects affecting more than one emission unit. Dennis Donohue and Daniel Ettinger provide advice on navigating Tribal opposition to permits necessary for mining projects, using project examples from the Great Lakes region for their insights on coordinating and avoiding potential delays in the process. Finally, Andrea Driggs, Stephanie Regenold, Matt Rojas, and Chris Thomas analyze the limited use of CWA state assumption of 401 and 404 permits with the added overlay of how the recent Supreme Court County of Maui decision and recent EPA-issued rules impact that process.

Speaking of details, this year, NR&E will mark its 35th anniversary and is introducing a new modern, clean, and airy look to its publication, with fresh new colors and paper (recycled as always) and sturdier binding. The magazine will continue its mission to inform lawyers of legislative and regulatory developments; offer solutions to the day-to-day problems that present themselves in the practice of natural resources, energy, and environmental law; and serve as a forum for discussion of environmental, resource and energy policy. Enjoy the read.
The Road to the Library
Sheila Hollis

My love of libraries began in early childhood; art and dinosaurs initially caught my attention and evolved into a hunger for anthropology and archaeology. As an only child, I lived with my mother, who was a weapons designer, geological and electrical draftsman, designer, and artist. She was an inveterate insomniac reader, a repository of what she described as “the useless information encyclopedia.”

In my early years, we moved often, and lived in a number of places, including Hanford, Washington, Los Alamos, New Mexico, California, Denver, Casper, Wyoming, and the eastern plains of Colorado. Regardless of our location, however, I always found my way to a library; a “paradise,” an escape (a cool Bookmobile stopping by for a day in the 100-degree heat of the High Plains with a caring librarian was an escape to heaven!). The ideas planted in those experiences with libraries and books continued to blossom over the decades, and guided me to people, places and life choices in subtle but powerful ways.

My love of books and the written word continued into adulthood, through law school and into my professional career. My work with the Section of Environment, Energy, and Resources eventually gave me the opportunity to serve on the Standing Committee on the Law Library of Congress (SCLLOC) over a decade ago, and the experience of serving as its Chair from 2015–2018 was a profound privilege. The SCLLOC was created in 1932 and encourages the knowledge and love of the treasure trove of ancient, contemporary, domestic, and international law contained within the Library of Congress (LOC) Law Library. The LOC itself was Thomas Jefferson’s legacy from the early 1800s. Sadly, during the War of 1812, the LOC (and much of Washington) was burnt to the ground. A handful of Jefferson’s books survived and remain the backbone of the LOC (and can be viewed there today).

The LOC is congressionally and privately funded. Vast collections of books, maps, artwork, designs, and other materials are lovingly cared for, catalogued, studied, and made available in person or online to America and the world. As one of the great libraries of the world, with the British and Vatican Libraries and other major national libraries, it is the ultimate “jewel box,” where, for example, Stradivarius instruments are displayed all year and on one magical day of the year, actually played! Ancient, exquisite books may be savored in the Rare Books collection. The LOC is open to all. As the first public building in the United States with electric power, the LOC’s historic Jefferson Building and its Great Hall pay particular homage to electric power, energy, and the environment.

After all the hours spent over the years in a wide variety of libraries consuming words and ideas, I found myself reinvigorated by the honor of chairing for four years the ABA SCLLOC, and it reinforced the powerful impact libraries have had on my life. The events coordinated by the SCLLOC in celebration of the 2015 800th anniversary of the Magna Carta, the 2017 the Charter of the Forest; the 2019–20 centennial of the 19th Amendment, and the 400th anniversary of the Mayflower Compact in 2020 are all part of this journey.

Everyone should visit the LOC and the Law Library and the Rare Books Collection. There are a huge number of free resources available online, and librarians are there to support you! I encourage everyone to participate in the outreach and events organized by the ABA’s SCLLOC.

Even in recent times, libraries are always the first to experience disbanding or destruction when learning is squelched, obliterated, or revised. Yet, somehow great books survive over the millennia to be treasured in various sacred sanctuaries across the globe. But it requires people who care about them and the irreplaceable legacy they provide to protect and preserve them into the future.

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The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, is a broad statutory scheme that, among other things, provides for cleanup of hazardous substances released into the environment. Congress, in enacting and reauthorizing CERCLA, determined that to effect the prompt and permanent cleanup of such sites to protect the environment and public health from harm, state and local permitting requirements needed to be preempted. Thus, section 121(e)(1) of CERCLA provides that no permits shall be required for remediations conducted pursuant to CERCLA. Defining the contours of this permit bar has, however, been left to the U.S. Environmental Protection Agency (EPA) and the courts. Moreover, this simple directive has resulted in states and municipalities attempting to impose permitting requirements under the guise of “permit equivalence” requirements, zoning changes, or municipality by-laws. This article will discuss the scope of the permit bar as currently interpreted and how remediating entities may respond to the concerns of local and state governments while carrying out CERCLA’s mandate.

Cleanups under CERCLA may be conducted by private parties, commonly known as potentially responsible parties (PRPs), or by the EPA itself. In order to determine the appropriate response action to a release of hazardous substances, potentially contaminated sites are first identified and investigated. Then, short-term removal and/or long-term remediation methodologies are studied, after which a cleanup plan is preliminarily selected. Each step in this process takes years, and in some cases, decades, before actual remediation begins. This process also must comply with the requirements of the National Contingency Plan (NCP), which provides procedures for responding to hazardous spills and releases, including how a remedial plan is selected. Throughout the process, the NCP requires that the local community be informed and involved, where appropriate. The cleanup plans, known as Action Memos for removals and Records of Decision for remediations, are published in the Federal Register before adoption so that the public may comment on those plans. In cases where the work is being done by one or more PRPs, once the selection of a remedy becomes final, implementation is incorporated into an Order, either by consent or otherwise, with strict timeframes for compliance by the remediating parties. Even at this stage, if a state does not agree to the remedial action, it can intervene in the proceedings.

Courts have held that CERCLA, though comprehensive, does not expressly preempt state law. Indeed, the NCP and section 121(d) of CERCLA generally require that when selecting a remedy, cleanups must meet state-identified applicable or relevant and appropriate requirements (ARARs) where they are more stringent than federal ones. However, to ensure that remedies that have gone through the stringent requirements of the NCP are not derailed by state or local entities, CERCLA also contains an express provision that exempts cleanups from local permitting requirements. Section 121(e)(1) of CERCLA provides that “[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted...
Entirely onsite, where such remedial action is selected and carried out in compliance with this section.” This provision (the Permit Bar) is echoed in the NCP itself, which provides that the Permit Bar is applicable to response actions “conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122.” 40 C.F.R § 300.400(e)(1). Thus, the Permit Bar applies regardless of whether the cleanup is being conducted by EPA, by another federal agency, by a state or political subdivision, by a tribal nation, or by a PRP or PRP group.

While seemingly clear on its face, the contours of the Permit Bar remain subject to interpretation and refinement, primarily with regard to what laws or regulations constitute a prohibited permit requirement as well as the geographical scope of activities deemed to be “onsite.” Moreover, not fully accepting of their loss of control, states and municipalities have attempted creative methods of imposing “permit equivalency” requirements, which, for the most part, have been rebuffed by the EPA and the courts.

In analyzing whether the Permit Bar applies, parties must first determine whether the activity is a removal or remedial action under CERCLA, whether it is considered “onsite,” and whether the regulation at issue is a permitting requirement.

Removal or Remediation

The Permit Bar is limited to activities associated with a removal or remedial action under CERCLA. This limiting feature was addressed specifically in In re U.S. Department of Energy Hanford Nuclear Reservation (Hanford), where the EPA argued that the Department of Energy (DOE) was required to obtain permits for certain drums that were storing hazardous waste at the Hanford Nuclear Reservation. 2000 WL 356388 (EPA ALJ Feb. 9, 2000). The DOE responded that, because portions of the Reservation were on the National Priorities List (NPL), a list of sites identified by EPA as requiring remediation under CERCLA due to risks to health or the environment, no such permit could be required under section 121(e)(1). EPA responded that the stored drums at issue were not part of any approved response action, and therefore the permit exception was not applicable. The administrative law judge hearing the matter agreed with the EPA in this regard, noting that “Section 121(e) (1) contemplates the presence of a qualifying action. . . . [I]t is further limited by its restriction to that portion of any removal or remedial action. Here, EPA rightly points out that there is no showing that the storage of the 17 drums in the 200 East Pipe Yard was part of any such CERCLA removal or remedial action.” Id. at *9.

Onsite Activity

Neither of the other key terms that establish the Permit Bar—“permit” and “onsite”—are defined in CERCLA. Nonetheless, we look to the statutory context to understand congressional intent with respect to these terms. See Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001) (holding that statutory interpretation requires reading the statute as a whole). CERCLA does define the term “facility” as a starting point for determining the meaning of “onsite.” A CERCLA “facility” means, in part, “any site or area where a hazardous substance

has been deposited, stored, disposed of, or placed, or otherwise come to be located.” 42 U.S.C. § 9601(9)(B). Further, in the context of each individual listing of a site on the NPL, EPA defines what constitutes “onsite.”

As a site or hazardous substance releases are investigated, by definition, what constitutes the “facility” may change as EPA determines where hazardous substances have “otherwise come to be located.” Thus, EPA can redefine the boundaries of the CERCLA site. See, e.g., Eagle-Picher Indus. v. EPA, 822 F.2d 132, 144 n.59 (D.C. Cir. 1987) (approving EPA expansion of the NPL site from 15 to 115 square miles based on discovery of full extent of contamination); United States v. Asarco, Inc., 214 F.3d 1104, 1104–05 (9th Cir. 2000); see also site history in the district court case of the same name, 28 F. Supp. 2d 1170, 1180–81 (D. Idaho 1998) (“site” was originally defined to be a 21-square-mile area known as the “Box” and was ultimately expanded to include at least 1,500 square miles and essentially all of the watershed of the South Fork of the Coeur d’Alene River); Coeur d’Alene Tribe v. Asarco, Inc., 2000 U.S. Dist. LEXIS 23434, at *20 (D. Idaho June 1, 2000) (eventually the “site” was narrowed by EPA to exclude the North Fork of the Coeur d’Alene River and the Spokane River). Conversely, as site remediation is completed, portions of the site can be deleted or “delisted” from the NPL, contracting the site boundaries. See 40 C.F.R. § 300.425(e).

To ensure that remedies that have gone through the stringent requirements of the NCP are not derailed by state or local entities, CERCLA also contains an express provision that exempts cleanups from local permitting requirements.

EPA has, however, expressly rejected the notion that “onsite” is necessarily coextensive with the boundaries of legal ownership or even with the CERCLA definition of “facility.” Hanford, 2000 WL 356388, at *1–2, 9. For purposes of the Permit Bar, EPA has defined “onsite” to mean “the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.” 40 C.F.R. § 300.5. EPA reasons that these measures—legal ownership or CERCLA “facility” boundaries—do not necessarily relate to the areal extent of contamination, or such contamination very nearby, which is the focus of EPA’s “onsite”
The cases that have examined the contours of the term “permit” in the context of CERCLA Section 121(e)(1) have concluded that neither a more restrictive local treatment requirement nor a zoning law is a “permit.”

EPA’s determination of what constitutes “onsite” is made in the context of a specific CERCLA site or facility, and, according to EPA, is “not a generic determination but rather it is a ‘response action-specific analysis.’” Hanford, 2000 WL 356388, at *6. This approach is reflected by standard provisions in EPA’s model administrative settlement agreements and orders on consent. See, e.g., RI/FS Administrative Settlement Agreement and Order on Consent (Sept. 2016), epa.gov/enforcement/guidance-2016-rifs-asao-and-uao. For example, in its CERCLA model RI/FS Administrative Settlement Agreement and Order on Consent (Model RI/FS AOC), EPA defines “Work” to mean all activities and obligations the settling party is required to perform under the settlement. See Model RI/FS AOC, sec. III, Definitions. Model agreements devote several paragraphs to a specific definition of the “site” and location of hazardous substance releases at the site. See id. sec. IV, Findings of Fact. These model agreements characteristically include a section titled “Compliance with Other Laws,” which states, in part:

Nothing in this Settlement limits Respondent’s obligations to comply with the requirements of all applicable state and federal laws and regulations when performing the RI/FS. No local, state, or federal permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work), including studies, if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621.

Id. sec. XIV, Compliance with Other Laws. This site-specific, response-action-specific approach is generally sufficient to eliminate any ambiguities about the scope of the Permit Bar in the context of the actions being taken under that settlement agreement. Where we tend to see Permit Bar challenges arise nevertheless are those instances where the state, local government, or citizens in proximity to the CERCLA site do not like the remedy. The remainder of this article describes some creative “work around” efforts.

Permitting Requirement

The case law addressing the CERCLA meaning of “permit” is limited. Not surprisingly, those cases generally address efforts by local government to impose their laws. CERCLA includes multiple processes for state involvement in site identification, listing, investigation, remedy selection, and oversight. See, e.g., 42 U.S.C. §§ 9605(a)(8)(B), 9620(a)(4), 9620(e)(1), 9620(f), 9621(d)–(f), 9652(d). Relevant here is the requirement that the remedy selected—or agreed to—by EPA must meet “any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal [counterpart] standard.” Id. § 9621(d)(2)(A)(ii). The more restrictive standards must meet the ARARs of that section and the state must actively engage to identify its ARARs to EPA for them to be incorporated in the remedy selection process. However, it is EPA, by delegation from the president, that ultimately must select the remedy. Id. §§ 9604(c)(4), 9621(a); Town of Acton v. W.R. Grace & Co.—Conn. Technologies, Inc., 2014 WL 7721850, at *8 (D. Mass. Sept. 22, 2014). Moreover, EPA is not obligated to incorporate more stringent local requirements, only more stringent state requirements. Town of Acton, 2014 WL 7721850, at *8–10.

The cases that have examined the contours of the term “permit” in the context of CERCLA section 121(e)(1) have concluded that neither a more restrictive local treatment requirement nor a zoning law is a “permit.” That said, in those instances, the courts have typically found that the local
requirement was preempted. In *Town of Acton*, the court first considered the *Black's Law Dictionary* definition of “permit” to mean “a certificate evidencing permission; a license.” *Id.* at *13. Also citing to *Rhode Island Recovery Corp. v. Rhode Island Department of Environmental Management*, the court noted the definition could include “a written approval.” *Id.* (citing *Rhode Island Recovery Corp. v. R.I. Dept. of Envtl. Mgmt.*, 2006 WL 2128904 (D.R.I. July 26, 2006) (finding that a “written approval” is a “permit” and therefore was subject to the CERCLA section 121(e)(1) Permit Bar)). In contrast, the court found that a municipal bylaw was not a permit.

In *Town of Acton*, in connection with a CERCLA site remediation, W.R. Grace had constructed a groundwater treatment system as one component of a remedy selected by EPA in a Record of Decision (ROD) with the concurrence of the Massachusetts Department of Environmental Protection. Grace was permitted to seek approval for discontinuing operation of the treatment system if it could meet certain criteria. Years earlier, Acton had adopted a bylaw requiring that any cleanup continuously meet or exceed groundwater cleanup standards set in the bylaw and those standards were more restrictive than state or federal counterparts. Acton challenged Grace’s request to discontinue treatment, based on the bylaw. The United States sought to bar application of the bylaw, contending that it was a “permit” and precluded by section 121(e)(1). Because the bylaw did not require any sort of permission, approval, or license, the court held that it was not a permit. Nonetheless, the court rejected application of the bylaw under the CERCLA section 122(e) enforcement bar.

The City and County of Denver tried a different approach to change a remedy; it tried to enforce a local zoning ordinance to preclude maintenance of hazardous waste in an area zoned for industrial purposes. *United States v. City & Cnty. of Denver*, 100 F.3d 1509 (10th Cir. 1996). In that case, after public comment and with state concurrence, EPA selected onsite solidification of contaminated soils for the Shattuck Chemicals portion of the Denver Radium Superfund Site. Denver provided comments but did not reference the zoning ordinance until after EPA’s remedy decision. Denver acknowledged the Permit Bar as an express preemption and then argued that “implied preemption cannot exist when Congress has included an express preemption clause in the statute.” *Id.* at 1513. The court rejected that and Denver’s further argument that a local zoning ordinance was a state environmental or facility siting law that should be incorporated as an ARAR. *Id.* Because the zoning law would preclude implementation of the EPA-selected remedy, the court held that application of the zoning ordinance would present an actual conflict with the remedy; thus, the zoning law was implicitly conflict preempted. *Id.*

The Tenth Circuit and the U.S. District Court for the District of Colorado have recognized one exception to the Permit Bar—for a permit that was in existence and operative at the time the site was added to the NPL. We have identified only two such cases, both in Colorado and both concerning a federal facility, the Rocky Mountain Arsenal. *Colo. Dept. of Pub. Health & Env’t, Hazardous Materials & Waste Mgmt. Div. v. United States*, 381 F. Supp. 3d 1300 (D. Colo. 2019) (citing *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993)). In these cases, the U.S. Department of the Army historically used a surface impoundment known as “Basin F” for the disposal of a wide range of hazardous wastes. Before the Arsenal was listed on the NPL, Basin F was regulated under the Resource Conservation and Recovery Act (RCRA), as delegated by EPA to the State of Colorado, through the Colorado Hazardous Waste Act (CHWA). Colorado sought to require the Arsenal operator, Shell Oil Company, to obtain a RCRA post-closure permit for Basin F and to require the Army to obtain post-closure permits for several other onsite waste disposal locations. In rejecting Shell’s and the Army’s challenges to the post-closure permit requirement, both courts held that the Arsenal is subject to regulation under CHWA, and to its permitting requirements, because the Arsenal was regulated under CHWA/RCRA before it became an NPL site. *Colo. Dept. of Pub. Health & Env’t*, 381 F. Supp. 3d at 1309 (citing *Colorado*, 990 F.2d at 1576).

### Addressing Permit Equivalency Requirements

Despite the direct language of section 121(e)(1) and even when the local action falls clearly within the Permit Bar, states and municipalities have attempted to assert authority over response actions by insisting that remediating entities engage in a “permit equivalency” process. Generally, such processes seek to require the completion of an application in advance of activities, while waiving other standard permit features such as the payment of a fee. In 1992, the EPA issued a memorandum, OSWER Directive 9355.7-03 (1992 Memorandum), in which EPA sought to clarify its position, starting with a strong statement that “[i]t is not Agency policy to allow surrogate or permit equivalency procedures to impact the progress or cost of CERCLA site remediation in any respect.” 1992 Mem. at 1.

The 1992 Memorandum’s discussion begins with an acknowledgment that permit equivalency requirements often seek to ensure that the remedial plan complies with local ARARs and cites to the Notes to the NCP encouraging coordination and consultation with local agencies regarding the application of substantive requirements. However, it also recognizes that these processes are often as lengthy and time-consuming as actual permitting requirements, thus eviscerating the purpose and intent of section 121(e)(1). The 1992 Memorandum also expresses concern for the authority of the EPA, arguing that acquiescence to such processes “also suggests, incorrectly, that the approval of a permitting authority is required before a CERCLA action may proceed or before an ARARs determination may be made with respect to the permitting regulations.” *Id.* at 3.

In discussing the potential responses to a local permit equivalency requirement, EPA acknowledged that lead agencies can simply refuse to participate, citing section 121(e)(1). But EPA then goes on to propose a more accommodating alternative, namely “actively consult[ing] on a regular and frequent basis with the permitting authority, in situations where the lead agency deems it helpful to hasten ARARs identification.” *Id.* at 5. The 1992 Memorandum recommends timely providing key documents to the local agency and potentially
entering into agreements that contain protocols to “establish specific time limits for the permitting authority to provide technical assistance in the evaluation of site-specific ARARs,” so long as it is clear that the remediating entities can terminate the consultation at any time in order to avoid delays and excessive costs. Id.

In addition to the 1992 Memorandum, EPA's RCRA, Superfund & EPCRA Hotline Training Module, Introduction to: Applicable or Relevant and Appropriate Requirements, EPA 540-R-98-020 (June 1998) (1998 Training Module) also addressed the scope of the permit exception, as follows:

EPA interprets CERCLA § 121(e) broadly to cover all administrative provisions from other laws, such as recordkeeping, consultation, and reporting requirements. In other words, administrative requirements do not apply to on-site response actions . . . . Only the substantive elements of other laws affect on-site responses.

1998 Training Module at 7. The module then goes on to discuss the Permit Bar in relation to other federal statutes. For example, the module notes that “CERCLA response actions frequently trigger administrative NPDES standards, because only surface water that is within or in very close proximity to [a Superfund site] is considered on site.” Id. at 15. On the other hand, it makes clear that a remediating entity would not have to obtain a permit for onsite storage of hazardous waste otherwise subject to RCRA.

Notwithstanding the expansive language and interpretation of section 121(e)(1), states still seek to have remediators, including the EPA, engage in a permit equivalency process. For example, the New Jersey Department of Environmental Protection (NJDEP) Division of Water Supply and Geoscience generally requires a party to obtain a Water Allocation Permit for any diversion of ground or surface water in excess of 100,000 gallons per day. Recognizing that it cannot require remediators acting pursuant to CERCLA to obtain such a permit, New Jersey has a "C.E.R.C.L.A. Application Permit Equivalency" form that in many ways mimics its Water Allocation Permit Application. While simpler, both forms request information regarding the location and property information, the quantity of water proposed to be diverted and its source, and a map depicting the location of affected and nearby wells, landfills, known contamination, and wetlands. Similarly, NJDEP's Division of Land Use Regulation purports to require completion of a permit application for CERCLA activities in flood hazard, coastal, and freshwater wetlands areas.

New Jersey has also attempted to unilaterally impose permits on exempt activities. In a recent matter, NJDEP sent a remediating PRP group a “New Jersey Pollutant Discharge Elimination System (NJDEP) permit equivalent.” The document purports to “authorize” certain discharges and warns that “compliance with conditions of the permit equivalent will be monitored by the Department’s Site Remediation Program.” While at times couching the document's requirements as “recommended,” it clearly contains mandatory language requiring monitoring, reporting, testing methodologies, and maximum limitations on certain effluents, and threatens suspension of the “permit equivalent” for violations.

As an even more striking example, in 2003, the Missouri Department of Natural Resources’ Water Pollution Control Program accepted and acted on “permit equivalent applications” completed by EPA Region VII, contending that the effluent limitations for stormwater discharges, sampling, reporting, and best management practices requirements in the document were “not a permit per se,” for the Annapolis Lead Mine Site and the Doe Run Leadwood-Eaton Tailings Dam Area but rather the establishment of relevant ARARs under Missouri’s Clean Water Law. Nevertheless, the documents themselves refer to the “permittee” throughout. See, e.g., Applicable or Relevant and Appropriate Requirements (ARARs) Discharges to Waters and Groundwater of the State at Leadwood, St. Francois County, Sec. 4, T36N, R4E, MO, dnr.mo.gov/env/wpp/permits/issued/docs/ARAR011.pdf.

Such overreaching by states may rightly concern PRPs, but early engagement can head off conflict. When dealing with state and local entities, compliance with permitting requirements, whether or not identified as such, once a determination is made as to whether a local requirement implicates the Permit Bar, it is important to determine whether the actual requirement is one that has already been met, or can be met without disruption of the remedial work. Whether representing a state or a PRP, encourage your client to be actively engaged in the remedy selection process. As an alternative to imposing permit requirements, states have the opportunity to apply their more restrictive standards and siting criteria through the ARARs identification process of CERCLA section 121(d) and, in that way, influence the remedy decision. PRPs generally have an interest in reducing process red tape to reduce costs. It is incumbent upon the PRP doing the work to communicate closely with EPA about the location of all work to ensure that it is truly within site boundaries or is defined by EPA to be “onsite” within the definition of 40 C.F.R. § 300.5. Lastly, if your client is a local government that has specific concerns about remedy options, it should be an active participant in the public comment process and work with the relevant state agencies to ensure they are fully informed about important local standards, requirements, and siting criteria that could influence the remedy. Ideally, such local requirements should be included by the state as state ARARs where feasible. ¶

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When States Assume Fulfilling Congress’s Objectives Under the Clean Water Act’s Wetlands Program

Brian R. Levey

For over 40 years, one of the Clean Water Act’s (CWAs) key regulatory programs has not functioned as Congress originally intended, producing, over time, significant inefficiencies in the federal permitting process that increase costs and delays for developers and hinder environmental review and protection. Today, renewed efforts at both the state and federal levels seek to achieve the objectives established by Congress in 1977. In particular, the U.S. Environmental Protection Agency (EPA) recently announced that it intends to revise long-standing regulations that have derailed state implementation of the program. EPA’s approach to this rulemaking, and whether it can adequately address critical barriers to state assumption, has the potential to transform the regulatory landscape and produce substantial benefits for states, the public, the regulated community, and the environment.

In 1972, Congress passed the CWA for the purpose of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation’s waters." 33 U.S.C. § 1251(a). Congress established a variety of tools to achieve this goal, including funding, research, and regulatory programs, and chose to "recognize, preserve, and protect the primary responsibilities of States . . . to plan the development and use . . . of land and water resources.” Id. § 1251(b) (emphasis added).

States, as comprehensive regulators of the aquatic environment, are often in the best position to timely and effectively address case-by-case environmental circumstances. Accordingly, the CWA enlists states to fulfill many of the statutory duties and includes key mechanisms for states to administer important permitting programs.

The National Pollutant Discharge Elimination System (NPDES), established in 1972 by section 402 of the CWA, is one such example. At base, this program authorizes EPA to issue permits for the discharge of any pollutant to navigable waters, like wastewater from industrial processes, effluent from concentrated animal feeding operations, and stormwater from construction activities. While EPA oversees this program, Congress included within the statute a process whereby EPA could transfer its authority to states to administer NPDES permits. Today, consistent with Congress’s goal, 47 states administer and enforce the NPDES program.

In 1977, Congress sought to establish a similar structure for the CWA section 404 “wetlands” program (although often referred to as the wetlands program, the program covers all navigable waters regulated by the CWA, including lakes, rivers, and streams). CWA section 404 authorizes the U.S. Army Corps of Engineers (Corps) to issue permits for the discharge of dredged or fill material into navigable waters. These permits are generally relied on for the discharge of fill material where necessary to construct portions of infrastructure (e.g., highways, airports, pipelines, etc.), residential and commercial developments, mining sites, and a host of other development projects. As with the section 402 program, Congress added a mechanism for states to “assume” the permitting process, and anticipated that most states would administer the section 404 program in due time:

By using the established mechanism in section 402 . . . , the committee anticipates the authorization of State management of the [404] permit program will be substantially expedited. At least 28 State entities which have already obtained approval of the national pollutant discharge elimination system under the section should be able to assume the program quickly.

S. Rep. No. 95-370, at 77–78, reprinted in 4 Legis. History 1977, at 710–11. Importantly, a state program will only receive approval if its permitting standards and procedures are at least as stringent as the federal program.
Yet, only two states have successfully assumed the section 404 program (Michigan and New Jersey), and no state has assumed the program since 1994. As a result, for over 40 years, the section 404 program has not functioned as Congress intended, producing, at times, inefficiencies in the permitting process, evidenced by substantial costs and delays for some permit applicants. A 2006 Supreme Court decision recognized that, as of 1999, it took the typical project developer over 788 days to prepare and negotiate an individual section 404 permit and cost, on average, $271,596. \textit{Rapanos v. United States}, 547 U.S. 715, 721 (2006).

An assumed program may produce significant benefits for states, the Corps, and the public by reducing duplication and overlap between state and federal permitting programs; allowing the Corps to focus its resources; allowing a state to meet time constraints, incorporate local requirements, and integrate review of section 404 applications with other applicable regulatory requirements; providing more consistent and thorough protection of certain waters within the state; and increasing regulatory program stability. Moreover, state agencies are generally more familiar with local concerns, community needs, and environmental conditions.

Recently, there has been renewed momentum at both the state and federal levels to fulfill the objectives set by Congress in 1977. In particular, the Corps has taken steps to facilitate state assumption, and according to the fall 2019 regulatory agenda, EPA will issue a Notice of Proposed Rulemaking in 2020 to modify its state assumption regulations. \textit{Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions}, https://www.reginfo.gov/public/do/eAgendaMain (Nov. 20, 2019). In addition, approximately 15 states recently have shown interest in assumption, see Timothy Cama, \textit{Trump Officials Push States to Take Power over More Waterways}, thehill.com (Aug. 7, 2018), and states like Florida, Minnesota, and Oregon have taken administrative and legislative steps to assume the section 404 program. In light of this renewed focus on state assumption under the section 404 program, this article explores why states in the past generally did not undertake assumption, some of the issues states are wrestling with today as they consider assumption, and the administrative steps EPA could take to further facilitate state assumption.

**Scope of Retained Waters Under an Assumed Program**

When a state assumes the program, the statute requires the Corps to retain permitting authority over certain waters ("retained" waters). See 33 U.S.C. § 1344(g)(1). A key issue that has derailed many states’ assumption efforts in recent years is the scope of waters to be retained by the Corps after a state assumes administration of the section 404 program.

To better understand the regulatory paradigm that exists under an assumed program, assumption essentially divides a state’s waters into four general administrative categories, which starting with the broadest scope include the following: (1) all waters within state boundaries, which include all aquatic features in the state, including areas beyond state or federal regulation; (2) waters subject to the state permit requirements, which include all aquatic features in which certain activities require a permit from a state regulatory agency; (3) waters subject to federal jurisdiction under the CWA assumed by the state, which include waters previously regulated by the Corps under the CWA where section 404 permitting authority is transferred to the state; and (4) waters subject to federal jurisdiction under the CWA retained by the Corps, which include waters where section 404 permitting authority is retained by the Corps.

The diagram below provides a simplified graphic representation of this relationship. Please note that the diagram is not
to scale and does not accurately reflect the percentage of waters within each category, which varies between states:

In 1977, Congress defined the waters to be retained by the Corps very precisely in section 404(g)(1): “... those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto. ...” 33 U.S.C. § 1344(g)(1).

Congress did not pull this language out of thin air; it has significant historical context. Based on the statutory text and the legislative history of the 1977 CWA amendments, it is clear that this language refers to those waters regulated under section 10 of the Rivers and Harbors Act of 1899 (RHA)—navigable waters that have been regulated by the Corps for more than 100 years—and adjacent wetlands. See EPA, Nat’l Advisory Council for Envtl. Pol’y & Tech. (NACEPT), Final Report of the Assumable Waters Subcommittee, app. F (May 2017). This makes sense because the purpose of the RHA is to maintain navigability for interstate commerce, as opposed to the CWA, which focuses on water quality. Thus, RHA section 10 waters are generally larger lakes and rivers that are susceptible for use as a means to transport people or goods.

In the past, however, states seeking assumption have been confronted by Corps district offices insisting that CWA section 404(g)(1) authorizes them to retain authority over more than just waters regulated under RHA section 10. The Corps has argued that it retains RHA section 10 waters, and also waters that have been identified as “traditional navigable waters” (TNWs) under the CWA in accordance with Corps regulations and guidance. See 33 C.F.R. § 328.3(a)(1) (2019); Rapanos Guidance. But TNWs, as defined by the Corps, encompass a much broader set of waters, significantly increasing the scope of waters retained by the Corps under an assumed program. What follows are some examples of streams and lakes that the Corps and EPA have in the past considered to be TNWs.

Kansas City District Streams. Within the Corps’s Kansas City District, which includes parts of Colorado, Kansas, Nebraska, Iowa, and Missouri, there are 887 stream miles of RHA section 10 waters. Adding the Corps-defined CWA TNWs, many of which are too small to qualify as TNWs under the RHA, would nearly triple the scope of retained streams from 887 stream miles to 2,476 stream miles. EPA, NACEPT, Assumable Waters Subcommittee Meeting Sept. 28–29, 2016, Meeting Summary, at 12–13.

Bah Lakes, Minnesota. EPA determined that a 70-acre isolated lake, which is “usually covered with up to 10-foot-deepwater,” was deep enough to provide navigation for small watercraft and, being only 60 miles from the border with North Dakota, was “readily accessible to interstate travelers.” EPA, Memorandum for Jurisdictional Determination # 2007-04488-EMN (Jan. 16, 2008).

Lake Auman, North Carolina. In March 2016, the Corps determined that this 1,000-acre isolated lake is a TNW because it “is presently and has historically been used for recreational [sic] fishing and swimming.” Corps, Approved Jurisdictional Determination Form (Mar. 14, 2016).

Hurdsfield-Tuffy Lake, North Dakota. The Corps determined that this 538-acre lake is a TNW because “[d]uring the on-site inspection of October 22, 2015, both boating and waterfowl hunting was observed . . . and the parked vehicles indicated that these participants were from North Dakota, Minnesota and Wisconsin.” Corps, Approved Jurisdictional Determination Form, NOW-2015-1512-BIS (Dec. 1, 2015).

Such waters are common across the American landscape. Identifying them as retained waters would significantly limit the scope of state administrative authority under an assumed program, requiring more permit applicants to obtain both state and federal approval, undermining the value of assumption to the states, and effectively defeating state efforts to assume the section 404 program. In 2014, affected states and their trade associations asked EPA to clarify the scope of the Corps’s retained waters and the meaning of CWA section 404(g)(1). In response, EPA established a subcommittee under the Federal Advisory Committee Act to advise how EPA can clarify which waters may be assumed versus which waters must be retained. The subcommittee, comprising 22 members representing states and tribes, environmental organizations, the private sector, and the Corps, operated under the auspices of NACEPT.

After studying the issue for two years, the entire subcommittee (except the Corps representative) concluded that the Corps should only be able to retain authority over waters regulated pursuant to RHA section 10 (minus RHA section 10 waters deemed navigable based only on their historical use) and adjacent wetlands. All other CWA waters within the state’s borders may be assumed by the state. The Corps representative contended that section 404(g) should be interpreted to allow the Corps to retain RHA waters plus TNWs regulated under 33 C.F.R. § 328.3(a)(1) (2019), which, as noted above, would result in many more waters being retained.

On July 30, 2018, the Assistant Secretary of the Army accepted the recommendations of the subcommittee and issued a memorandum clarifying the scope of waters to be retained by the Corps: "Retained waters” mean waters that are jurisdictional under RHA section 10 (minus waters deemed jurisdictional under the RHA based on historical use) and wetlands adjacent to RHA section 10 retained waters, landward to a boundary agreed to by the state and the Corps. The location and extent of RHA section 10 waters are fairly well understood, and most Corps districts possess and actively manage a list of RHA section 10 waters within their district. Thus, the Corps will use existing RHA section 10 lists of waters as a starting point to define retained waters.

EPA also intends to address this issue in a forthcoming rulemaking. See, e.g., The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,332 (Apr. 21, 2020). If EPA codifies the waters over which the Corps would retain permitting authority, states would be more inclined to pursue assumption and to take an active role in section 404 permitting within their jurisdiction.
Other Obstacles for States Contemplating Assumption

While the dispute over the scope of retained waters is all but settled, a number of other important legal and administrative obstacles remain. One such legal obstacle is that the federal section 404 program includes no restrictions regarding the expiration date of a permit; however, section 404 permits under an assumed program will be subject to a five-year expiration date requirement. See 33 U.S.C. § 1344(h)(1)(A)(ii) (“To issue permits which . . . are for fixed terms not exceeding five years.”). If state law allows, states may be able to continue a state-issued permit pursuant to 40 C.F.R. § 233.38, but it is not clear how this provision would apply to larger construction, infrastructure, mining, or other projects that generally require longer than five years to complete, and a reissuance process could result in additional costs and uncertainty for permittees. This raises the question of whether a long-term project could opt out of the state program to pursue a Corps permit, or whether a state could issue a section 404 permit in accordance with a holistic project review, allowing renewals every five years without further regulatory action, provided there is no anticipated increase in environmental impacts. Perhaps EPA will also address such issues in its upcoming rulemaking.

Another legal issue is that Corps permits are federal actions that can trigger a range of environmental review requirements under federal laws such as the National Environmental Policy Act, the Endangered Species Act (ESA), and the National Historic Preservation Act. However, state permits issued under an assumed program are not considered federal actions. Thus, absent a federal action associated with their project, permit applicants and state permitting agencies may no longer be involved in these review processes, which could have practical implications for permittees and states. For example, without ESA section 7 consultation on the state permit, authorization for “incidental take” of federally listed species would require either section 7 consultation on a separate federal action associated with the project (a process that takes approximately one to two years to complete) or an ESA section 10 permit (a much longer process). This could present a substantial obstacle for applicants and states in locations where a large number of endangered or threatened species reside. If a proposed project would result in a take, applicants would need to design the project to avoid adverse impacts to listed species or their habitat, or obtain take authorization through another mechanism such as an ESA section 10 incidental take permit or an incidental take statement in section 7 consultation on a related federal agency action. For Florida, which has the third highest number of ESA-listed species (a total of 130), the absence of ESA section 7 consultation is an important consideration. Listed Species Believed to or Known to Occur in Each State, Fish & Wildlife Serv., Envtl. Conservation Online Sys., https://tinyurl.com/y6vjsra7. States like Oregon are also considering how to address and comply with the ESA under an assumed program, and Arizona recently abandoned its assumption effort, in part due to concerns expressed by stakeholders about endangered species considerations. See Elizabeth Whitman, Arizona Abandons


Administrative considerations also include whether a state has sufficient financial and human resources to administer the section 404 program. According to a recent study by the Environmental Integrity Project (EIP), when adjusted for inflation, 30 states have reduced funding for their agencies’ environmental programs from 2008 to 2018. See EIP, The Thin Green Line, at 9 (Dec. 5, 2019). Thus, some states may not have the financial or political capital to implement, or even to assess the feasibility of, an assumed program.

At the outset, states may spend, on average, $225,000 to investigate the feasibility of assumption. Kathy Hurld & Jennifer Linn, Wetlands Div., EPA, Pursuing CWA 404 Assumption: What States Say About the Benefits and Obstacles, at 12 (May 30, 2008); see also Minn. Dep’t of Natural Res. & Minn. Bd. of Water & Soil Res., Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study, front matter (Jan. 17, 2017) (MN Feasibility Study) (estimated cost to prepare feasibility study was $139,289). Once a state determines that assumption is feasible, it must prepare its formal application to EPA. To ensure the state’s permitting program is eligible for assumption and to prepare a successful application, the state would need to take a number of preliminary steps. Initially, the state legislature may need to amend state statutes and the state regulatory agency may need to amend its regulations to ensure that the state permitting program aligns with the eligibility requirements. Also, the state would need to begin negotiations with EPA and the Corps to determine the scope of federal oversight and the scope of retained/assumed waters, should the state assume the program. Once the necessary statutes and regulations are in place, and the state has reached agreements with the Corps and EPA, the final step in the process would be to submit a formal application.

While some of these initial costs may be recovered via EPA’s State Wetland Program Development grants, 33 U.S.C. § 1254(b)(3), such funds cannot be used for the significant annual costs associated with implementation or the ongoing administration of an assumed program. For example, the New Jersey program costs approximately $3 million per year and requires 42 full-time employees, and the Michigan program costs $7 million and requires 86 full-time employees. Greg Peck & Jim Giattina, State/Tribal Assumption of the CWA 404 Program, Kentucky Task Force on CWA Section 404 Program Assumption, at 19 (Nov. 17, 2005). Larger and wetter states, like Minnesota, estimate an annual cost of approximately $11 million with 102 state employees, MN Feasibility Study at viii, while drier states, like Arizona, estimate an annual cost of $2.5 million and 10 full-time staff. Ariz. Dep’t of Envtl. Quality, CWA § 404 Assumption Roadmap Review Meeting (Sept. 2019).

Importantly, however, for states such as Minnesota that already administer a permitting program that overlaps with the section 404 program, the incremental increase in costs associated with assumption of the section 404 program could be relatively small. For example, Minnesota’s current permitting program costs the state approximately $10 million a year and...
requires 98 full-time staff. MN Feasibility Study at ix. Under an assumed program, Minnesota projects an increase in annual expenditures of less than $1 million and a projected need of only four additional full-time staff. Id. at viii–ix. Furthermore, states can recover some of these costs through permit fees or taxes.

The CWA's statutory and regulatory requirements mandate that the Corps transfer all pending section 404 permits to the state as soon as the Corps receives notification from EPA that a state program has been approved. 33 U.S.C. § 1344(h)(4); 40 C.F.R. § 233.14(b)(2) (often referred to as the “clean break” provisions). Therefore, to avoid delays for permit applicants, states would need to appropriate the necessary funds, acquire sufficient staff, and develop the requisite information technology infrastructure to administer the section 404 program in advance of assumption.

In order to receive approval from EPA to administer an assumed program, the state must also demonstrate that its program is equivalent to or more stringent than the complex requirements of the federal section 404 program, including CWA standards for jurisdiction, mitigation, and permit review criteria and exemptions. For example, except for waters where the Corps retains permitting authority, the state must assume administrative authority over all other CWA waters, including wetlands (i.e., the state cannot assume authority for only certain categories of waters such that some waters of the U.S. are left unregulated). 40 C.F.R. § 233.1(b). Additionally, the state’s delineation methodology for identifying wetlands and waters must be consistent with the federal delineation methodology. The state must have authority to regulate all activities that are regulated under federal law; a state cannot exempt activities that are not exempt under the CWA. Id. § 233.1(d). And the state agency must have enforcement authority including the ability to impose penalties that are at least comparable to federal fines and penalties. Id. § 233.41. Accordingly, a state that seeks assumption will most likely need to take complex administrative and legislative steps to adapt its program(s) to meet these requirements.

In Minnesota, for example, the state would need to modify various aspects of its Wetland Conservation Act to align with CWA § 404 requirements. Specifically, the state would need to revise exemptions that allow wetland impacts with no mitigation or reporting, amend the state’s compensatory mitigation location requirements, and update the citizen suit provisions. See MN Feasibility Study at vi. Florida’s 1997 attempt to assume the program was scuttled, in part, by issues related to Florida’s wetlands delineation methodology. Evidently, Florida’s designation of “slash pine” as an upland plant, rather than a facultative one, posed the most significant problem. See Debra Alise Spungin, Troubled Waters: Florida’s Isolated Wetlands in the Aftermath of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 26 Nova L. Rev. 371, 390 (2001) (citing Letter from Fla. Dep't of Env'tl. Prot. to Carol Browner, Admin., Env'tl. Prot. Agency (Sept. 17, 1997)).

Federal Steps to Facilitate Assumption

In addition to codifying the Corps’s retained waters guidance, EPA could take additional steps to modify its regulations and further facilitate state assumption. Pursuant to 40 C.F.R. § 233.1, partial state programs are not approvable, i.e., a state program must regulate all discharges of dredged or fill material into waters regulated by the state under section 404(g) (1). However, some states may prefer to administer a state section 404 program only in certain geographic areas, such as the coastal zone, or in tidal wetlands, or for certain industries. Providing for partial assumption would also allow states to implement a phased program, potentially easing the transition and taking the sting out of the statutory “clean break” provision.

As noted above, EPA has indicated in its regulatory agenda that it intends to revise its CWA section 404(g) regulations. This upcoming rulemaking would provide EPA with an opportunity to remove or modify the prohibition against partial assumption. By allowing for partial assumption, EPA could help states navigate many of the issues discussed above.

Oregon, which is well-known for its commitment to wetlands and water quality, is actively pursuing this option and may become the first state to obtain approval for a partially assumed section 404 program. In November 2019, the Oregon Department of State Lands submitted an update to the Oregon Legislature to consider partial section 404 assumption in advance of the 2020 session. This report indicates that Oregon seeks to gain approval from EPA for a partial section 404 permitting program. Under the proposed approach, the state would administer section 404 permitting for mining activities, the creation and operation of mitigation banks, and development activities within an urban growth boundary (excluding farming, ranching, or forestry activities). Ore. Dept’ of State Lands, HB 2436 (2019): Partial 404 Assumption Legislative Update, at 2 (Nov. 2019). If EPA modifies its regulations to allow for partial assumption, Oregon intends to submit a complete application to assume the section 404 program during 2021. Id. According to earlier testimony, EPA has been “encouraging in recent discussions . . . regarding a partial assumption program.” Testimony of Eric Metz, Before the House Comm. on Agric. & Land Use (Mar. 19, 2019).

States and other stakeholders have come a long way in resolving the legal obstacles to fulfilling Congress’s goal of having states administer the section 404 program. A diversely represented advisory committee reached agreement on how to interpret the scope of retained waters, the Corps has now adopted those recommendations in guidance, and EPA plans to codify those recommendations this year. Yet, states still face a number of important financial and legal obstacles, and how such issues are managed by states and EPA will ultimately determine the number of states that successfully assume the program and whether EPA can achieve Congress’s original objectives.

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Debunking the Myths Behind the NEPA Review Process

John Ruple and Heather Tanana

Our fathers grew up thousands of miles apart—one in a traditional hogan on the Navajo reservation, and the other under the city lights in Seattle. They nonetheless imparted on us similar fatherly wisdom: Don’t sacrifice your long-term goals by chasing fads; cheap is not the same as inexpensive; and, most importantly for this article, don’t believe everything that you hear. When it comes to the National Environmental Policy Act (NEPA), we took these lessons to heart. Conventional wisdom is that NEPA compliance is unduly burdensome; NEPA litigation is an overused cudgel for environmentalists; and NEPA unreasonably delays much-needed projects, thereby hurting the economy. Recalling our fathers’ words, we found ourselves searching for the data and studies to support conventional wisdom. Finding little beyond anecdotes, we set out to answer a very basic question: Does rhetoric reflect reality? We conclude that it does not. What follows is a summary of what we found with respect to several pervasive criticisms.

An Overview of the National Environmental Policy Act

NEPA was signed into law on January 1, 1970, on the heels of the Santa Barbara oil spill, which spread oil across hundreds of miles of pristine California beaches. NEPA also followed shortly after the Cuyahoga River in Ohio burst into flames (for the 13th time) and publication of Rachel Carson’s book *Silent Spring*, documenting how DDT and other pesticides nearly led to the bald eagle’s extinction. NEPA’s enactment reflected a national consensus that federal law and policy had largely ignored the need to protect aesthetic and ecological values.

NEPA begins by declaring that, as a matter of national policy, the federal government “will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation[,]” 42 U.S.C. § 4321. While other environmental laws focus on a particular medium such as water or air, NEPA defines the process for federal agencies making decisions affecting the environment. NEPA requires that agencies take a hard look at potential impacts before acting, and that the public have an opportunity to offer input before those decisions are made.

Under NEPA, “major federal actions significantly affecting the quality of the human environment” must undergo an environmental review before those actions can proceed. 43 U.S.C. § 4332(2)(C). The decision to license or permit a project on federal land is generally considered a major federal action. When a federal project’s impacts are known to be significant in terms of their context and intensity, compliance requires completion of an Environmental Impact Statement (EIS). But EISs are rare, accounting for less than one percent of all NEPA actions. Most actions undergo expedited review. U.S. Gov’t Accountability Office, GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analysis* 8 (2014).

When EISs are required, they are prepared in stages. At the outset of the NEPA process, the lead agency publishes a Notice of Intent to Prepare an EIS (NOI) in the *Federal Register*. The NOI describes the action contemplated, as well as the reasons for the action, and invites public comments on environmental issues raised by the proposed action as well as alternate means of achieving project goals. After considering public comment, the lead agency prepares a Draft EIS analyzing the direct, indirect, and cumulative impacts of both the proposed action and one or more alternative means of achieving the desired end. The Draft EIS compares the impacts projected to result from each alternative against the impacts that would result from a continuation of the status quo (the “no action alternative”).
After another public comment period, and any appropriate revisions, a Final EIS and Record of Decision (ROD) are issued. If significant deficiencies are identified in a Draft or Final EIS, the lead agency may prepare a Revised or Supplemental EIS.

Most federal actions do not involve significant environmental impacts and therefore do not require an EIS. NEPA authorizes agencies to promulgate regulations specifying “Categorical Exclusions” (CEs)—categories of actions that the agency determines do not individually or cumulatively have a significant impact on the human environment. Actions that fall within one of these regulatory CEs can be approved without an EIS, provided that the action does not involve “extraordinary circumstances.” 40 C.F.R. § 1508.4. Congress has also created statutory CEs for certain types of oil and natural gas development. See, e.g., Energy Policy Act, 42 U.S.C. § 15942.

Actions falling outside the scope of a CE can still avoid preparation of an EIS if a federal agency prepares an Environmental Assessment (EA) determining that the proposed action would not cause significant impacts. If projected impacts are not significant, the agency issues a Finding of No Significant Impact (FONSI) and the NEPA review process is complete. Alternatively, the agency may issue a “mitigated FONSI,” which includes measures to reduce impacts to below the level of significance. If the proposed action is determined to have a significant effect, however, an EIS is required. Most federal actions do not require completion of an EIS because a CE applies, or they are determined in an EA not to have significant environmental impacts.

**Myth 1: NEPA Review Delays Federal Decision Making**

Under NEPA, the amount of time and effort spent evaluating environmental impacts is proportionate to the scale of the anticipated impacts. Ninety-five percent of actions that trigger NEPA review are addressed in a CE. The fastest and least-burden some level of NEPA analysis, CEs require a matter of days to several months to approve. About five percent of actions requiring NEPA review involve an intermediate level of scrutiny and require an EA, which takes from one to eighteen months to complete. EISs are reserved for the projects that have the greatest impacts (e.g., large logging operations, interstate or international oil pipelines, and airport expansions) and account for less than one percent of all NEPA actions. The White House Council on Environmental Quality (CEQ) reports that the median completion time for an EIS is 3.6 years. GAO-14-370 at 8.

Conceptually, different timeframes to complete different levels of review make sense. Rational decision-makers increase their level of scrutiny as the stakes rise. The federal government is doing the same thing with the resources charged to its care by reserving EISs for federal actions involving the highest level of environmental impact, scientific complexity, and public concern. And while critics frequently deride the long completion times for these most searching reviews, the multyear review process is often attributable to factors outside of the lead agency’s control, such as lack of funding, project complexity, higher agency priorities, changes in scope of the project, engineering requirements, and delays in obtaining nonfederal approvals. See, e.g., GAO-14-370 at 15, 19.

But we can dig deeper. To better understand NEPA in action and the burden of NEPA compliance, we reviewed 607 federal rules designating critical habitat for species that are protected under the Endangered Species Act. Because of conflicting circuit court opinions on NEPA’s applicability to critical habitat designation, some of these designations underwent NEPA review while others did not. Designations that were subject to NEPA review were completed on average three months faster than those that were exempted from NEPA. John C. Ruple, Michael J. Tanana & Merrill M. Williams, Does NEPA Help or Harm ESA Critical Habitat Designations? An Assessment of over 600 Critical Habitat Rules, 46 Ecology L.Q. 829 (2020). This is not to say that the time spent on NEPA compliance is inconsequential, only that a NEPA review does not appear to delay federal decision-making, and that the NEPA process may create a vehicle for coordinating other permitting decisions to improve overall permitting efficiency.

**Myth 2: NEPA’s Benefits Are Illusory and Unreasonably Costly**

The U.S. Supreme Court has consistently stated that NEPA is a procedural statute under which the agency must take a requisite “hard look” at likely impacts before rendering a decision. See, e.g., Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978); Robertson v. Methow Valley Citizens Coun cil, 490 U.S. 332, 350 (1989). With the focus placed squarely on NEPA’s procedural mandate, the question becomes whether the process produces a better result than what would have occurred but for NEPA.


The limited number of EISs for oil and gas development projects surprised us because oil and gas production was booming during that period. From 2004 through 2014, between 1,095 and 1,871 drill rigs were operating onshore each year. U.S. Energy Info. Admin., U.S. Onshore Crude Oil and Natural Gas Rotary Rigs in Operation. From 2009 through 2014 (the period of available data), 34.6 to 45.4 million acres of federal land were under lease for oil and gas development. Bureau of Land Mgmt., U.S. Dep’t of the Interior, Oil and Gas Statistics, tab.2, Acreage in Effect. These data affirm the point made above—EISs are rare, and most projects, even some very large projects, are authorized in EAs or CEs.

In reviewing those 29 EISs, we compared the impacts anticipated under the No Action Alternative in the Draft EIS
Our analysis also indicates that the BLM remained focused on the most significant issues, which is precisely what NEPA directs. NOX, PM10, and PM2.5 emissions as well as wetland impacts are all common concerns associated with oil and gas development, and all experienced large reductions. In contrast, SO2 and CO, which are subject to action-forcing regulation under the Clean Air Act, both experienced comparatively minor impact reductions (both ~5%). Lower rates of emission reduction may indicate that agencies focus their efforts on pollutants of local concern (the project areas analyzed in these EISs generally have ambient SO2 and CO levels that are well below National Ambient Air Quality Standards). Such an approach is consistent with NEPA’s mandate to focus on significant impacts. 40 C.F.R. § 1500.4(c).

We also found that transitioning towards directional drilling and consolidated well pads, a change that appears to have been driven by technological advancements and NEPA comments rather than application of substantive environmental laws such as the Clean Air Act or Clean Water Act, resulted in 13% reductions in permanent surface disturbance and 10% reductions in temporary surface disturbance. Both disturbance reductions were statistically significant, indicating that meaningful reductions can occur solely under NEPA’s procedural mandate.

Critically, we found that for the oil and gas projects, job creation and state and local tax revenue increased in the face of enhanced environmental protections, though the rate of growth slowed as environmental protections increased. The BLM’s Resource Management Plans fared similarly, producing a statistically significant increase in the application of more protective surface use stipulations without a significant change in either the projected number of jobs created or the number of oil and gas wells that could be drilled. In fact, the number of jobs created and wells drilled increased by eight percent and two percent respectively despite strengthened environmental protections. Overall, reductions in environmental impact were achieved without a corresponding reduction in economic benefit.

**Myth 3: NEPA Review Results in Excessive Litigation**
NEPA’s detractors often charge that environmental activists have made NEPA litigation their weapon of choice in a systematic effort to stop or delay wide-ranging federal actions. This does not appear to be the case.

There is no single repository for NEPA decisions or even an accurate count of NEPA actions, so calculating the number of decisions that are completed annually poses a challenge. We can, however, estimate the volume of NEPA decisions based on federal data. The EPA publishes notices of availability for all EISs and, as previously stated, less than one percent of NEPA actions involve an EIS. Extrapolating from those figures, we estimate that federal agencies generate roughly 52,000 NEPA decisions annually, possibly more.

While the number of NEPA decisions completed annually involves uncertainty, the number of NEPA decisions that are challenged in court does not. The CEQ maintained data on all NEPA litigation in federal court from 2001 through 2013. Over that period, the CEQ documented 1,499 federal NEPA cases, or about 115 cases annually. Dividing the count of federal cases by our estimate of NEPA decisions indicates that only about 1 in every 450 NEPA decisions, or 0.22% of all NEPA decisions, results in litigation. John C. Ruple & Kayla M. Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50:2 Envtl. L. ___ (forthcoming 2020). To put that in perspective, during the 12-month period ending March 31, 2017, 9.78% of all federal district court civil decisions were appealed. See Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 2017.

The CEQ’s data also show a strong downward trend in NEPA litigation, with the last five years in our dataset all showing below-average court filings. At the same time that NEPA litigation was falling, the number of civil suits handled annually by the U.S. Attorney’s Office increased by over 14,000. NEPA challenges also fell faster than the rate at which agencies prepare EISs, which is also declining. We simply do not see in the data evidence that NEPA results in excessive litigation, given the low and declining rate at which NEPA decisions are challenged.

Other recent scholarship found that while environmental organizations are more likely to challenge a NEPA decision than other groups, environmentalists also prevail in litigation at a higher rate than other kinds of plaintiffs. David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 3, 22 (2018). This indicates that environmentalists, rather than being highly litigious, are selective in the cases that they elect to file.

We admit that when estimating the universe of NEPA decisions completed each year we are extrapolating from limited data, and our estimates may therefore be off—but we are using the best information currently available. This limitation, we believe, highlights the importance of obtaining better information about NEPA decisions. As a nation, we would not make decisions about national health or education policy based solely on anecdotal information, and decisions about environmental policy should be no different. As our fathers might say: You can’t manage what you can’t measure.

**Myth 4: “Streamlining” NEPA Will Reduce the Time Required for Permit Issuance**
Recent NEPA reform efforts focus on reducing the NEPA compliance burden by “streamlining” the NEPA process. Pending proposals involve page limits on NEPA documents, restricting
the number of alternatives considered, and imposing strict time limits on the NEPA analysis.

While we agree that NEPA compliance can be improved, sacrificing quality for speed places agencies at risk. When reviewing a NEPA decision, courts consider both compliance with NEPA's procedural requirements, and whether the agency took the requisite “hard look” at likely impacts. Robertson, 490 U.S. at 350. The hard-look standard grows not from NEPA's implementing regulations, but from section 101 of the Act itself. Section 101 is Congress's declaration of our national environmental policy, and it is axiomatic that an agency cannot change a policy that has been enacted into law by passing a contrary regulation. Streamlining efforts do not change the Supreme Court–mandated standard of review. The question becomes whether agencies can consistently clear the same substantive hurdle in less time and with less space to document their analysis. We question whether that is possible and anticipate that pending streamlining proposals, if enacted, will backfire. If implemented, streamlining will likely increase the volume of litigation and the rate at which NEPA decisions are struck down in court, and that will delay federal decisions. The data support this expectation.

Our colleagues David Adelman and Rob Glicksman recently calculated the number of EISs produced by an agency as a percent of EISs government-wide. They then calculated the agency’s share of all EIS litigation. Combining these two figures results in a production to litigation ratio, where a ratio greater than one indicates a higher-than-average rate of NEPA litigation. Adelman & Glicksman, supra, at 30. We built on their work by comparing the litigation ratio to the amount of time spent on the NEPA analysis and found that going fast increases the risk of litigation. The old adage, go slow to go fast, is borne out by the data.

Looking at the four federal agencies that prepared the largest number of EISs from 2010 through 2017, Adelman and Glicksman found that the Forest Service prepared 276 EISs and had a litigation ratio of 1.4, indicating that Forest Service EISs were challenged at a rate roughly 40% higher than that for all agencies government-wide. The Bureau of Land Management came in a distant second in terms of the number of EISs produced, accounting for 128 and a litigation ratio of 1.0. The Federal Highway Administration was almost as active, preparing 114 EISs over the study period, but doing so while generating a litigation ratio of just 0.3. The Army Corps of Engineers prepared 89 EISs with a litigation ratio of 0.5. These ratios, when combined with the time spent on EIS preparation, tell a powerful story.

The less time an agency spent on EIS preparation, the more likely it was to be sued. As noted above, median completion time for an EIS was 3.6 years. The BLM, with a litigation ratio of 1.0, was almost average, requiring 3.8 years to complete an EIS. The Forest Service cut approximately 7 months from EIS preparation time, but they did so at the expense of increased litigation. The Federal Highway Administration and Army Corps of Engineers both spent considerably more time on EIS preparation and significantly reduced their risk of litigation. Rapid EIS preparation, in short, was more likely to result in litigation.

With NEPA litigation taking an average of 23 months to complete (Adelman & Glicksman, supra, at 38), gains in preparation time are likely to be more than offset by litigation-related delays. We lack the data to say how the time spent on EIS preparation correlates with litigation outcomes, but we suspect that a rushed analysis increases the risk of an oversight or mistake. And an error resulting in court-ordered revisions to a NEPA document will compound litigation-related delays. The benefits gained by expediting NEPA may, in short, be subsumed by even greater costs for NEPA litigation and document revision. As our fathers would say: Do it right the first time.

**The Future of NEPA**

In 2017, President Trump signed an Executive Order directing that the environmental review for major infrastructure projects should be reduced to no more than two years. Exec. Order No. 13807, 82 Fed. Reg. 40,463, 40,464 (Aug. 24, 2017). Shortly thereafter, the Secretary of the Interior ordered agencies within the Department of the Interior to limit EISs to no more than 150 pages, or 300 pages for “unusually complex projects.” The Secretary also directed agencies to “complete each Final EIS . . . within 1 year from the issuance of a Notice of Intent (NOI) to prepare an EIS.” He further directed each Interior agency to propose page limits and time deadlines for EA preparation. Dep’t of the Interior, Sec’y Order No. 3355 (Aug. 31, 2017).

On June 13, 2019, the U.S. Forest Service proposed revisions to its NEPA regulations. As the Service explained, “[t]he proposed rule would contribute to increasing the pace and scale of work accomplished on the ground and would help the Agency achieve its mission to sustain the health, diversity, and productivity of the nation’s forests and grasslands to meet the needs of present and future generations.” U.S. Forest Serv., National Environmental Policy Act (NEPA) Compliance, 84 Fed. Reg. 27,544 (June 13, 2019). The proposed rule would, among other things: allow the Service to use multiple CEs to authorize separate but dependent portions of a larger single project; narrow what must be considered when determining whether “extraordinary circumstances” require preparation of an EA or EIS; create a CE for treatment of up to 11.4 square miles provided that no more than 6.5 square miles includes commercial or noncommercial timber harvest; and remove actions that modify roadless and potential wilderness areas from the list of projects normally requiring an EIS.

On January 10, 2020, the CEQ issued a notice of proposed rulemaking announcing its intent to amend NEPA’s implementing regulations, which apply to all federal agencies. Council on Evtl. Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020). The proposed rule seeks to define away NEPA’s hard-look requirement, in part by imposing time limits and page restrictions and by eliminating cumulative effects from the environmental review. However, these revisions appear to be based on anecdote rather than data, and they are likely to result in more litigation and reversals rather than improved efficiency.

**Recommendations**

Overall, data support the conclusion that NEPA is working more efficiently than its critics contend, and while reforms are...
Streamlining the Federal Environmental Review Process

The Pros and Cons of FAST-41

Nathan Eady, Christopher Kane, Christian Marsh, and Patrick Veasy

Title 41 of the Fixing America’s Surface Transportation Act (Act), 42 U.S.C. § 4370m et seq., now commonly known as the FAST-41 program, may prove to be a vital set of tools to facilitate the successful processing and approval of the nation’s most important infrastructure projects. Enacted in 2015 and signed into law by President Obama, the Act created a new governance structure, set of procedures, and funding authorities to improve the federal environmental review and authorization process for “covered” infrastructure projects. The Act intentionally casts a broad net over a wide range of potential infrastructure initiatives including aviation, ports, water resources, energy production and transmission, pipelines, and even broadband internet improvements. Ultimately this initial gateway into the policy was written so broadly that any project determined to be “covered” under the Act by the Federal Permitting Improvement Steering Council (Permitting Council)—a collection of federal departments and agencies tasked with improving federal infrastructure permitting—can potentially enter the program. Therefore, the limiting factor for project entrants is more closely tied to the size and complexity of the undertaking.

In order to qualify for entrance to the FAST-41 program, a proposed “covered project” must meet a few specified criteria, including (1) the total capital investment related to the project is likely to exceed $200 million; (2) the project does not qualify for abbreviated authorization or environmental review under other applicable laws; and (3) the project must be subject to the requirements of the National Environmental Policy Act (NEPA) and, in the opinion of the Permitting Council, the project is likely to benefit from the enhanced oversight and coordination afforded by the program. See 42 U.S.C. § 4370m(6)(A).

Suggested criteria for conditions in which the FAST-41 program would provide such a benefit include (1) the project requires authorization and/or environmental review by two or more federal agencies and/or (2) the project requires the preparation of an Environmental Impact Statement (EIS). Even this secondary set of criteria provides broad discretion to the Permitting Council to ensure that the program has maximum flexibility to assist projects that reasonably reach the scale, complexity, and intent of the program.

In order to become a covered project under FAST-41, project sponsors must submit a FAST-41 Initiation Notice (FIN) with information described under the Act. Id. § 4370m-2(a)(1). In accordance with the Paperwork Reduction Act, an online FIN submission tool is under development. In the interim, interested project sponsors for new potential covered projects can submit a variety of information about the project, including information about the project’s location and environmental, cultural, and historic resources, to the Permitting Council’s Executive Director and the appropriate facilitating agencies.

From a cursory viewpoint, the FAST-41 program seeks to provide covered projects with three primary benefits. The first benefit is to provide a faster, more transparent, and predictable path. Even for the most complex of projects, including those subject to the development of an EIS and the authorization of several different agencies, the program envisions completion of the entire NEPA process (spanning publication of the Notice of Intent (NOI) to the Record of Decision (ROD)) in two years or less. Upon entrance into the program, the requisite federal agency staff, with assistance from the Permitting Council, must develop a Coordinated Project Plan (CPP) including a timeline of significant milestones. See id. § 4370m-2(c)(1). Once set, the major timeline milestones can be shifted backward with prior notification to and approval of the Permitting Council. Elements of the CPP are both provided to the project proponent/applicant as well as posted on the publicly accessible “Permitting Dashboard,” see id. § 4370m-2(b)–(c), which is outlined in greater detail below.
A second primary benefit is to increase accountability and coordination among federal agencies. Where projects require the oversight and approval of multiple federal agencies, the Permitting Council and its Washington, DC–based staff act as supplemental support for project management as well as arbitrators to resolve discrepancies between each agency’s individual permit processes and administrative practices. Essentially, the Permitting Council provides direct logistical and authoritative support for implementation of the “One Federal Decision” mandate, which requires federal agencies to shorten the time for environmental review for major infrastructure projects that are subject to NEPA. See Exec. Order No. 13807 (Aug. 15, 2017). Importantly, the Council’s role is not designed to impose top–level political mandates; rather, it is to ensure adequate coordination and attention.

The third primary benefit is to provide enhanced legal protection. While there are multiple Executive Orders that seek to provide comparable streamlining of the NEPA process or federal permit actions, the FAST-41 program also extends its timeline benefits beyond the ROD. Covered projects also receive the benefit of a statute of limitations shortened from six years to two, and the Act further limits the ability to file lawsuits challenging the underlying permit actions to those parties who actively participated in and commented upon the project’s respective environmental document. 42 U.S.C. § 4370m–6(a). Lastly, the program limits the manner in which project opponents can seek disruptive injunctions. Id. § 4370m–6(b).

As noted above, the Act codified into law the use of a Permitting Dashboard to track project timelines and provide other information that is made available to the public. See id. § 4370m–2(b)–(c). The Permitting Dashboard is an online tool for federal agencies, project developers, and interested members of the public to keep track of the federal government’s environmental review and authorization processes for complex and large infrastructure projects. The Dashboard tracks several categories: (1) infrastructure projects designated as “covered projects” under the Act; (2) certain other Department of Transportation (DOT) projects (subject to Titles I, IX, and XI of the Act); (3) major infrastructure projects, see Exec. Order No. 13807, § 3(e) (Aug. 15, 2017); and (4) legacy projects, which were part of the original MAX.gov Permitting Dashboard.

Currently there are 580 projects listed in the database, almost half of which (275) have been completed or canceled. The vast majority of projects on the Permitting Dashboard and in the database have been aviation and surface transportation projects (504 projects, or 86 percent). The other sectors include renewable energy (wind, solar and hydro), 21 projects; water resources, 19 projects; pipelines, 16 projects; electrical transmission, 10 projects; conventional energy, 6 projects; and ports and waterways, 3 projects.

Apart from the above, the Permitting Dashboard contains a detailed Federal Environmental Review and Authorization Inventory and a Regulatory and Permitting Information Desktop (RAPID) Toolkit. The Inventory highlights the fact that there are 61 different permits and review processes implemented by 15 different federal agencies, and provides toolkits for certain types of projects—bulk transmission of electricity, geothermal energy, hydropower, and solar. These RAPID Toolkits make regulatory and permitting information rapidly accessible from one location by providing a step-by-step analysis of the approval process, contact information for federal and state regulators, best practice information, reference material, and links to permit applications, manuals, and related information.

The Permitting Dashboard process also includes an Accountability Scorecard, which evaluates agency performance and overall progress in processing environmental reviews and authorization decisions for major infrastructure projects. The performance accountability system requires agencies to report data on different performance indicators. These indicators include whether they are jointly and cooperatively processing environmental reviews. The Scorecard also includes evaluating whether the federal government is making authorization decisions using the “One Federal Decision” framework.

Critical, the Scorecard also shows whether major infrastructure projects have complete permitting timetables, whether they are meeting major milestone target dates, and whether agencies establish and use a process to elevate schedule delay issues to senior agency officials. The time and cost to complete reviews and make decisions are also part of the Scorecard. The Office of Management and Budget is tasked to review agencies’ performance at least once each quarter and will publish a quarterly scorecard of agency performance on meeting these indicators on the Permitting Dashboard.

Coordinating FAST-41 with New Initiatives
As briefly mentioned above, the FAST-41 program now has some level of redundancy with Executive Orders issued by the Trump administration. For instance, in 2017 President Trump signed Executive Order 13766, which laid the foundation for subsequent actions to help “Expedite[e] Environmental Reviews and Approvals for High Priority Infrastructure Projects.” Exec. Order No. 13766 (Jan. 24, 2017). In particular, Executive Order 13766 sets forth a similar goal of completing NEPA review in two years or less irrespective of the scale or complexity of the project. Also in 2017, President Trump signed Executive Order 13807 for “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.” Exec. Order No. 13807 (Aug. 15, 2017).

Executive Order 13807, which established what is known as “One Federal Decision” (noted above), requires federal agencies to shorten the time for environmental review for major infrastructure projects that are subject to NEPA. Id. The goal of this effort is for agencies to process environmental reviews and authorization decisions as “One Federal Decision” and in no more than two years (from publication of a NOI to prepare an EIS to issuance of the ROD). Id. § 2(h). Executive Order 13807 further requires all other federal authorization decisions for the construction of a major infrastructure project to be completed within 90 days from the issuance of the ROD. Id. § 5(b)(iii).

While these Executive Orders have emphasized permit streamlining procedures under NEPA and expanded the role of the Council on Environmental Quality (CEQ)—the main federal agency overseeing NEPA implementation—the Executive Orders have often been labeled as too aggressive in setting page...
and time limits. Criticisms of the Executive Orders have been compounded by the Trump administration’s announcement on January 10, 2020, to further narrow the scope of NEPA by, for example, narrowing the definition of “effects” to be considered.

Despite criticism of the Executive Orders, the FAST-41 program has gained funding and staffing and continues to garner strong bipartisan support. Indeed, the FAST-41 program received a unanimous, 21-0 vote by the Senate’s Environmental and Public Works Committee in July 2019 in support of S. 1992, which is intended to continue funding authority for provisions of the FAST Act, currently set to expire in the fall of 2020. A Bill to Amend the FAST Act to Repeal a Rescission of Funds, S. 1992, 116th Cong. (2019). Other FAST-41 legislation has also been introduced and remains pending in both the Senate and House. See, e.g., Federal Permitting Reform and Jobs Act, S. 1976, H.R. 3671, 116th Congress (2019). With another election cycle looming, the FAST-41 program provides perhaps the safest harbor within which a project proponent can ride out any political storm.

Despite the proven advantages that accompany the FAST-41 program, potential project proponents should be aware that the initiation in this process does come with some moderate administrative burdens, which in turn depend on the nuances of each specific regulatory and development scenario.

A Deeper Understanding of FAST-41 Pros and Cons
As expected with a large and sometimes controversial, but well-intended, effort to streamline other administrative processes, the actual implementation of and participation in the FAST-41 program has its “ups and downs.” The primary intended benefits, such as the expedited NEPA timeline and reduction in legal risks, are obvious and at times already available from alternative means such as the Executive Orders without needing to take action to become a FAST-41 covered project. Some of the other positive nuances, however, must be experienced firsthand to appreciate.

One primary issue to consider is that use of the Executive Orders can be a passive action, subject to some level of discretion. A request to agency staffers to comply with the specifications of an Order may or may not succeed. There is little you can do as a project applicant to supply the agencies with additional resources or oversight. The FAST-41 program, on the other hand, has the added benefit of providing local staff with direct support within their own individual department/division, as well as from the Permitting Council, CEQA, and federal lead agency representatives. This has proven particularly helpful when dealing with local offices of federal agencies, which are often underfunded, understaffed, and inexperienced with projects of significant size, complexity, or controversy. Instead of those local staffers being left to fend for themselves, the Permitting Council drives home the importance of the project’s success from Washington, DC, through each individual department’s chain of command. By the time the local staff is back in the loop, their management team has taken notice and brought in the additional resources needed to fulfill their agency’s respective contribution to the overall permitting effort.

The program also provides a uniquely beneficial tool for linear projects. While the program can presumably include any project involving two or more federal agencies, the benefits of the program are amplified as the number of federal agencies increases. Given their tendency to span long distances and thus transect more federal jurisdictions, linear projects (pipelines, electrical transmission, water diversion, etc.) have an increased likelihood of creating these scenarios. In these circumstances, it is not just the number of federal agencies involved, but also the context in which they have permit and/or environmental oversight. Long linear projects are more likely to involve a federal agency that is an owner/caretaker of federal lands rather than just a resource agency. An illustrative example is the difference between the U.S. Department of Agriculture overseeing a national forest versus the U.S. Army Corps of Engineers overseeing a Water of the U.S. The latter deals with permitting almost daily and has the requisite staffing and systems in place to handle such requests; the former has a primary role of facilitating recreation, environmental management, or fire protection, with permitting being an ancillary request far outside the local district’s core mission, staffing expertise, and/or annual budget.

There may also be trickle-down benefits to state and local permitting. The FAST-41 program obviously cannot force local jurisdictions, with their independent police power, or states, pursuant to state regulations (such as the California Environmental Quality Act (CEQA)), to directly participate in the streamlined federal permitting effort and/or expedited timelines. However, these jurisdictions can choose to voluntarily participate directly in the FAST-41 effort because there will likely be some benefits that positively affect the project as a whole. For example, if the federal team elects to hire a third-party consultant to prepare the EIS and that consultant needs to meet the aggressive federal schedule, this can sometimes foster the faster completion of a related state-level environmental review such as an Environmental Impact Report (EIR) pursuant to CEQA. Similarly, with a federal team motivated to issue an Endangered
Species Act take authorization and associated Biological Opinion (BO), it can clear the path for a state's wildlife agency to issue concurrence with the BO earlier than otherwise possible.

Despite these proven advantages that accompany the FAST-41 program, potential project proponents should be aware that the initiation in this process does come with some significant administrative burdens, which in turn depend on the nuances of each specific regulatory and development scenario.

For example, participation in the program requires that the Permitting Council post certain basic project information onto the publicly accessible Permitting Dashboard website. This stems from the program's desire to hold permitting agencies accountable for the timely and transparent progression of projects. While virtually all permit application packages are accessible upon the filing of a Freedom of Information Act or applicable state-level Public Records Act request, gathering that documentation takes a concerted effort by the interested party. On the other hand, projects on the FAST-41 dashboard will have basic information such as geographic location, project sponsor/proponent contact information, lead agency contact information, estimated development cost, brief project description, and high-level permit timeline proactively placed on the federal website, potentially subjecting that project to greater public scrutiny.

The FAST-41 process also includes other unique and additive burdens, including the creation of threshold steps or initial hurdles in the environmental review process. As noted above, agency staff are required to develop a CPP, including a timeline for all major project milestones, and actively report progress up their own federal departmental management chain and to the Permitting Council, as well as observe certain protocols regarding notifications to the Permitting Council and/or Congress when project delays exceed certain thresholds. As a result, proponents and agency staff alike should consider the relative cost/benefit of participating in the FAST-41 program versus utilizing the aforementioned Executive Orders to achieve many of the same streamlining benefits with fewer statutory strings attached.

Participation in FAST-41 also highlights the importance of agency relationships. Any seasoned permitting agent or land use attorney understands the value of relationship building and preservation with critical agency contacts. Electing to participate in the FAST-41 process may create additional points of contention with all these important stakeholders. For instance, initiation in the program could involve several different federal agencies, not all of which welcome the added time pressure and leadership oversight that comes with the FAST-41 structure. It is not uncommon to hear federal staffs point out that hours spent reporting progress to high levels of management are hours that otherwise could have been spent actively focusing on the permitting or environmental tasks. This point of friction can be mitigated to some degree by paying close attention to the human element of the process and employing restraint in requesting direct interactions with the Permitting Council.

Finally, participation in the FAST-41 program, or adherence to the similar Executive Orders, can conflict with other regulatory processes or create unintended consequences. For example, these federal streamlining programs set page limits (150–300 pages) for EIS documents along with the aggressive overall timelines. In some instances, this can create scenarios where local or state agencies feel they cannot rely on the truncated NEPA process to support their respective regulatory schemes. For example, projects in California that may have historically proceeded with a combined EIS and state-level EIR might determine that it is too difficult to create a legally defensible environmental document satisfyingdueling federal and state mandates. Therefore, the FAST-41 program may accelerate the federal environmental review process but inadvertently delay the state or local process.

The goals of FAST-41 to streamline and expedite permitting have already benefitted many types of infrastructure projects across the country.

### Representative Projects with Completed Permits

The goals of FAST-41 to streamline and expedite permitting have already benefitted many types of projects across the country. Some representative projects in other sectors that have completed permitting include the examples that follow. Further details can be found on the FAST-41 Permitting Dashboard, https://www.performance.gov/about/fast-41. These are good examples of how the streamlining program helps projects with complicated permitting issues, multi-stakeholders and local communities, and the jurisdiction of multiple permitting agencies. These examples all achieved their permitting in a timely manner, as indicated on the Dashboard.

### Hudson River Rebuild by Design Project: Resist, Delay, Store, Discharge (New Jersey)

This coastal resiliency project, proposed by New Jersey state and local groups, is an urban stormwater management strategy to address impacts from coastal storm surge flooding and infall rain flooding along the Hudson River, experienced during Superstorm Sandy. The comprehensive approach to managing flooding and surge is done in a very integrated manner, including the following combination of hard infrastructure, green infrastructure, and soft landscape solutions for coastal defense: Resist: barriers in a combination of hard infrastructure (bulkheads, floodwalls, and/or seawalls) and soft landscaping (berms and/or levees that could be used as parks). Delay: urban green infrastructure designed to focus on slowing stormwater runoff throughout the region using a combination of public and private amenities. Store: green and grey infrastructure improvements, such as bio-retention basins, swales, and green roofs.
intended to slow down and capture storm water. Discharge: enhancements to Hoboken’s existing stormwater management system to reduce combined sewage overflow and manage flooding.

Housing and Urban Development (HUD) was the lead agency for this project through its Community Planning and Development/Community Development Block Grant Disaster Recovery Fund program. HUD worked closely with the New Jersey Department of Environmental Protection and Department of Community Affairs and three local communities as well as U.S. Fish and Wildlife Service (FWS) and Department of Commerce (N.O.A.A.). The participants considered social, economic, engineering, and environmental factors using a collaborative process, including a thorough and extensive outreach, public involvement, and agency coordination. The funded first phase included the design and environmental impact analysis of the overall comprehensive master plan of the entire project. According to the Dashboard, the first-phase permitting has been completed as scheduled.

**Chokecherry and Sierra Madre Wind Energy (Wyoming)**
The Power Company of Wyoming LLC proposed to develop and operate the Chokecherry and Sierra Madre Wind Energy Project in Carbon County, Wyoming. The first phase includes building 500 wind turbines. Once the buildout is completed, the project will have the capacity to generate up to 1,500 megawatts of clean, renewable power—enough to run nearly 500,000 homes and representing the largest proposed onshore wind energy facility in North America when fully operational. The total project will be capable of generating up to 3,000 megawatts of clean, renewable power, enough to power nearly one million homes. Some of the major obstacles to the development of wind power in Wyoming include concerns over the impact of wind turbines on airborne wildlife (in particular, eagles), opposition due to aesthetics, and resistance from the state’s fossil fuel industry, which is the backbone of the state’s economy.

Because the project involved a large proportion of federal lands, the Department of Interior was the lead agency for the permitting process, with the primary responsibility under its Bureau of Land Management (BLM). The project proponent consulted closely with the BLM and the FWS to design an Avian Protection Plan and an Eagle Conservation Plan. Early coordination resulted in numerous wildlife monitoring practices that will improve the siting of wind turbines. Additionally, the project proponent’s proposed actions were significantly modified by agreement to account for issues raised by the public. In particular, this process included resolving potential conflicts with other resource uses in the area. The permitting was completed within the overall project development time frame with minimum delays.

**All Aboard Florida—Miami to Orlando Passenger Rail Service (Florida)**
All Aboard Florida – Operations LLC (AAF) proposed to construct a privately owned intercity passenger railroad system to connect Orlando and Miami, Florida. The initial Phase I consists of a new passenger rail service along the 66.5 miles of the Florida East Coast Railway Corridor connecting West Palm Beach, Fort Lauderdale, and Miami. AAF also proposed to extend that service to Orlando with Phase II. The total project will consist of a 235-mile intercity passenger rail service with an anticipated three-hour travel time between Miami and Orlando.

The Department of Transportation, through the Federal Railroad Administration (FRA), was the lead agency for the NEPA review process. FRA issued a Finding of No Significant Impact (FONSI) for the initial Phase I of the Project on January 30, 2013, and published a notice to prepare an EIS on April 15, 2013. The EIS was initiated for Phase II of the Project but analyzed the cumulative effects of both phases of the Project because train operations will cover the full corridor between Miami and Orlando. In coordination with FRA, the FWS reviewed the request for AAF to obtain a permit authorizing the filling of wetlands in association with Phase II and issued a revised Biological Opinion to include additional species and clarification of project details. According to the Dashboard, the Record of Decision for the combined Final EIS was completed December 15, 2017, per the original target date.

In summary, FAST-41 provides a vital set of tools to help coordinate the environmental processing and approval of most major infrastructure projects. The program is certainly not perfect, and coverage of a project under FAST-41 can have certain disadvantages. However, FAST-41 can also lead to a variety of benefits, including a more predictable permitting path, increased accountability and coordination among federal agencies, and certain legal protections. In the end, any potential FAST-41 project applicant should spend the time and resources to weigh the pros and cons of obtaining FAST-41 coverage. That coverage may help achieve the often-elusive goal of corralling disparate agencies and timelines for important infrastructure projects, all without compromising the depth and integrity of the NEPA process.

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Alternative Dispute Resolution in EPA and State Permit Appeals

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Alternative dispute resolution (ADR) has for many years played an important role in resolving disputes associated with environmental permits, including both permits issued by the Environmental Protection Agency (EPA) and permits issued by state agencies under the authority delegated to them by EPA. In an effort to streamline the processing and finality of permits under its review, the EPA has proposed several changes to the Environmental Appeals Board’s (EAB) permit review process. EPA’s proposed rule, published in the Federal Register on December 3, 2019, would revise its approach to ADR by imposing a time-limited ADR process as a requirement for judicial review and thereby transform EAB’s current ADR practice from an “opt-in” to an “opt-out” system. Envtl. Prot. Agency, Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084 (Dec. 3, 2019).

In its proposed rule, EPA also recommends other changes to the EAB’s permit review process, including eliminating EAB’s ability to issue sua sponte decisions, accept amicus curiae briefs, and decide whether EPA properly exercised its discretion regarding an “important policy consideration”; imposing a 60-day deadline for the EAB’s issuance of a final decision after final briefing and argument and a 12-year term limit on EAB judges; limiting the EAB’s ability to grant filing extensions; creating a process to identify certain EAB decisions as precedential; and allowing the EPA administrator, through the General Counsel, to issue a binding legal interpretation on matters or issues before the EAB. Id.

EPA’s proposal would affect only the review of certain EPA-issued permits and would not impact EAB’s review of enforcement matters under the various pollution-control statutes. And because most states issue their own permits under federal delegation, the proposal would necessarily affect only a small number of the numerous environmental permits issued each year. State administrative processes regarding state permit review, many of which include their own separate procedures for ADR, would remain unchanged.

This article outlines the EAB’s historical authority over the ADR process and the major recommendations in EPA’s proposal, and provides a sampling of the public comments received by EPA on the proposed rule changes. We also examine the various mechanisms for ADR in state administrative review processes, which provide a variety of different approaches to implementing ADR in the context of disputes involving environmental permits.

EAB History and Purview

Created by regulation in 1992, the EAB is an impartial appellate body housed within EPA. It was itself established in a streamlining effort to help the EPA adapt to “new realities” resulting from increased enforcement efforts—that is, rapidly increasing numbers of appeals that proved difficult for the EPA Administrator and judicial officers to handle. The EAB exists to “allow for a broader range of input and perspective on administrative decisionmaking,” thereby “lending greater authority to [EPA] decisions”; to “inspire[ ] confidence in the fairness of [EPA] adjudications”; and to “confer[ ] on [EPA] appellate proceedings the stature and dignity that are commensurate with the . . . importance of such proceedings.” 57 Fed. Reg. 5320, 5321–22 (Feb. 13, 1992).

To that end, the EAB operates independently and is comprised of four Environmental Appeals judges who are career service employees, not political appointees. Its goals are to ensure that EPA applies legal requirements consistently and to provide an efficient, cost-effective means for appeal that will expedite environmental compliance and permit finality without the expense and delay of protracted litigation.
The EAB typically hears permit challenges and appeals of administrative civil penalty assessment under the various environmental statutes. However, the EAB also has authority to review petitions for reimbursement of cleanup costs, certain acid rain program appeals, and challenges to pesticide registration and cancellation proceedings, in addition to proposed consent agreements involving administrative enforcement by EPA Headquarters. The EPA’s Environmental Appeals Board at Twenty-Five: An Overview of the Board’s Procedures, Guiding Principles, and Record of Adjudicating Cases [hereinafter EPA’s EAB at Twenty-Five].

In terms of permit appeals, the EAB hears (1) permitting decisions by EPA Regional Administrators under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act (RCRA); (2) Clean Air Act New Source Review (NSR) permits issued by EPA in Indian Country; and (3) terminations of National Pollutant Discharge Elimination System (NPDES), RCRA, and Marine Protection permits.

The Procedures for Decisionmaking, at 40 C.F.R. part 124, provide the mechanism for the EAB’s permit review. Any person who filed comments on a draft permit or participated in the public hearing on the draft may file a petition for review before the EAB. The petitioner must file the petition within 30 days after notice of the permit decision and must identify the specific challenge(s) to the decision and clearly explain why the EAB should review it. The EAB will grant the petition if the permit decision was based on a “finding of fact or conclusion of law that is clearly erroneous” or an “exercise of discretion or an important policy consideration that the [EAB] should, in its discretion, review.” 40 C.F.R. § 124.19(a)(4)(i). If the permit applicant did not file the petition, it may file a notice of appearance and respond to the petition, as may interested parties by filing amicus briefs. Id. § 124.19(b)(3)–(4), (e).

EAB’s Current ADR Process

The EAB established a voluntary ADR process in 2010 “to promote faster resolution of issues and more creative, satisfying and enduring solutions; to foster a culture of respect and trust among EPA, its stakeholders, and its employees and to improve working relationships; to promote compliance with environmental laws and regulations; to expand stakeholder support for [EPA] programs; and to promote better environmental outcomes.” 84 Fed. Reg. at 66,086. Because it is voluntary, the current system is an “opt-in” system. Because three members of the EAB typically hear matters as a panel, the fourth member is available to act as a settlement judge if parties wish to attempt to resolve their dispute informally through ADR. This settlement judge and a counsel to the Board serve as neutral mediators and provide a confidential assessment of the strengths and weaknesses of each party’s case. EPA’s EAB at Twenty-Five at 5. As EPA notes in its proposed rule, “[t]he ADR program has been highly successful and, to date, over 90% of the cases that have gone through the program have been resolved without litigation.” 84 Fed. Reg. at 66,086.

In its current process, parties to an EAB dispute are invited to participate in ADR, and all parties must agree in order to start the process. If the parties agree, a settlement judge is appointed, and the appeal proceedings are stayed for 60 days. The settlement judge will hold a status conference, and then the parties must submit issue summaries within 10 days. At an initial ADR meeting, the parties will begin the case evaluation/mediation process. Id.

ADR may be terminated if the settlement judge determines that mediation is no longer appropriate; the settlement judge determines that there has been insubstantial ADR progress during the stay; or any party decides it no longer wishes to mediate the dispute. The matter will then be returned to the EAB’s docket. Id.

If, on the other hand, the parties reach a resolution during ADR, they will then execute a written agreement resolving all or a portion of the issues in dispute. If they resolve all issues, they must file a joint motion to dismiss the matter. If only some of the issues are resolved, the parties must file a motion to dismiss the resolved issues. The EAB will then issue an order returning the remaining issues to the EAB’s docket. Id.

EPA’s Proposal

EPA’s proposal to change the EAB’s permit review process and purview would affect all EPA-issued NPDES, Underground Injection Control, and RCRA permits, and the following EPA-issued Clean Air Act permits: Outer Continental Shelf, Title V, Acid Rain, Tribal Major Non-Attainment NSR, and Tribal Minor NSR. The proposed revisions would not, however, affect the EAB’s review of enforcement or other matters.

First and foremost, EPA has proposed changing the ADR process for EAB permit reviews to an “opt-out” process, in which ADR would automatically commence upon receipt of a notice of dispute. According to EPA, this procedural proposal is “intended to streamline and modernize part of the Agency’s permitting process.” Id. at 66,084. Under the proposal, the EAB’s receipt of a notice of dispute for the covered areas would trigger the appointment of a settlement judge, who would then have 30 days from the response deadline to convene a meeting of all parties. Each party would be required to submit issue summaries at least 10 days prior to the meeting. At the meeting, each party would meet privately with the settlement judge and receive a confidential, oral assessment of the strengths and weaknesses of the party’s case. After the meeting, or no later than 30 days after the response deadline, the parties may decide unanimously to either extend the ADR window or proceed with an EAB appeal. A party’s participation in the convening meeting would be a prerequisite for later seeking judicial review. If the parties do not agree to extend the ADR process or proceed with an EAB appeal, the permit would then become final and could be challenged judicially.

EPA has also proposed that only those issues that the parties agree on for further ADR or EAB review should continue through the process. In other words, any remaining issues might be preserved for appeal but could not be challenged through federal court unless the parties exhausted administrative review on those issues. EPA specifically requests comments on whether all issues raised in a notice of dispute should continue through the EAB process, or only those issues on which...
the parties unanimously agree to either continue with ADR or proceed with an EAB appeal.

Other components of EPA’s proposed rule could affect how EAB currently conducts the ADR process. EPA has proposed narrowing EAB’s scope of review to prevent it from reviewing whether EPA properly exercised its discretion with respect to “an important policy consideration.” Id. at 66,088. According to EPA, EAB’s current authority to review policy consideration has caused confusion “as to whether a petitioner may ask the EAB—standing in the Administrator’s shoes—to address issues that a federal court generally could not review”—i.e., evaluate discretion in the context of policy considerations. Id.

EPA also proposes eliminating EAB’s acceptance of amicus curiae briefs in permit appeals. EPA believes that additional input from amici will not be necessary with the proposed ADR process because it “would be the proper forum for parties to resolve disputes over [EPA] permits.” Id. EPA also believes that disallowing amicus briefs is consistent with purported purposes of streamlining permit appeals: “By eliminating amicus briefs, EPA proposes to hasten the resolution of permit appeals by 15 days, . . . and to simplify the process.” Id. (internal citations omitted). As stated in the proposal, EPA considers public participation in the permit process, rather than submittal of amicus briefs, the proper avenue for members of the public to provide input on disputed permits.

Finally, EPA proposes a mechanism by which the EPA Administrator, through the General Counsel, could issue a dispositive legal interpretation in any matter or issue before the EAB. Such an interpretation could be issued in both permit appeals and enforcement reviews and would be binding on the EAB. According to the EPA, this proposal is intended “to allow the Administrator, in specific cases, to retain authority as it pertains to legal interpretations.” Id. at 66,090.

Public Comments on EPA’s Proposal

As one might expect, industry groups have submitted comments largely supportive of EPA’s streamlining proposal, with environmental nonprofit groups generally opposed. As for the ADR “opt-out” proposal itself, most of the supportive comments focused on the need for minimizing delays in the permit review process. According to one industry commenter, EPA’s proposed changes “would provide permit applicants with greater certainty as to when they can obtain final action on their permits and, if approved, proceed with their projects.” Amer. Petroleum Inst. Comments at 4 (Jan. 2, 2020), regulations.gov/document?D=EPA-HQ-OGC-2019-0406-0020.


Most other substantive comments seem to concern the proposals to disallow amicus curiae briefs and to allow the EPA Administrator to issue binding legal interpretations in matters before the EAB. On these points, even the industry groups seem reluctant to accept EPA’s proposal in whole. For instance, the Tennessee Valley Authority (TVA), an electricity provider in the Southeast, supports the proposal to limit amicus participation but suggests that such participation not be disallowed outright. TVA recommends that amici briefing be allowed where participants have exhausted their administrative remedies or where the EAB specifically requests amici briefing on “particularly difficult legal issues that would benefit from other perspectives in reaching resolution.” Tenn. Valley Auth. Comments at 4 (Jan. 2, 2020), regulations.gov/document?D=EPA-HQ-OGC-2019-0406-0019. The Air Permitting Forum, an industry group representing permittees, writes, “one concern is that the approach to issuing the ‘dispositive’ legal interpretation is unclear and the inability of non-parties to participate in the proceeding could lead to precedent decisions being made without notice.” Air Permitting Forum Comments at 2. The Forum therefore suggests that any such dispositive legal interpretation be appealable as a final action by any person.

ADR in State Administrative Proceedings

As noted above, EPA’s proposal would not affect state administrative review of state-issued permits, which account for the majority of environmental permits issued each year. 84 Fed. Reg. 66,086. Most states do provide some sort of ADR process for permit appeals, though the format and scope vary widely. Some states have instituted a formal process for ADR, including detailed rules, while others simply encourage settlement through mediation without any formal process in place. Many of the states specifically assert in statute, rule, or guidance that the ADR process cannot be used as a tool to delay a hearing on a contested matter. States emphasize the advantages of ADR, such as saving litigation costs for the parties and administrative costs for the state and narrowing the time of a resolution, as well as the ability to address issues that cannot be addressed in the civil or administrative process due to jurisdictional constraints, such as aesthetics. Even if the mediation does not result in a final resolution, it may assist in narrowing the issues, which could speed up the final resolution to the contested case. The following is a sampling of how some states’ ADR processes work in various regions of the country.

The Texas Commission on Environmental Quality (TCEQ) has a voluntary settlement procedure that employs the use of mediation. 30 Tex. Admin. Code ch. 40. There are several opportunities for resolving a contested permit through mediation, and all run parallel with the administrative hearing, except when there is an order issued by the presiding administrative
judge delaying the hearing. (This occurs only if it appears the matter is likely to settle and the parties do not want to incur any further litigation expenses.) The ADR director for the TCEQ coordinates and oversees the ADR process and makes recommendations to the TCEQ commissioners regarding mediation before a contested matter is referred to State Office of Administrative Hearings (SOAH) by the commissioners. The parties can request mediation, but usually the ADR director is the first to reach out to the parties to determine if ADR could facilitate a resolution. The ADR director usually reaches out to the parties to evaluate whether mediation would assist in resolving the issues once a hearing is requested to challenge the permit and the comment period has closed, but before the commissioners make a decision regarding whether the challengers are eligible parties to request a hearing. Often the ADR director’s evaluation is based on how many challengers have requested a hearing. If there is a very large number of participants, mediation will likely not be effective at this point in the proceedings. The ADR director provides a recommendation to the commissioners if the contested case can be resolved through mediation at the time the commissioners hold a hearing on whether the matter needs to be referred to SOAH for a hearing on the relevant issues.

Once the case is forwarded to SOAH, the parties can also seek mediation. Similar to the TCEQ ADR process, SOAH has its own set of regulations regarding mediation. 1 Tex. Admin. Code § 155.351. Discovery can help focus the issues or provide additional evidence that will assist in making the mediation productive. The TCEQ ADR mediators tend to run the mediations, but SOAH also has mediators, which the participants can utilize. Both TCEQ and SOAH provide mediators at no cost to the parties, though the parties have the option of hiring a private mediator—in this case, the participants pay for their own mediators. 30 Tex. Admin. Code § 40.4; 1 Tex. Admin. Code § 155.31(e). Private mediators are utilized if the participants are concerned about the independence of the TCEQ mediators. Mediations only occur if all the parties consent; however, the SOAH judge does have the authority to compel mediation without the consent of all the parties, though the SOAH judge generally will not exercise this authority. Instead, SOAH may offer the parties a presentation by a SOAH mediator about the mediation process and why it may be useful in narrowing the issues or reaching a complete settlement. This multilayered mediation process for TCEQ-contested cases allows for the possibility of settling the matter through mediation at various stages of the contested case hearing without delaying the proceedings.

The Florida Department of Environmental Protection (Florida DEP) has a process through the Environmental Litigation Reform Act (ELRA) that allows mediation instead of going before the circuit court for a Notice of Violation (NOV) involving certain alleged violations with a proposed penalty of $10,000 or less. Fla. Stat. § 403.121(2). ELRA allows the respondent to elect to go through an administrative hearing to obtain a final order with the additional option of mediation before proceeding to the circuit court. Once the ELRA NOV is issued by the Florida DEP, the respondent can petition for a resolution through an administrative hearing within 20 days or opt out of the ELRA process and go to the circuit court. If an administrative hearing is chosen, the respondent has 10 days from the time of the administrative law judge’s initial order setting a date for the hearing (which is usually no more than 180 days out) to request mediation. The Florida Conflict Resolution Consortium then provides a list of mediators. The respondent must select one within 15 days and then mediation must be completed 15 days prior to the hearing. If the respondent wants to mediate the issues, the Florida DEP cannot opt out for an ELRA NOV. On the other hand, if it is a regular NOV or a contested permit, all parties must agree to the mediation. In addition, for non-ELRA NOVs, if all the parties agree to mediation, the filing of the petition is tolled until the end of the mediation. FL DEP Enforcement Manual 82. The cost of the mediation is divided among the parties.

Tennessee’s Uniform Administrative Procedures Act encourages agencies to establish procedures for informal settlement of matters, Tenn. Code Ann. § 4-5-105, but there are no specific rules by the Tennessee Department of Environment and Conservation or the Office of Administrative Hearings for mediation of environmental disputes. In practice, an administrative judge from the Administrative Procedures Division (APD) typically asks parties if they have interest in mediation during the first prehearing conference call regarding a contested case. If the parties want to mediate, APD will appoint a neutral administrative judge to oversee mediation. The contested case will remain on APD’s docket until a resolution is reached.

New York’s Department of Environmental Conservation (DEC) provides mediation services through its Office of Hearings and Mediation Services (OHMS) for permits, orders, or any other matter over which DEC has jurisdiction. The mediation costs are paid for by OHMS. The parties can request mediation during the course of an administrative hearing, but all parties must agree to the mediation. The DEC has proposed to replace the Uniform Hearing Procedures with new rules that add a section on mediation. Proposed N.Y. Codes R. & Reg. tit. 6, § 622.19. The comment period on the proposed rule ended on January 31, 2020. The proposal gives the AJJs authority to mediate enforcement matters and sets forth the AJJ’s powers with respect to the mediation. The proposed mediation rule also provides that “[t]he hearing will not be adjourned, in whole or part, without the permission of the assigned AJJ or the Chief AJJ . . .” due to the mediation. Id. § 622.19(c).

In Arizona, the Office of Administrative Hearings has a list of “Mediation Rules” governing mediations. It is a voluntary process, requiring all parties to participate in order for the mediation to be scheduled. The parties are encouraged to request mediation early on in the hearing process, usually no later than 10 days after receipt of the Notice of Hearing. Unlike many of the states with formal rules or guidance on mediation procedures, Arizona postpones setting a hearing date until after the mediation. If the mediation does not end in a settlement, the mediator, if the parties all agree, can prepare a “mediator’s proposal” of suggested settlement terms and submit those terms in separate meetings with the parties. The Mediation Rules encourage the mediator to provide “Facilitative
Mediation,” which focuses on obtaining an agreement for settlement by “asking questions, validating and restating parties’ points of view, identifying interests underlying the positions of the parties, and finding and analyzing options for resolution,” and “Evaluative Mediation,” which focuses on the legal weakness and realities of the parties.

In Washington, the appeals from decisions by the Department of Ecology are heard by the Pollution Control Hearings Board or the Shorelines Hearings Board, depending on the type of case. The Board encourages early settlement, and to that end, it provides mediation services to parties free of charge, utilizing Administrative Appeals judges as mediators. All parties must agree to mediation before a time is set for mediating the dispute. Wash. Admin. Code § 371-08-395. The Board requires that the mediations be conducted early in the process so as to not delay the adjudicative proceeding. Wash. Admin. Code § 10-08-230. The mediations are conducted pursuant to the state’s Uniform Mediation Act. Wash. Rev. Code Ann. ch. 7.07.

The North Carolina Office of Administrative Hearings handles contested case hearings forwarded by the North Carolina Department of Environmental Quality. Within 10 days of the filing of the contested case petition, the chief administrative law judge can require by order that the parties attend a prehearing mediated settlement conference. 26 N.C. Admin. Code 03.0201. The ALJ must give a specific date for completion of the mediation, which shall not be less than 90 days or more than 120 days from the ALJ’s Order. Id. 03.0203(b). The parties must pay for the mediator, and if they cannot agree on a mediator within 21 days after the mediation order is issued, the ALJ will appoint one. Id. The parties can file motions to dispense with mediation if good cause is shown. Id. The rules require that the mediation not delay the proceedings, including discovery and the filing or hearing of motions. Id. 03.0203(e).

EPA’s efforts to streamline EAB permit reviews through required, “opt-out” ADR differ from many of the established state administrative processes and may change in response to public comments from both industry and environmental nonprofit groups. Based on the negative feedback from commenters, it would not be surprising to see, for example, changes to the proposals to eliminate amicus curiae briefs and allow for binding legal interpretations from the EPA Administrator. It is also possible that certain states could reevaluate their own processes for permit challenges and ADR in light of any changes EPA ultimately makes to its own procedures. Either way, permittees likely will benefit from federal and state endeavors to simplify and expedite permit reviews.

Debunking the Myths Behind the NEPA Review Process

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always needed, we do not believe that aggressive “streamlining” is warranted. Indeed, page restrictions, time limits, and the like could make it more difficult to satisfy hard-look requirements and cause increased litigation-related delays.

If we do amend the regulations implementing the “Magna Carta” of environmental laws, Daniel R. Mandelker, NEPA Law and Litigation § 1:1 (2d ed. 2014), we should have sufficient information to assess the effect of any changes that are made. To make changes to a system that we don’t understand and with no way to accurately evaluate the effect of those changes is no way to run a business or a government. Regulatory changes should be grounded in fact and data if we are to avoid significant unintended consequences. This should begin by collecting and publishing data on the number and type of NEPA documents prepared by each agency as well as the time spent on the analysis and number of alternatives considered. Data should be organized to allow tracking of decisions to determine whether administrative challenges or litigation occur, and if so, the outcome that followed.

As the Forest Service noted in the preamble to its proposed NEPA regulations, the Service experienced a 39% reduction in all nonfire personnel since 1995 coupled with a dramatic shift in funding away from forest resource management. Reduced staffing and inadequate budgets are not unique to the Forest Service and appear to be a major cause of delays in NEPA completion. Fully staffing and funding agencies would allow agencies to do better work and complete that work faster. While supporting the passage of NEPA, Senator Jackson stated: “The future of succeeding generations in this country is in our hands.” 115 Cong. Rec. 40417 (1969). As we look to the future and consider pending NEPA reform proposals, our fathers’ words continue to resonate: Do it right the first time, and do not confuse cheap with inexpensive.

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Emerging Developments in Water Quality Certification for Federally Licensed or Permitted Facilities

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For many infrastructure projects requiring a federal permit or license, a major permitting hurdle is water quality certification (WQC) under section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., from the state or Native American tribe authorized to implement the CWA. Section 401(a)(1) requires the federal permitting applicant to request WQC for an activity that “may result in any discharge into the navigable waters” to provide the federal permitting or licensing agency a certification from the state in which the discharge will originate. The WQC is intended to provide reasonable assurance that there will be compliance with enumerated provisions of the CWA. Section 401(d) authorizes the certifying entity to include in any certification conditions “necessary to assure” that the applicant complies with these enumerated provisions, “and with any other appropriate requirement of state law.” Any such conditions must be included as conditions of the federal license or permit issued by the federal agency. Obtaining CWA section 401 certification often leads to project delay, particularly where the state has limited resources to implement this program within the maximum one-year timeframe provided by the statute. In some instances, to extend the maximum one-year time frame, project proponents—frequently at the request of states—have withdrawn their WQC request prior to the expiration of the one-year period and resubmitted it to toll the deadline, leading to additional uncertainty and delay.

Since 2019, there have been two legal and regulatory decisions that may fundamentally change this longstanding approach to implementing the WQC program under CWA section 401. First, in January 2019, the U.S. Court of Appeals for the D.C. Circuit issued Hoopa Valley Tribe v. FERC, 913 F.3d 1099 (D.C. Cir. 2019), which held that certifying entities have a maximum period of one year to act under section 401, and therefore invalidated the “withdraw and resubmit” practice. Second, on June 1, 2020, the Environmental Protection Agency (EPA) issued a final rule revising its nearly 50-year-old WQC regulations. EPA’s new rule not only adopted Hoopa Valley Tribe’s statutory interpretation of a one-year maximum time period, but also focused certification and conditioning authority for WQCs.

This article provides an overview of the regulatory landscape concerning WQCs for projects regulated by the Federal Energy Regulatory Commission (FERC), as well as an analysis of how Hoopa Valley Tribe and EPA’s rulemaking are likely to impose significant changes to the section 401 program nationwide. As the regulated community, states, tribes, and environmental advocates await implementation of EPA’s final rule and further implementation of the Hoopa Valley Tribe precedent, it remains to be seen the depth to which these developments will result in a more focused approach to WQCs, a larger number of denials of WQCs, increased incidents of section 401 waiver by states and tribes, or other results. While initial activity has sparked administrative litigation, with more likely to come, resolving these important matters in the WQC program may lead to settlement opportunities and refinement of state and federal processes that better facilitate coordination between states and federal permitting agencies and accommodate state and tribal action in a timely manner.

Overview of the WQC Program

Section 401 of the CWA requires that applicants for federal licenses or permits that may result in a discharge to navigable waters seek a WQC from the state in which the discharge will originate. Although the CWA is a federal statute, section 401 delegates to the states, together with tribes that have attained “Treatment as a State” authority under the CWA, the authority to issue certifications and to condition such certifications to ensure that the federal license or permit satisfies certain
provisions of the CWA and other appropriate requirements of state law. Some common examples of licenses or permits that may be subject to section 401 certification are actions by FERC, including hydropower licenses issued under the Federal Power Act (FPA) and natural gas pipeline certificates issued under the Natural Gas Act (NGA), CWA section 404 dredge-and-fill permits issued by the Army Corps of Engineers (Corps), and CWA section 402 National Pollutant Discharge Elimination System permits where EPA administers the permitting program.

The CWA provides that states and tribes must exercise this WQC authority within "any reasonable time, not to exceed one year." A state or tribe may waive the certification voluntarily, or by "failing or refusing to act" within the established reasonable time period. 33 U.S.C. § 1341(a)(1). Notably, these terms are not defined by the statute, and both Hoopa Valley Tribe and EPA’s rulemaking interpret Congress’s meaning and are poised to change how section 401 is implemented.

To begin with, the Supreme Court has interpreted section 401 as a broad delegation of conditioning authority to the states. Pub. Util. Dist. No. 1 of Jefferson Cty. v. Wash. Dept of Ecology, 511 U.S. 700 (1994). With respect to hydropower projects, the U.S. Court of Appeals for the Second Circuit has held that FERC is required under section 401 to include all certification conditions as conditions of the FERC license. See Am. Rivers v. FERC, 129 F.3d 99 (2d Cir. 1997). If FERC objects to certain water quality certificate conditions or finds that they would render the project "not in the public interest," it has the option of not issuing a new license altogether, but FERC may not modify or reject a state certification condition in the event it issues a license. See, e.g., Idaho Power Co., 161 FERC ¶ 61,284, at P 20 (2017); Duke Energy Progress, Inc., 153 FERC ¶ 61,056, at P 36 (2015).

This construct has led to WQCs that include conditions addressing issues that arguably have a tenuous connection to water quality effects of the licensed project. For example, certification conditions have required hydropower licensees to construct public recreational facilities, including hiking and hiking trails; release water to enhance recreational boating opportunities; develop invasive species monitoring plans; control livestock or wildlife access to navigable waters; and make financial contributions to a nongovernmental organization for habitat. Natural gas developers also have received WQCs with conditions that require quantifying downstream greenhouse gas emissions that result from pipeline projects.

With respect to the timeframe within which WQCs must be issued, FERC’s regulations give the certifying agency the full one-year period under the CWA to decide on a certification request, while EPA’s and the Corps’ regulations generally provide a 60-day certification deadline. In some states, however, it was common practice prior to Hoopa Valley Tribe for WQC applicants, at the request of the certifying agency, to withdraw their request prior to the one-year mark and resubmit the same application (often through the filing of a one-page withdraw-and-resubmit letter) to purportedly restart the one-year time period. For several projects, this approach led to substantial delays and hamstrung FERC’s ability to license proposed new projects or modernize environmental requirements at existing projects through relicensing. See, e.g., Placer Cty. Water Agency, 167 FERC ¶ 61,056, at P 11 (2019).

D.C. Circuit’s Rejection of the “Withdraw-and-Resubmit” Practice

Hoopa Valley Tribe rejects the "withdraw-and-resubmit" practice. There, the court held that the states of California and Oregon waived their WQC authority by failing to rule on the applicant’s request within one year from the date the applicant first applied for WQC in 2006. The applicant for many years had, at the request of the states, withdrawn and resubmitted its certification application in an attempt to annually reset the one-year time period. Moreover, the applicant, states, and other parties had reached a settlement in the FERC relicensing process, in which the states had agreed to hold their certification proceedings in abeyance pending the disposition of the settlement terms. In Hoopa Valley Tribe, the court determined that such activities constituted a waiver of the states’ section 401 authority, holding that the plain text of CWA establishes that “a full year is the absolute maximum” time for a state to decide on a certification application.

While Hoopa Valley Tribe did not address the scope of certification conditioning authority under section 401, it interpreted a one-year maximum time period for certifying entities to complete their review and decide whether to issue certifications, and what conditions, if any, should be included in them. Aside from the long-delayed proceedings that Hoopa Valley Tribe allowed to move forward, the ruling is expected to place additional pressure on both applicants and certifying entities to ensure that sufficient information is available to support a decision, and for the certifying entity to place sufficient resources into certification requests such that it can meet the one-year maximum time allotted under the CWA.

FERC Implementation of Hoopa Valley Tribe

Since its issuance in January 2019, Hoopa Valley Tribe has had far-reaching effects for hydroelectric licensing as well as other federal permitting activities. This is particularly true for federal permitting applications that have long languished before the agency, awaiting decision only because of an outstanding CWA section 401 certification decision. Since Hoopa Valley Tribe, for example, FERC has determined that a state has waived section 401 authority in no fewer than 14 pending licensing and permitting proceedings. Several of these orders address timing issues not specifically addressed by the D.C. Circuit in Hoopa Valley Tribe.

While Hoopa Valley Tribe clarified that a state’s authority to issue a certification is limited to one year, for example, it did not address the related issue of when the one-year period begins. Prior to Hoopa Valley Tribe, FERC in Empire Pipeline found that an agreement between New York Department of Environmental Conservation (New York DEC) and National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (collectively, National Fuel) to alter the receipt date of the application did not extend the statutory one-year deadline for New York DEC to act on the application. Nat. Fuel Gas Supply Corp. &
Empire Pipeline, 164 FERC ¶ 61,064 (2018). On April 2, 2019, FERC relied on Hoopa Valley Tribe to affirm its prior order finding that the New York DEC waived its authority under section 401 by failing to act within one year of its actual receipt of the application. FERC’s determination has since been challenged, and as of this publication, the case is pending in the Second Circuit. Nat. Fuel Gas Supply Corp. & Empire Pipeline, 167 FERC ¶ 61,007 (2019).

Another question raised by Hoopa Valley Tribe is what type of resubmission to the certifying entity is sufficient to re-trigger a new one-year period for WQC decision. Hoopa Valley Tribe maintains that the submission of the same application (often through a one-page letter) year after year is insufficient but declined to wade into how different a new submission must be to be considered a “new” request.

In 2013, Constitution Pipeline (Constitution) applied for a certificate of public convenience and necessity from FERC pursuant to the NGA. FERC granted the certificate in 2014 but required Constitution to file documentation that it had received all applicable authorizations, including a section 401 WQC or evidence of waiver thereof, before beginning construction. The New York DEC denied Constitution’s application for WQC in 2016 after it filed two letters to “simultaneously withdraw and resubmit” its application. In 2017, Constitution petitioned FERC to declare that New York DEC waived its section 401 authority through delay, but FERC issued a declaratory order finding that each submission was an independent request. Constitution sought judicial review of that order before the D.C. Circuit, prior to the D.C. Circuit’s decision in Hoopa Valley Tribe. After Hoopa Valley Tribe, FERC asked the D.C. Circuit for voluntary remand on Constitution’s challenge. On remand, FERC reversed its determination in Constitution’s declaratory order, consistent with Hoopa Valley Tribe. FERC found that, as a general principle, a state waives section 401 authority when an applicant withdraws and resubmits a request for WQC for the purpose of avoiding section 401’s one-year time limit and the state does not act within one year. It also found that the state’s reason for delay—including an agreement with the applicant to withdraw and resubmit its application—was immaterial when considering the plain language of the statute.

FERC grappled with this same issue in a September 2019 order in which it issued a hydropower license to McMahan Hydroelectric, LLC (McMahan), for a project in North Carolina. McMahan Hydroelectric, LLC, 168 FERC ¶ 61,185 (2019). There, FERC held that North Carolina Department of Environmental Quality (DEQ) waived its certification authority by failing to act within one year of receiving McMahan’s request for certification. In that case, after McMahan filed its request for certification with the state on March 3, 2017, North Carolina DEQ requested additional information, including a water quality monitoring plan and FERC’s environmental assessment (EA), and indicated that McMahan’s application would be put on hold until that information was filed. In April 2017, McMahan filed its water quality monitoring plan. Because FERC had yet to issue its EA, North Carolina DEQ instructed McMahan to withdraw and refile its application for WQC, which it did on February 20, 2018, and again on February 11, 2019.

Based on these facts, FERC held that North Carolina DEQ waived its section 401 authority, finding that the additional information requested by the state did not constitute a “new” certification application that would reset the one-year statutory deadline. FERC maintained that responding to a state’s request for additional information “generally would not rise to the level of a material change to a project’s plan of development” warranting a new section 401 application. In its order, FERC held that only “a material change to a project’s plan of development,” which “would involve significant changes to the project’s physical features” would constitute a “new” application for purposes of restarting the one-year certification period under section 401. McMahan Hydroelectric, LLC, 168 FERC ¶ 61,185 (2019), relq denied, 171 FERC ¶ 61,046 (2020).

In FERC’s orders, Commissioner Richard Glick concurred that DEQ had waived its 401 authority but stated that there may be situations where an applicant withdraws its request for certification and resubmits “a wholly new one in its place,” or where additional information constitutes “a significant modification” to a pending section 401 application that could justify restarting the one-year clock. Importantly, Commissioner Glick’s opinion did not address how significant a modification would need to be to restart the one-year clock.

State Agency and Project Proponent Coordination

Following Hoopa Valley Tribe, states argued that the court only rejected the ability of the state and project proponent to enter an explicit agreement to delay issuance of the certification. FERC, however, has disagreed. On April 18, 2019, FERC issued an order finding that the California State Water Resources Control Board (SWRCB) waived its authority to issue a certification in the pending relicensing of the Middle Fork American River Project because, even though SWRCB and the applicant did not have a formal agreement in place regarding the withdrawal and resubmission of its certification application, they engaged in a “coordinated scheme” to delay issuance of the certification. Placer Cty. Water Agency, 167 FERC ¶ 61,056 (2019).

FERC also rejected arguments that Hoopa Valley Tribe should be applied only prospectively, and that finding a waiver of section 401 authority would be fundamentally unfair and disrupt the policy of “cooperative federalism” embodied in the CWA. FERC found that “[t]he Hoopa Valley court did not in any way indicate that its ruling was limited solely to the case before it, and to conclude that the court’s decision does not apply to similarly-situated cases would fail to give full effect to that ruling. We are aware of no sound legal or equitable basis for doing so.” Id. at P 15.

EPA Rulemaking on Section 401 WQC Regulations

On August 8, 2019, EPA released a Notice of Proposed Rulemaking (NOPR) to clarify its regulations on WQC procedures under section 401. Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (Aug. 22, 2019). The NOPR proposed substantive changes to the scope of certification authority under the CWA and the procedures governing these
certifications, focusing on the plain language of the statute and at times offering an interpretation of section 401 that differs from prior judicial opinions. On June 1, 2020, EPA released its final rule updating its regulations implementing section 401. While the final rule promulgates considerable across-the-board changes to the section 401 program nationwide—such as adopting an absolute maximum one-year time period consistent with Hoopa Valley Tribe; pre-filing consultation requirements; certification application contents requirements; enforcement of certification conditions; and future modification of conditions—EPA recognized that “the foundation of the final rule” is the “scope of certification,” as provided in the new section 121.3 of its regulations.

Prior to this rulemaking, EPA’s regulations implementing section 401—which were promulgated before section 401 was significantly modified by Congress in the 1970s—were broad, giving states extensive power to impose a wide variety of conditions on proposed projects, which are often costly to implement and maintain, and inject a large degree of uncertainty into the development process.

In its final rule, EPA clarified that “section 401 appropriately focuses on addressing water quality impacts from potential or actual discharges from federally licensed or permitted projects. Clean Water Act Section 401 Certification Rule, Pre-Publication Version at 149. In other words, EPA’s final rule requires states and tribes to focus their review on the water quality of the discharge, and not on the overall activity that is the subject of the federal permitting effort.

This interpretation is considerably narrower than the Supreme Court’s landmark ruling in Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994), in which the Court found that the authority of states to include conditions pursuant to section 401 is very broad, though not unbounded. Explaining that the federal regulations that guided the Court’s PUD No. 1 ruling were enacted prior to the 1972 CWA, observing that the Court in PUD No. 1 lacked the benefit of EPA’s statutory interpretation of section 401, and persuaded by Justice Thomas’ dissenting opinion in PUD No. 1, EPA’s final rule formally interprets WQC as pertaining only to point-source discharges associated with a federally licensed or permitted activity—and not the entire federally licensed or permitted activity.

In addition to confining state and tribal section 401 authority to point-source discharges of a federally licensed or permitted activity, EPA’s final rule requires state and tribal certification authorities to demonstrate that their certifications and any included conditions to meet “water quality requirements”—a newly defined term under the final rule. Under the final rule, “water quality requirements” are defined as effluent limitations and standards of performance for new and existing discharge sources (CWA sections 301, 302, and 306); water quality standards under CWA section 303 (including designated uses, numeric criteria and narrative standards); and toxic pretreatment effluent standards under CWA section 307. The final rule significantly curtailed a broad interpretation of section 401(d)’s passage that conditions can include “any other appropriate requirement of state law,” maintaining that the canon of ejusdem generis requires any such conditions to be related to water quality. As such, the final rule also includes within the definition of “water quality requirements” conditions related to “state or tribal regulatory requirements for point source discharges into waters of the United States. EPA noted that some such requirements may be preempted by federal law, such as the FPA.

EPA’s proposed rule would have required federal agencies to review a certification action to determine whether it was within the “scope of certification,” and would have permitted them to reject conditions that, in their view, were beyond the scope of the certification. The final rule, however, clarifies that federal agencies are only to review certification actions for compliance with the procedural requirements of section 401. These newly imposed procedural requirements include providing certain information in a grant or waiver of certification, including statements explaining why certification conditions are necessary to ensure that the discharge will comply with water quality requirements, or, alternatively, why the discharge will not comply with water quality requirements, as well as citations to applicable federal, state, or tribal law.

The final rule also clarified the time period for section 401 state review, providing more concrete guidance regarding the outer bounds of state review and defining the meaning of a state’s “failure or refusal to act.”

Building on the D.C. Circuit’s ruling in Hoopa Valley Tribe, EPA’s final rule clarifies that one year is the “absolute outer bound” for states to act on requests for WQC, and that the one-year period begins at the state’s receipt (meaning the date the request was received) of a certification request (meaning a signed and dated written communication requesting certification with a description of the project, its discharges, and receiving waters). The rule would also prohibit a state and applicant from engaging in a coordinated effort of withdrawal and resubmittal requests to toll the one-year period.

Recognizing that the statute expressly requires state action within a “reasonable” time period (up to a maximum of one year), EPA also asserted that not all projects should require a full year for the state to act and provided that a federal licensing or permitting agency may set a reasonable period of time for a certification—either on a project-by-project basis or categorically through a rulemaking—but acknowledged that federal agencies should be able to modify the established reasonable period of time as long as the modification does not exceed one year.

EPA’s final rule also clarified that a state will be considered to waive its certification authority when it “fails or refuses to act” on a section 401 certification application within the “reasonable period” designated by the federal permitting agency. In addition, the final rule is explicit that a state “fails or refuses” to act when it fails to issue a WQC or denial in writing or follow the procedural requirements of section 401.

Looking Forward: Waiver, Water Quality Effects, and Final Regulations

Both Hoopa Valley Tribe and EPA’s rulemaking process have drawn praise and sharp criticism, with environmental...
Candidate Conservation Agreements with Assurances

The Next Great Tool for Win-Win Conservation

Galen Schuler, Greg Corbin, and Lawson Fite

Candidate Conservation Agreements with Assurances (CCAs) are a tool that enables landowners to enter into binding conservation agreements regarding species being considered for listing under the Endangered Species Act (ESA). These agreements can be factored into the analysis done by the Fish & Wildlife Service (FWS) or National Marine Fisheries Service (NMFS; collectively the Services) to determine if a species should be listed, and robust CCAs can provide justification to avoid the burden of a listing while ensuring future conservation. We are only now beginning to unlock the potential for use of CCAs as a conservation tool. And, in what might prove to be a watershed event for CCAs, the FWS’s announcement of its May 2020 decision not to list Pacific fisher populations in Northern California and Southern Oregon recognized that the “heavy lifting” done by CCAs in that situation “greatly alleviates the need for regulation.” Press Release, FWS Sw. Region, Celebrating Conservation: Partners Finalize Plans to Protect Pacific Fisher (May 14, 2020).

The CCAA Tool

A species is not afforded the considerable protections of the ESA until it is listed as either threatened or endangered. Prior to listing, a species in decline may nevertheless benefit from voluntary actions by landowners who, in turn, may benefit from a greater degree of regulatory certainty. CCAs are the tool the Services use to implement that trade. A CCAA identifies (i) the candidate species, (ii) the status of the species and its habitat on the covered lands at the time the CCAA is executed, (iii) key threats to the species, (iv) conservation measures the landowner agrees to perform to address those key threats, (v) the benefits expected to result from the landowner’s commitments, and (vi) the assurances the Services will provide in return for the landowner’s implementation of the conservation measures. FWS & NMFS, Candidate Conservation Agreements with Assurances Policy, 81 Fed. Reg. 95,164 (Dec. 27, 2016) (CCAA Policy).

The purpose of the CCAA Policy is to incentivize nonfederal landowners to engage in activities for the benefit of species that are candidates for listing or “may become candidates or proposed for listing in the near future.” The incentive for nonfederal landowners to implement these conservation measures is to receive from the Services assurances “that additional conservation measures above and beyond those contained in the [CCAA] will not be required, and that additional land, water, or resources use restriction will not be imposed upon them should the species become listed in the future.” Id. at 95,170. Regulatory assurances also are provided by authorizing a specific level of take through issuance of an ESA section 10(a)(1)(A) enhancement-of-survival incidental take permit. Because the species would not yet be listed at the time the CCAA is executed, the permit becomes effective only upon listing of the species. 50 C.F.R. § 17.22(d)(4). The Services, however, retain the ability to revoke the permit if the permitted activities would result in jeopardy to the species.

The general permit regulations followed by the Services provide standards for evaluation of a CCAA and issuance of an enhancement-of-survival permit. See 50 C.F.R. §§ 17.22 (endangered species) & 17.32 (threatened species). In evaluating a CCAA, the Services determine whether the benefits derived from the conservation measures address “the key current and anticipated likely future threats” to the species that are under the landowner’s control and are reasonably expected to result in “a net conservation benefit to and improve the status of the covered species.” Id. § 17.22(d)(2)(ii); 81 Fed. Reg. at 95,170. Consistent with section 7 of the ESA, the Services also must determine that the CCAA and any authorized incidental take are not likely to jeopardize the continued existence of the species or likely to destroy or adversely modify proposed or
designated critical habitat. 50 C.F.R. § 17.22(d)(2)(iii); 81 Fed. Reg. at 95,171. The permit will also include conditions that (i) the landowner notify the Services upon transfer of the covered lands, (ii) the landowner give the Services advance notice of expected incidental take, and (iii) any other conditions the Services deem necessary to carry out the purposes of the CCAA and permit. 50 C.F.R. § 17.22(d)(3).

There is no set formula for how a CCAA is developed, its scope, or even how many landowners may participate, which provides wide latitude to be creative. The Habitat Conservation Plan (HCP) Handbook describes many possible types of CCAs, but in practice we see three broad categories: individual, programmatic, and template.

An individual CCAA is entered into with a single landowner and results in the issuance of a single enhancement-of-survival permit. The land area covered may be very small and permit an isolated activity or cover large geographies and multiple activities. Individual permits afford a great deal of flexibility, but they are the most resource-intensive to complete and may overstretch the Services and impose unreasonably high transaction costs on landowners.

On the other end of the spectrum is the programmatic CCAA, typically executed between the Services and a non-federal governmental entity. As with an individual CCAA, there is only one permit holder—the sponsor agency—but the CCAA and permit will authorize a set of activities that fall within the jurisdiction of the governmental entity, such as a state’s regulatory program for forest practices. Others who wish to be covered by the CCAA do so either through regulatory instruments issued by the governmental entity or by obtaining a “certification of inclusion.” Programmatic CCAs typically cover large geographies, cover numerous activities, and are more efficient for individual landowners once in place. However, the development of programmatic CCAs is often complex and time-consuming because of the scope and number of activities and conservation measures covered, the need to include multiple stakeholders in the process, and the potential for controversy.

Between individual and programmatic CCAs lie a number of hybrid options. Here we focus on the development of CCAA templates. In this scenario, a group of potential CCAA applicants (a collection of similarly situated landowners) negotiates a form of CCAA that will be the template on which individual landowners can enter into individual CCAs. This approach is best suited to situations where no governmental entity is willing or able to be the permit holder, and the potential applicants can provide a suite of conservation measures across a landscape. Each template CCAA is evaluated and administered as any other individual CCAA, and collectively they have the potential to provide an overall conservation benefit similar to that achieved by a programmatic CCAA.

**CCAs in Practice—The Pacific Fisher**

In 2004, FWS published a finding that the West Coast population of fisher (*Pekania pennanti*)—a small carnivorous mammal related to weasels—warranted listing but was precluded at that time by other agency work, making it a “candidate species” under the ESA. At the time, the fisher was already managed as a sensitive species on over 24 million acres of federal land and was also addressed as a covered species under various habitat conservation plans (HCPs). Despite these efforts, a range-wide conservation effort for the fisher was still needed.

In 2008, Sierra Pacific Industries (SPI) worked with FWS to develop the first CCAA for the fisher on the 160,000-acre Stirling Management Area in California. The Stirling CCAA allowed SPI to reintroduce fishers to commercial forest lands and monitor the population to better understand fisher survival, reproduction, and habitat use on a managed forest landscape. The results of that reintroduction demonstrated that managed forests could provide good habitat for fishers.

The future of fisher conservation became a more immediate concern in 2014 when FWS proposed listing the West Coast fisher as a threatened species. Within a span of five years following the proposed listing, more than eight million additional acres of nonfederal timberland were committed to management under new CCAs and HCPs. Different strategies were applied in Washington, Oregon, and California. All used CCAs with enhancement-of-survival permits, but each state used a different variation. Each strategy was tailored to the institutional and landowner opportunities available in each state.

Washington used the strategy of a programmatic CCAA. When the Pacific fisher was designated as a candidate species in 2004, it was already considered extirpated in Washington. In 2008, however, the National Park Service in cooperation with the Washington Department of Fish and Wildlife (WDFW) commenced a program to reintroduce fishers into the forests of Washington’s Olympic Peninsula. The fisher quickly established a small population, and the project was determined to be a success. Notably, the fisher dispersed outside Olympic National Park to both public and private lands.

Based on the successful reintroduction of fishers, WDFW took the lead on a program to reintroduce fishers in Washington’s Cascade Mountains. To secure public support for the reintroduction, WDFW worked closely with Washington’s timber industry to develop a programmatic CCAA with protection measures for fishers and regulatory assurances for landowners.

A programmatic CCAA was possible with WDFW as the willing permit holder. WDFW not only arranged for the fisher reintroductions and monitoring, but undertook the administration of the CCAA to enroll landowners who would commit to implement the fisher protection and habitat conservation measures of the programmatic CCAA in exchange for regulatory assurances.

WDFW’s programmatic CCAA for the fisher was approved by FWS on April 4, 2016, and quickly enrolled 58 landowners managing over three million acres subject to the CCAA conservation measures. The enrolled landowners included tribes, municipalities, nonprofit land conservation entities, small family-owned tree farms, and the state’s largest commercial timberland managers.

The robust enrollment of Washington landowners in WDFW’s fisher CCAA illustrates the advantages of a programmatic CCAA. By developing a programmatic CCAA, WDFW and FWS secured efficiencies for all participants that could not be achieved if individual landowners were to negotiate over 50 individual CCAs with a separate federal decision-making process for each CCAA (e.g., review under NEPA or the ESA). In addition, the landowner enrollment and termination process...
is quite simple so that sellers and purchasers of forestland can easily assign and assume a certificate of inclusion or terminate enrollment (with a loss of assurances) as needed. Furthermore, the conservation of fishers is achieved at a range-wide scale with millions of acres being managed to benefit the species.

In January 2020, WDFW announced that it had completed its plan to reintroduce over 250 fishers in western Washington, and all indications point to a successful reintroduction. Although the population is small relative to the available habitat, fishers again inhabit the forests of western Washington and the population is expected to grow.

Oregon chose to instead use a template CCAA. When the Pacific fisher was determined to be a candidate species for listing under the ESA, Oregon had a native population of fishers inhabiting the Siskiyou Mountains and a reintroduced fisher population established in 1977–1981 near Crater Lake National Park. With these exceptions, Pacific fishers are thought to be extirpated in much of Oregon.

When the fisher was proposed for listing as a threatened species in 2014, Oregon landowners and the Oregon Department of Fish and Wildlife (ODFW) were interested in replicating the programmatic CCAA under development in Washington. However, in Oregon there were legal and funding barriers that prevented ODFW from undertaking the role of implementing a fisher conservation program similar to that of Washington. The FWS Oregon Field Office overcame this barrier by using the general conservation plan concept described in section 3.4.3 of the HCP Handbook. In 2016, a template Fisher CCAA was proposed based on the conservation commitments found in the Washington programmatic CCAA. In April 2017, the form of the template CCAA was approved by FWS.

Like the Washington programmatic CCAA, the template CCAA allowed multiple landowners to cooperate in fisher reintroductions and provide fisher protection measures where fishers exist or disperse in the future. By 2018, a total of six landowners representing two million acres of private and state forest land had prepared a site plan for lands to be managed under the template CCAA conservation measures together with unique supplemental conservation measures for each landowner. In 2019, all of the site plan applications were approved and each landowner was issued an enhancement-of-survival permit under ESA section 10(a)(1)(A). On March 12, 2020, FWS proposed two more Oregon template CCAAs for approval.

Like the Washington programmatic CCAA, the Oregon template CCAA secured efficiencies for individual landowners and for FWS by using a single template development and review process for multiple landowners. Individual landowners were required to develop a site plan with enrolled lands and applied additional unique conservation measures, but the Oregon template CCAA reduced the time, effort, and cost that would be incurred if each landowner developed a CCAA that required a unique approval process. Enrollment and permit transfer are not as simple as with the programmatic CCAA, but site applications under a template CCAA are significantly less burdensome than individual CCAAs or HCPs.

It is too soon to know whether the combination of fisher conservation on millions of acres of federal forest land and two million acres of template CCAA ownerships will secure recovery in Oregon, but there are promising signs. During the development of the template CCAA, several landowners cooperated with FWS on early actions to survey for fishers. It appears that their number and range are expanding and Oregon’s reintroduced fisher population in the southern Cascades is now interbreeding with the native Siskiyou population of fishers.

California’s strategy has been to use single-landowner CCAAs (and HCPs). Although a programmatic or template CCAA could be pursued in California, the unique circumstances of large landowners there have led to fisher conservation through three conservation plans on individual ownerships covering more than two million acres.

The Pacific Lumber Company HCP approved in 1998 addressed fishers as a covered unlisted species before it was a federal candidate species. The Pacific Lumber Company HCP is now implemented by Humboldt Redwood Company on over 200,000 acres. Building on the Stirling CCAA approved in 2008, SPI and FWS collaborated on the development of a fisher CCAA for management of 1.6 million acres of SPI timberland in California. The SPI fisher CCAA was approved by FWS in October 2016. In June 2019, FWS approved a new Forest HCP for management of over 350,000 acres of California timberlands owned by Green Diamond Resource Company. Green Diamond chose to address fishers as an unlisted species in the Forest HCP rather than a CCAA because the conservation measures for a listed species covered by the HCP, the northern spotted owl, were also beneficial for fishers, which are abundant on Green Diamond’s California timberlands.

The individual landowner approach to fisher conservation plans in California comes with a higher transaction cost for each landowner, but it is also better suited to the unique needs of each landowner. In California, the conventional single landowner CCAA/HCP has been the conservation strategy used by affected landowners. Even single landowner plans can achieve species conservation at a scale that matters.

### CCAAs in Listing Litigation

The Services may determine that a robust CCAA weighs in favor of a decision not to list a candidate species. There is a developing split among courts as to how much weight to give CCAAs. A failure to give weight to a CCAA during the listing process disincentivizes conservation because it undermines the potential benefits to landowners and is also contrary to the Services’ own policy. In no sense is an existing and effective CCAA an automatic exit from listing, but if CCAAs’ significant benefits are not recognized in listing determinations, it is unlikely that landowners or states will view them as worth the effort.

The leading case on consideration due CCAAs in the listing decision-making process is *Defenders of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016), which upheld FWS’s 2012 decision to withdraw a proposed listing rule for the dunes sagebrush lizard. After the lizard was proposed for listing, there was a significant increase in enrollments by ranchers and oil and gas companies in conservation agreements in New Mexico (including a CCAA), and the 30-year Texas Conservation Plan, including a CCAA, was signed. *Id.* at 36. These plans and associated agency actions...
applied conservation measures to 95 percent of the lizard’s habitat in New Mexico and 71 percent of mapped habitat in Texas.

As described by the D.C. Circuit, the Texas Conservation Plan would “guide development away from lizard habitat and permit development in lizard habitat only when there is no feasible alternative.” Id. at 6. Additionally, “[a]ny habitat loss must be reported and mitigated through specified mitigation activities; mitigation credits can be ‘banked’ for future use.” Id. Finally, “[t]otal lizard habitat loss is limited to one percent during the first three years and can be increased to up to a ten percent cap over the life of the 30-year plan.” Id.

FWS found both plans to have high levels of certainty and implementation effectiveness under its Policy for the Evaluation of Conservation Efforts (PECE Policy). It accordingly found the plans would result in “discontinuation of habitat loss and fragmentation, and the restoration of already fragmented habitat.” Withdrawal Notice, 77 Fed. Reg. 36,872, 36,894 (June 19, 2012). Thus, “with the conservation agreements, the current habitat conditions will be maintained or improved,” and Listing Factor A—habitat loss or destruction—not longer weighed in favor of listing. Id. at 36,895.

On appeal, the plaintiffs continued to challenge FWS’s reliance on the Texas Plan, alleging it to be faulty on both effectiveness and implementation grounds. The court again rejected the challenge to the Texas Plan and highlighted the deference owed to the Service as well as the flexibility in the PECE Policy, which permits analysis to “vary across agreements” as “the purpose of its criteria is merely to ‘direct’ its analysis; the Service has not identified any one criterion or set of criteria as necessary or sufficient.” Defendants, 815 F.3d at 9. This echoes the same court’s decision in Friends of Blackwater v. Salazar, 691 F.3d 428 (D.C. Cir. 2012), which upheld the delisting of the West Virginia northern flying squirrel and FWS’s interpretation of the ESA “as not requiring that the criteria in a recovery plan be satisfied before a species may be delisted pursuant to the factors in the Act itself.” Id. at 436. Defendants likewise applies a deferential approach to the exercise of technical and scientific expertise rather than a check-the-box accounting, concluding that “the Texas plan may not be foolproof, but neither is every regulatory regime.” Defendants, 815 F.3d at 17.

Permian Basin Petroleum Ass’n v. Dept’ of the Interior, 127 F. Supp. 3d 700, 712 (W.D. Tex. 2015), invalidated listing of the lesser prairie-chicken where FWS did not give enough credit to private conservation commitments. The court noted that the Service “assume[d] that if a listing of the lesser prairie-chicken is precluded, much of the incentive for industry to enroll in the range-wide plan would be removed after March 31, 2014.” But “[n]o explanation was offered for this assumption other than the fact that the listing decision was due on March 31, 2014 . . . .” This concursional assumption was arbitrary and capricious as no substantive basis was provided, legitimate or otherwise.” Id. The court recognized the Service’s duty not to unduly discount or wave away those commitments.

Two recent decisions are more troubling to proponents of CCAAs. Colorado ex rel. Colo. Dept’ of Natural Res. v. FWS, 362 F. Supp. 3d 951 (D. Colo. 2018), upheld FWS’s listing of the Gunnison sage-grouse and its concomitant disparagement of a CCAA. The court described the CCAA as a standard exemplar, where “private landowners who enroll in the CCAA are required to engage in specified habitat protection measures on their property in exchange for assurances that, if the species is listed, they will reap the benefits of the CCAA permit and not be required to engage in additional conservation measures.” Id. at 974. The Service “found problematic the voluntary nature of the program, its limited 20-year duration, and the fact that the Agreement did not address many of the identified threats to the sage-grouse or its habitat.” Id. at 975. The court agreed, finding “the CCAA is a limited, voluntary conservation measure; it is not legally binding, nor are the incentives sufficient to ensure regulatory certainty.” Id. And it found “[t]he CCAA does not take into account climate change, drought, disease, and small population issues—all of which reasonably support the threatened listing.” Id. Unlike Defendants and Blackwater, the Colorado court appears to have focused on amelioration of each threat, rather than the overall status determination. It also did not appear to recognize the incentive structures and significant commitments involved in enrolling in a CCAA.

Similarly, Desert Survivors v. U.S. Dept of the Interior, 321 F. Supp. 3d 1011 (N.D. Cal. 2018), discounted conservation efforts including private commitments of over three million dollars toward conservation, and upheld listing of the Bi-State sage-grouse. Desert Survivors found the efforts were sufficiently certain to be implemented in light of the “documented track record of active participation and implementation by the signatory agencies, and commitments to continue implementation into the future.” Id. at 1033. But it found the efforts were not sufficiently certain to be effective, faulting the Service for not documenting “a direct correlation” between the actions and sage-grouse population response. Id. at 1063. The court, despite disclaiming any intent to do so, required the Service to show that any conservation efforts had a proven track record. This view, if more widely adopted, would severely crimp cooperative conservation and ignore the potential for surprising discoveries. On remand, the Service again withdrew the proposed listing. FWS, Withdrawal of Proposed Rules to List the Bi-State Distinct Population Segment of Greater Sage-Grouse with Section 4(d) Rule and to Designate Critical Habitat, 85 Fed. Reg. 18,054 (Mar. 31, 2020). The Service concluded the conservation measures at issue “will continue to be implemented because (to date) we have a documented track record of active participation and implementation by the signatory agencies and commitments to continue implementation into the future.” Id. at 18,055. This may give courts in the Ninth Circuit another opportunity to defer to the Service’s evaluation of public/private conservation initiatives.

The Service’s proposed listing rule for fishers in 2014 initially followed in the footsteps of Colorado and Desert Survivors by ignoring substantial commitments of resources. Although the Service withdrew its 2014 proposed rule prior to many of the CCAAs being in place, that withdrawal was remanded. Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 342 F. Supp. 3d 968 (N.D. Cal. 2018). In the proposed listing rule on remand, the Service “determined that we did not need to evaluate these voluntary conservation efforts” under the PECE Policy because
Emerging Developments in Water Quality Certification for Federally Licensed or Permitted Facilities

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advocates generally arguing that these developments will result in a project’s potential impacts on water quality being ignored and project proponents praising greater certainty regarding the scope and timeliness of certifications. One possibility of the developments discussed above is that federal permitting agencies will increasingly find that states have waived WQC—either by failing to timely issue certifications or by issuing certifications that the federal permitting agencies determine fail to meet the procedural elements of section 401. Under that outcome, project proponents might expect the need to protect their interests from state challenges in state or federal court, which could have the unintended effect of drawing out the certification and permitting process, rather than making it more efficient. On the other hand, EPA’s finalization of the major regulatory changes set forth in the final rule could lead to increased collaboration between states and federal permitting agencies as they navigate this new regulatory landscape. Indeed, the final rule requires environmental stewardship in agency decision-making.

It is also unclear whether EPA’s final rule will have the deleterious effects on water quality that some fear. The FPA, for example, gives FERC the ability to impose in hydroelectric licenses water quality conditions that are more stringent than those contained in a state’s certification. See, e.g., Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207 (9th Cir. 2008). Other applicable statutory programs—e.g., Rivers and Harbors Act, CWA section 404 permitting, and Endangered Species Act—all require environmental stewardship in agency decision-making.

Both Hoopa Valley Tribe and EPA’s new regulations are now final. Subsequent judicial review of the new regulations undoubtedly will shed light on the scope of the section 401 certification program. Regardless, EPA’s final rule and FERC’s orders following Hoopa Valley Tribe demonstrate both the need and opportunity for project proponents, federal and state regulators, Native American Tribes, and other stakeholders to work cooperatively to develop procedures for timely decision-making in federal licensing and permitting proposals in a manner that accommodates state WQC through the principles of cooperative federalism envisioned by Congress in the CWA.

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“these benefits will be realized at more of an individual fisher/local scale where implemented, and not necessarily at a scale and magnitude sufficient to ameliorate the primary significant threats imperiling the DPS.” FWS, Endangered and Threatened Wildlife and Plants; Threatened Species Status for West Coast Distinct Population Segment of Fisher with Section 4(d) Rule, 84 Fed. Reg. 60,278, 60,284 (Nov. 7, 2019). Where more than 10 million acres of nonfederal timberland and nearly 40 million federal acres are managed for the benefit of West Coast fisher, with over two million acres enrolled in Oregon, the Service’s statement revealed a deep skepticism of public-private partnership that carried a risk of undermoming the whole enterprise.

In May 2020, however, FWS issued its final listing determination on the Pacific fisher. FWS, Endangered Species Status for Southern Sierra Nevada Distinct Population Segment of Fisher, 85 Fed. Reg. 29,532 (May 15, 2020). The Service listed a Southern Sierra Nevada population of the fisher as endangered, but it determined the Northern California–Southern Oregon (NCSO) population did not warrant listing. Responding to comments by conservation partners, the Service evaluated the CCAAs in detail and recognized these measures “provide a benefit to fishers and their habitat.” Id. at 29,546.

Lessons Learned
Section 10 of the ESA and the relevant FWS implementing regulations, policies, and guidelines have proven remarkably creative and flexible in providing tools for conservation partnerships with nonfederal landowners and resource managers. Transaction costs remain a barrier to participation, but innovations such as programmatic and template CCAAs provide scale and efficiencies that can substantially lower the transaction costs and increase landowner participation. With these tools, it is equally important that the agency culture of FWS understands and embraces the use of ESA section 10 plans and permits as well as other tools such as ESA section 4(d) to leverage private and nonfederal conservation partnerships that integrate the needs of the landowner and resource manager with the conservation needs of sensitive species. Leaders in FWS Regional Offices and Field Offices should receive encouragement and support for investment of agency time and resources in effective private and nonfederal conservation partnerships that produce conservation benefits at a scale that matters in a time frame that makes a difference. While some courts have proven willing to give appropriate treatment to CCAAs, others remain skeptical or unwilling to do so. Support from the Services will be essential to listing decisions that give adequate weight to CCAAs and can be approved by the courts.

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Reforming New Source Review
What Project Emissions Accounting Really Means, and Why It Should Survive

Carroll “Mack” McGuffey

In the world of the Clean Air Act (CAA), few topics elicit more controversy than new source review (NSR). Okay, perhaps “climate change” actually takes top billing, but NSR is probably next in line. After all, NSR was the first program the U.S. Environmental Protection Agency (EPA) used to regulate greenhouse gases from “stationary sources,” those power plants and industrial facilities now responsible for just under half of the greenhouse gas emissions in the United States. NSR generally refers to both the Prevention of Significant Deterioration (PSD) program and the nonattainment NSR program because the applicability provisions of both are similar—both require facilities to consider installing new emission controls when making other major modifications.

A variety of NSR reforms have been promulgated over the years, with several more proposed by the Trump administration. The round of reforms currently underway, first initiated by EPA Assistant Administrator Wehrum and now in the hands of EPA Assistant Administrator Idsal, is more narrowly targeted than the last comprehensive overhaul in 2002 under President George W. Bush.

One of the targets of the current set of NSR reform measures is Project Emissions Accounting (PEA), which clarifies how to determine whether a project at a stationary source that both increases and decreases emissions will trigger the requirement for an NSR permit. At a high level, EPA’s PEA policy can be stated quite simply: Both increases and decreases count. But that simple description belies many complex implications.

The complexity underlying PEA is more than one article can unravel fully, and applying it to specific projects will, of course, require a case-specific review. Nevertheless, this article is intended to explain as plainly as possible when, and how, PEA could make a difference in determining whether real-world projects trigger NSR permitting. It also explores whether PEA is legal, based on the history and evolution of the policy and the legal authority for it, while attempting to dispel a few myths along the way.

The bottom line is that PEA will be relevant for only a small number of projects, but where it applies, it could be outcome-determinative. Contrary to critics’ claims, the policy is likely to encourage greater environmental protection, not greater emissions. Although it will be challenged by those that oppose any type of NSR reform, relevant precedent suggests it is likely to survive the inevitable attack.

When Does PEA Apply?
In addition to governing the construction of “new sources,” the NSR program requires existing stationary sources to obtain a permit before performing a “major modification.” A project only constitutes a “major modification” if it will result in an “increase” in emissions of a regulated air pollutant. The rules and guidance that govern whether a project will cause an emissions increase are complex. At a high level, sources must first compare pre- and post-project emissions of each relevant pollutant to see if the individual project under review will cause any to increase (EPA calls this “Step 1”). If so, then the source may also check to see whether the calculations would still indicate an increase even if all of the projects conducted over the preceding five years are considered together (EPA calls this “Step 2” or “contemporaneous netting”).

Under EPA’s current rules, a project constitutes a “major modification” if both the Step 1 and Step 2 calculations indicate that the emissions of any pollutant will increase by a “significant” amount—i.e., above certain thresholds expressed in tons of emissions per year. “Major modifications” require NSR permits that are remarkably onerous. Even under the best circumstances, NSR permits can take more than a year to obtain, and the cost of complying with the requirements in those permits can exceed the cost of the projects that triggered them.
For most projects, determining whether an individual project will cause an emissions increase (Step 1) requires only a single calculation for each relevant pollutant because most projects only affect a single emission point or stack. Think of a facility with only one stack that plans to install a new component that will cause the facility to burn more fuel. Determining whether that project will significantly increase emissions requires comparing a baseline of emissions from before the project to a projection of future emissions after the project. The difference will be either positive or negative, indicating an emissions increase or decrease, for each air pollutant.

Notably, even if a pollution control device is installed as part of the same project, there will still be only one calculation comparing a baseline to a future projection. The result of that comparison will still be either positive or negative for each pollutant, not both.

In contrast, some projects can affect more than one emission unit or stack. Think of an expansion project at a manufacturing facility that involves installing new components for both the production line and the boiler providing steam and power to the process, each with a separate stack. In that case, two sets of calculations are needed—one to compare baseline and future emissions for the production line and one to compare baseline and future emissions for the boiler.

Both calculations could result in an increase, which would be typical for a project designed to expand production capacity. However, under some circumstances, one calculation could result in an increase while the other results in a decrease. For example, if the boiler is converted from coal to gas as part of the project, the emissions from the boiler may fall even as emissions from the process line rise. Because the project affects two emission units, it can cause both an increase and a decrease at the same time, but only because it affects those two emission units in different ways.

That is where PEA comes into play—for projects affecting more than one emission point in different ways. EPA first announced the policy in a March 2018 guidance memorandum. Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program (Mar. 13, 2018), and then proposed to codify it in August 2019 via clarifying revisions to the NSR rule text, even though EPA notes that the current text already provides sufficient support for the policy. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, Proposed Rule, 84 Fed. Reg. 39,244 (Aug. 9, 2019). EPA has not yet finalized the proposed revisions to the rule, but promulgation could come any day.

PEA ensures that NSR permitting only applies to a project affecting more than one unit if the increases it causes will outweigh the decreases it causes by a “significant” amount. Accordingly, PEA is irrelevant to the single-stack example above; it is only relevant in situations akin to the second example, and only when both an increase and a decrease are expected from at least two different emission units. Because the vast majority of projects only affect a single unit or affect all units in the same way, the use of PEA may be somewhat limited.

How Does PEA Affect NSR Permitting?
Even more important than determining when PEA may be relevant is determining how it might affect the analysis of the projects to which it may apply. Critics of the policy have complained that the NSR rules already allow sources to use emission decreases to offset increases through “contemporaneous netting,” and that PEA is just a shortcut for doing the same thing, but without certain requirements that EPA built into its rules on netting. That argument raises an important question: How does PEA differ from “contemporaneous netting”? Unlike PEA, which focuses only on a single project (albeit one that affects more than one emission unit), “contemporaneous netting” allows sources to consider the sum total effect from both the project under review and all other projects across the entire source over the past five years. It also comes with three strings attached. First, projects that reduce emissions only create contemporaneous netting “credits” to the extent the decreases are made “enforceable” via new permit limits and conditions. Second, EPA has claimed in guidance that netting credits must be calculated using worst-case estimates of a source’s “potential to emit” as the post-project emissions level, not a more realistic assessment of “projected actual emissions.” EPA Letter from Cheryl L. Newton, Region 5, to Keith Baugues, Ind. Dep’t of Envtl. Mgmt., at 5 (Apr. 4, 2011). Third, in order to count any decreases from another project, the source must count all decreases and increases from all other projects performed in the past five years.

In essence, the contemporaneous netting rules require sources to pretend as if all projects conducted over the five years preceding a new project were all together, in theory, one massive five-year-long project. Moreover, the only decreases that count are ones for which the source has accepted new permit limits, and any projections of actual decreases in emissions must be ignored, no matter how reliable and verifiable those projections may be. These constraints severely complicate and limit the utility of contemporaneous netting. They force sources to take a highly unrealistic view of past projects and revise their permits to accept new conditions—counterintuitively requiring permitting to avoid permitting.

EPA’s PEA policy confirms these constraints are unnecessary when evaluating emissions increases and decreases that are associated with a single, individual project. It allows source owners to take a more realistic view of the effect on emissions from each individual project, and it avoids the need to count all other recent projects in every permitting evaluation. So, while the number of projects that might benefit from PEA may be limited, the policy could change the outcome of the permitting analysis whenever it applies.

Is PEA Legal?
Of course, any new policy is only meaningful if it is able to survive legal review. As with past NSR reforms, EPA’s PEA policy will be challenged in the U.S. Court of Appeals for the D.C. Circuit, where all challenges to nationally applicable air regulations must go. Over the years, challenges to any form of NSR reform have become a matter of course, and many have been successful. For instance, while many of EPA’s 2002 reforms survived
the challenges to those rules, the D.C. Circuit vacated two provisions and remanded a third. New York v. EPA, 413 F.3d 3 (2005) (vacating the “clean unit” and “pollution control project” provisions, and remanding for clarification the “reasonable possibility” provision).

The debate over how to count changes in emissions when determining NSR applicability is as old as the program itself. The CAA requires permitting for any “increase” in emissions, 42 U.S.C. §§ 7411, 7475, 7479, but it does not define the word “increase,” leaving room for interpretation. Such ambiguity leaves EPA in charge of deciding how sources must determine whether an “increase” will occur. New York, 413 F.3d at 22–24. In fact, a different dispute over the ambiguities in the very same statutory provision resulted in the Supreme Court’s now famous (or infamous) Chevron decision on agency deference. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984) (concluding that the EPA’s method of calculating emissions is a reasonable policy choice).

In an attempt to define the ambiguous word “increase,” EPA has adopted increasingly complex regulations, but those rules have consistently maintained that source owners must be allowed to consider the overall “net effect” of a project on the stationary source as a whole. This idea has taken on many names and forms over time—referred to variously as the “bubble concept,” “contemporaneous netting,” “project netting,” and now “Project Emissions Accounting.” The only debate has been in deciding what rules are needed to right-size the NSR permitting program so that permits are required only for those projects that truly warrant such review.

No one can predict with any certainty how the D.C. Circuit will receive PEA. However, the D.C. Circuit already decided long ago that the CAA allows EPA significant discretion in deciding how sources should calculate emissions increases and decreases in applying NSR permitting requirements.

The issue of whether and how to count multiple changes in emissions under NSR arose in the context of legal challenges to EPA’s 1978 NSR rules. Alabama Power Co. v. Costle, 636 F.2d 323, 399–403 (D.C. Cir. 1980). In that lengthy opinion, specifically the portion authored by Judge Wilkey, the court recognized that there were two logical ways to interpret the word “increase” in the statute—a source must either determine the “net effect” or count only increases and ignore decreases.

The court resoundingly rejected the idea that decreases should be ignored, calling the idea “unreasonable and contrary to the expressed purposes of the [Act].” Instead, the court decided that the statute requires EPA to “look at any change proposed for a plant, and decide whether the net effect of all the steps involved in that change is to increase the emission of any air pollutant[,] this is commonly termed the ‘bubble’ concept.” Id. at 401 (emphasis added). To explain its reasoning, the court noted that “[t]he bubble concept is precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement.” Id. at 402.

Notably, the court referred to the “net effect” of “that change” in describing its understanding of the issue, confirming that its focus was on a single project, not multiple projects. Later in the opinion, the court agreed that other “contemporaneous” changes might also be considered as an “offset” to a project that would increase emissions. But that point was a sidebar and made merely as one example of how “[t]he Agency retains substantial discretion in applying the bubble concept,” given the ambiguity inherent in the word “increase.” Id.

Despite that discretion, the court imposed an important constraint on EPA: It must be consistent. And that proved to be the stumbling block for EPA’s 1978 regulations. Although EPA had included a “qualified form” of the bubble concept in its rule, the court rejected it because the agency had tried to have it both ways—it counted decreases in applying substantive requirements (i.e., best available control technology) but ignored decreases in applying procedural requirements (i.e., permitting procedures). The court made clear that consistency matters:

There is no basis in the Act for establishing two different definitions of “modification,” one that looks only at net increases for substantive requirements, and a second that looks at all increases, without allowing offsets, for procedural requirements. If a particular set of industrial alterations is not a “modification” within the terms of the Act, then it is subject to neither procedural nor substantive PSD requirements.

Id. at 403.

EPA Rules and Guidance: Evolution of the Two-Step Test

Immediately after Alabama Power, EPA revised its rules for determining when a project should be expected to result in a “net emissions increase.” However, its 1980 rules imposed an unexpected restriction on netting: All contemporaneous increases and decreases over five years, not just those due to a single project, must be considered in every review. Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,735 (Aug. 7, 1980). EPA essentially required netting over five years for every project—permitting was required if all projects over five years increased emissions significantly, regardless of whether the individual project under review did so on its own. Id. at 52,702.
Recognizing that netting should not be mandatory in every case, EPA attempted to reverse course almost immediately. Just five months after those rules were written, in January 1981, EPA issued guidance to confirm that a project that alone does not significantly increase emissions will not trigger permitting, regardless of what other projects preceded it. EPA Memorandum, Accumulation of Emissions (Jan. 5, 1983) (reaffirming a memorandum issued in 1981 that interpreted the regulations to “exclude any modification from applicability that did not in and of itself result in a significant emission increase,” and encouraging rule revisions to clarify the point). The author of that guidance expressed a desire for regulatory revisions to clarify the point, but they did not come, at least not quickly—the relevant definitions looked nearly the same until EPA reformed the rules in 2002.

Without clarifying rule revisions, the guidance on single projects that result in both increases and decreases (again, requiring two stacks) was lost in the shuffle. Even though the D.C. Circuit first framed the question around a single project in requiring netting in Alabama Power—i.e., the “net effect” of “that change”—EPA began to refer to its rules as requiring a two-step process: Step 1, count increases due to the project itself; if significant, then apply Step 2 netting. That construct gave the impression that no netting was allowed until Step 2, when all other projects in the preceding five years must also count.

A statement from EPA’s 1990 Draft NSR Workshop Manual is perhaps the best example of this way of thinking. EPA opined that “when any emissions decrease is claimed (including those associated with the proposed modification), all source-wide creditable and contemporaneous emissions increases and decreases of the pollutant subject to netting must be included in the PSD applicability determination.” EPA Draft NSR Workshop Manual, at A.36 (1990). Subsequent EPA guidance documents tagged on and extended the idea. EPA Letter from Jole C. Luehrs, EPA Region 6, to Mr. Michael Carbon, Radian Int’l, at 2 (Nov. 26, 1997). Thus, just like the text of the 1980 rules appeared to require, EPA’s guidance restricted netting to only “increases,” unless and until all other projects over five years were also counted.

Then, in the New Year’s Eve NSR reform rule of 2002, EPA made a change that seemed to finally realign its rules with the statute and Alabama Power and finally fulfill the request for clarifying revisions in its own 1981 guidance. In that rule (in a provision upheld by the D.C. Circuit), EPA confirmed that a project only triggers permitting if it results in both a significant emissions increase and a significant net emissions increase. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting, 71 Fed. Reg. 54,235, 54,248 (Sept. 14, 2006). In a brief notice of proposed rulemaking (occupying only two pages of the Federal Register), EPA noted that its own “past determinations” had required sources to count only increases. Then EPA proposed to allow “project netting” by counting decreases, subject to certain restrictions, including enforceable limits.

EPA never finalized its 2006 proposal. In 2009, it finalized the portion of the proposal related to “aggregation” but confirmed that it was taking “no action” on “project netting.” Shortly after that decision, under a new presidential administration, EPA began issuing new guidance documents to reinforce its pre-2002 policy by claiming that, even under the 2002 rules, “project netting” could not be allowed. EPA Letter from Barbara A. Finazzo, EPA Region 2, to Ms. Kathleen Antoine, HOVENSA, L.L.C., at 5 (Mar. 2010).

Counting Decreases Makes Sense
Despite this back-and-forth, the fact remains that the CAA requires NSR permitting only for a “change” (singular) that results in an emissions “increase” (ambiguous), and the D.C. Circuit held years ago that EPA must allow sources to consider the “net effect” in evaluating any such “change.” EPA’s contemporaneous netting policy, while a helpful option for considering multiple changes, is really beside the point. When a single change results in both increases and decreases, that change only triggers NSR permitting if the net effect of it results in a significant emissions increase. Alabama Power also made clear that EPA should not have two different tests—one counting decreases, and the other not. Even within its wide discretion, EPA’s policy must be consistent.

PEA upholds these principles far better than EPA’s prior policies. When a single “change” causes one unit to increase emissions and another to decrease emissions, the “net effect” should determine whether permitting is warranted.

The question then becomes: What is a single “change”? To fully answer that question would require another slogs through NSR history, but in short EPA’s recent action on “project aggregation” confirms that a “change” must include all activities that are “substantially related.” Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration, 83 Fed. Reg. 57,324 (Nov. 15, 2018). While that policy also requires a case-by-case analysis,
Navigating Tribal Opposition to Permits for Great Lakes Mining Projects
Obstacles and Opportunities

Dennis J. Donohue and Daniel P. Ettinger

Mining and beneficiation of metals was an early driver in the economic development of the Great Lakes region. The mining of both iron and other minerals came to the Upper Peninsula of Michigan in the early 1840s, spurred by Douglass Houghton’s publication of a report on the famed native copper deposits of the Keweenaw in 1841, followed closely by the discovery of iron ore deposits in Marquette County in 1844. The state mascot of Wisconsin—the badger—is a reference to the hillside dwellings of lead miners who worked in the southwestern portion of the state in the early 1800s, well before iron mining began in the Wisconsin portion of the Penokee/Gogebic Iron Range in 1885. Iron mining in Minnesota began in 1884, with development of the Vermilion Range. Iron mining continues in Michigan and Minnesota to this day. Recently, the mining of nickel, copper, and other noniron metallic minerals is undergoing a resurgence in the region. There are several new projects currently in development, and one in production.

Permitting these projects is a complex undertaking given the myriad federal and state environmental reviews and permits that apply. In addition, socioeconomic changes in historic mining districts have led to recreation and tourism playing a much greater role in these areas, broadening the pool of highly engaged stakeholders scrutinizing these projects. Perhaps most importantly, however, is the role that federally recognized tribes are now actively playing in the review and permitting of new mines. A number of these tribes have “treatment as state” status under federal air and water pollution control laws. Most of the tribes in the region also have treaty rights.

This article examines the challenges involved in navigating tribal opposition to environmental permits for new mining projects in the Great Lakes, particularly when no federal approvals are needed and the role of tribes in the permitting process is less defined. This situation can lead to legal uncertainties and potential lengthy delays in the permitting processes unless mining companies take proactive steps early in project development to make good faith efforts to address the concerns of tribes.

Current Mining Projects in the Great Lakes
There are several new mining projects currently in development in the upper Great Lakes region and one recently permitted project currently in production. These projects are all nonferrous projects—i.e., nickel, copper, zinc, and other deposits that tend to be located in ore bodies with sulfur compounds in the host rock. These are known as “sulfide” ore bodies. This type of rock, if left exposed to both air and water over time, can generate an acidic, metal-containing runoff known as acid rock drainage (ARD). In past decades, prior to the advent of modern mining techniques and rigorous environmental regulation, ARD led to environmental degradation at certain mines, particularly in the western United States. These legacy impacts have resulted in a high degree of public scrutiny and controversy surrounding development of these projects. This article focuses on three of those projects in the Great Lakes as good examples of the intensive level of tribal engagement that is becoming common.

The NorthMet Project
The NorthMet Project will be a copper-nickel mine in the Mesabi Range, a well-established mining district in northeastern Minnesota. The project will entail the refurbishment and reuse of an existing mill and tailings facility. The project will have a large, positive impact on the local community, creating more than 5,000 construction jobs, and, once operational, the mine will create approximately 1,300 mining jobs. In 2018, the State of Minnesota, after over a decade of intensive environmental reviews, issued a mining permit, an air pollution...
control permit, an NPDES permit, and a dam safety permit for the project. Because of wetland impacts and because the project required the exchange of U.S. Forest Service (USFS) lands with the mining company, the U.S. Army Corps of Engineers (Corps) and USFS also reviewed the project, issuing a Clean Water Act section 404 Wetlands permit and approval of the land exchange in 2019.

This federal/state permitting process entailed a joint environmental review under the Natural Environmental Policy Act (NEPA) and Minnesota Environmental Policy Act (MEPA). Three federally recognized Ojibwa tribes served as consulting parties in the environmental review: the Fond Du Lac Band of Lake Superior Chippewa, the Bois Fort Band of Chippewa, and the Grand Portage Band of Chippewa. Because of their cultural ties to the area, these bands were also the focus of the federal and state governments’ consultation efforts under section 106 of the National Historic Preservation Act (NHPA). A multi-year consulting process resulted in the execution of a section 106 Memorandum of Agreement (MOA) between the Corps, USFS, the State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Places (AHP) in 2016. The MOA, among other things, resolved potential adverse effects to a sugarbush site in the project that had been used in the past by tribal members for sugaring. These extensive environmental review and consultation efforts ultimately did not, however, mitigate tribal opposition to the project. The Fond Du Lac Band (along with several NGOs) has filed several challenges to various permits issued for the project in state and federal court. This litigation is ongoing.

Eagle Mine/Humboldt Mill
The Eagle Mine and associated Humboldt Mill are located within the Marquette Iron Range area in Marquette County, Michigan. Eagle is a new underground nickel mine originally constructed by the Kennecott Eagle Minerals Company in the Yellow Dog Plains, about 18 miles from Lake Superior and several hundred feet below the headwaters of the Salmon Trout River, in a bedrock formation with no hydrogeological connection with the river. It is now known as the Lundin Eagle Mine. The Humboldt Mill, about 18 miles south of the mine site, is located on a former iron mining site. State permits and authorizations needed to build and operate the mine and mill sites were issued in 2012, after intensive litigation challenging certain permits needed for the mine. The mine went into production in 2014.

The Keweenaw Bay Indian Community (KBIC) vigorously opposed the mine, joining NGOs in challenging the state mining permit and groundwater discharge permit issued for operations at the mine site by the State of Michigan. The state groundwater discharge permit regulated mine dewatering water discharging through a system of perforated pipes originally designed to discharge to sandy soils underground. This underground subsurface distribution system subjected the project to regulation under the Federal Safe Drinking Water Act Underground Injection Well Control program (UIC). Although these types of “wells” are typically permitted by rule under the UIC regulations, U.S. Environmental Protection Agency (EPA), due to the controversial nature of the project, exercised its discretion allowed under the UIC regulations to require an individual UIC permit for the discharge. Although the UIC permitting process was subject to a categorical exemption under NEPA, NHPA still applied. The mine ultimately redesigned the discharge as an above-ground discharge, avoiding the need for a UIC permit (and, consequently, NHPA consultation with tribes in the region by EPA). However, Kennecott (owned by Rio Tinto) voluntarily undertook an extensive NHPA-like consultation process of its own to support its permitting effort. The primary focus of this effort was to evaluate the cultural use and significance of Eagle Rock, an outcrop in the middle of the mine site and the eventual location of the portal to the underground mine workings. KBIC asserted that Eagle Rock was a place of worship and the site of historic gatherings and ceremonies. As explained further below, these voluntary efforts did not prevent litigation seeking to belatedly “re-federalize” the permit process for the mine and subject the process to NEPA and NHPA reviews, although this effort was not led by KBIC.

Back Forty Project
The Back Forty Project, owned by Aquila Resources, is a proposed zinc and gold mine located in the Western Upper Peninsula of Michigan along the Menominee River, which serves as the border between Michigan and Wisconsin. The State of Michigan has issued mining, wetland, air, and NPDES discharge permits for the project between 2016 and 2018. The Menominee Tribe of Wisconsin has filed challenges to the mining and wetland permits, which are ongoing. Like the Eagle project, the Back Forty Project does not require any federal permits or approvals. However, the Menominee have led efforts in federal court to compel federal wetland permitting for the project, with the attending NEPA and NHPA reviews. The Menominee Tribe’s concerns stem from the importance of the Menominee River to the Tribe’s origin story and the presence of burial mounds and historic garden beds near the mine site. As discussed below, the Menominee Tribe’s efforts to compel federal permitting for the project have thus far been unsuccessful.

Novel Theories of Federal Jurisdiction
Although each of these cases underscores the depths of the concerns of many tribes in the region when it comes to mining projects, the two Michigan projects—Eagle Mine and the Back Forty Project—underscore the lengths to which stakeholders opposing these projects will go to ensure that tribal concerns are vetted when the more defined tribal role in the permitting process afforded by federal laws is not in play. Both cases involved interesting theories in support of the “federalization” of projects governed by state law. Both cases also provide valuable guidance for companies in how to navigate the uncertainties associated with addressing tribal concerns outside of the NEPA/NHPA context.

In May 2012, after Eagle Mine had completed construction of most of its surface facilities and a substantial portion of the decline from the mine portal to the ore body, the Huron Mountain Club (the Club), which owned property in the general vicinity of the mine and vigorously opposed the project, filed
a lawsuit in the U.S. District Court for the Western District of Michigan. It claimed that the mine would affect the traditionally navigable waters of the Salmon Trout River, and that the EPA and Corps violated the Clean Water Act (CWA) and the Rivers and Harbors Appropriations Act (RHA) by failing to require Eagle Mine to obtain CWA section 404 and RHA section 10 permits, which the Club claimed were necessary for the mine to operate. The Club sought a preliminary injunction to require the Corps to assert permitting jurisdiction over the project and undertake review under NEPA and NHPA because the CWA and RHA permits would be considered major federal actions.

In its July 2012 decision, the court denied the Club’s preliminary injunction motion, holding that the Club was not likely to succeed on its claims because the Corps is not authorized or required to order the filing of a permit application when a private party engages in work subject to section 404 of the CWA or section 10 of the RHA. Huron Mountain Club v. U.S. Army Corps of Eng’rs, No. 2:12-CV-197, 2012 WL 3060146, at *5 (W.D. Mich. July 25, 2012). The court stated: “Under both RHA § 10 and CWA § 404, Congress placed the burden of applying for a permit on the project proponent, who proceeds without a permit at his own risk. Congress has not placed any obligation on the agency to initiate the permit process. Although the Corps is required to process permit applications, this duty arises only when a permit application is filed.” Id. The court said that because Eagle Mine did not file permit applications, the Corps had no obligation to act and its failure to act “does not constitute final agency action subject to judicial review.” Id. at *6. The court distinguished between the Corps’ permitting obligations, which are triggered by a permit application, and its enforcement activity, which is discretionary. Id. at *6–7. Finally, the court held that because the Club’s NEPA and NHPA claims were derivative of its claims under the CWA and RHA, the Club was unlikely to succeed on those claims as well. Id. at *12. The Sixth Circuit affirmed the district court’s decision on appeal. Huron Mountain Club v. U.S. Army Corps of Eng’rs, 545 Fed. App’x 390 (6th Cir. 2013). Although the court disposed of the Club’s claims based on legal principles governing the exercise of federal authority, its decision likely was influenced by the fact that characterizing the swampy headwaters of the Salmon Trout as a traditionally navigable water was dubious at best, especially considering that the Corps had determined years before that only the mouth of the Salmon Trout (which connected with Lake Superior on Club property many miles downstream of the mine site) qualified as traditionally navigable and subject to RHA jurisdiction, with no comment from the Club.

In January 2018, the Menominee Indian Tribe of Wisconsin filed a lawsuit in the U.S. District Court for the Eastern District of Wisconsin against the EPA and Corps under the CWA’s citizen suit provision and the Administrative Procedures Act (APA), claiming that the agencies failed to assume federal jurisdiction over the wetland permit for the Back Forty Project that the State of Michigan was administering under its assumed permitting program. During the pendency of the lawsuit, Michigan granted Aqilia Resources a wetland permit for the Back Forty Project, which led the Menominee Tribe to seek to amend its complaint to add claims that the EPA’s decision to withdraw its objections to the assumed CWA section 404 permit was arbitrary and capricious under the APA, and that the federal agencies violated section 106 of the NHPA by failing to consult with the Menominee Tribe.

In December 2018, the court dismissed the Menominee Tribe’s lawsuit. Menominee Indian Tribe of Wis. v. EPA, 360 Fed. Supp. 2d 847 (E.D. Wis. 2018). The court held that the CWA’s citizen suit provision does not waive sovereign immunity with respect to the Corps and that the claim failed to identify a non-discretionary duty that the federal defendants did not perform, as the federal defendants have no duty to administer the section 404 permitting program. Id. at 857–59. The court also rejected the Tribe’s as-applied challenge under the APA, holding that EPA’s 1984 decision to allow Michigan to assume permitting authority over the section 404 program is the final agency action, and the federal defendants’ responses to the Tribe’s letter requesting that they make a determination regarding the jurisdictional status of the permitted wetlands “did nothing more than reiterate that the EPA approved Michigan’s permitting program in 1984 and that the Federal Defendants would not exercise jurisdiction over the permit as a result.” Id. at 860. With respect to the requested amendments, the court held that EPA’s withdrawal of its objections to the state permit is a decision committed to agency discretion and therefore not reviewable. Id. at 854–55. The court also rejected the Tribe’s proposed NHPA claim, holding that NHPA did not apply because the Back Forty Project was not federally funded or licensed. Id. at 855–56. The Menominee Tribe appealed the district court’s decision to the Seventh Circuit. On January 27, 2020, the Seventh Circuit affirmed the district court’s decision. Menominee Indian Tribe of Wis. v. EPA, 947 F.3d 1065 (7th Cir. 2020). The Tribe filed a petition for rehearing, which was denied on May 8, 2020.

**Tribal Engagement Even in the Absence of Clear Federal Jurisdiction**

As sovereign nations, federally recognized tribes typically prefer federal jurisdiction over projects of importance, including mining projects, in the vicinity of their reservations or traditional territory to ensure government-to-government consultation and full review under NEPA and NHPA. That being said, NEPA and NHPA are procedural statutes that do not ensure protection of sites of importance to tribes, which often breeds distrust, confusion, and misunderstandings. And in some instances, mining companies cannot be sure of whether their projects will trigger federal jurisdiction. But the potential lack of federal jurisdiction can offer an opportunity for responsible mining companies to engage tribes in the vicinity of their projects early in the permitting process to address both cultural resource issues and environmental concerns.

Indeed, early, broad engagement and relationship building with tribes, including cultural resource investigations that would typically occur as part of NHPA review, are best practices for mining companies regardless of whether federal jurisdiction is triggered or such engagement is otherwise required. This is true for numerous reasons.

First, in cases where federal jurisdiction is clear, mining
companies should not simply rely on government agencies regulating their projects because it is neither their project nor their reputation on the line. Although it is ultimately the obligation of the permitting agencies to conduct the NHPA consultation and cultural resource reviews, good faith, significant efforts by project proponents to establish dialogue and a relationship with potentially impacted tribes can make the agency process more effective and efficient. This is true even if such efforts do not result in resolution of tribal objections to the project. A permitting agency’s NEPA and NHPA consultation is made easier if the affected tribes and the project proponent at least have a good sense of where the other party is coming from at the outset of the formal consultation process. A record of good faith and persistent engagement efforts also informs how a reviewing court will approach the project in subsequent permit litigation.

Second, it is the right thing to do. The differences in cultural norms and priorities between tribes and mining companies often seem vast, and the inability to resolve these differences and avoid litigation can be frustrating (not to mention costly). However, mining companies should respect communities with ancestral ties to their project areas and listen to their concerns. Further, resource development projects are usually long-term projects, so establishing relationships with tribes in the area that may be affected by the project to learn about and address concerns if practicable is advisable. Obtaining the “social license” for these projects is a process that continues for years well after the permitting phase through operations and closure. Establishing relationships and working on developing a level of trust over time—even during contentious litigation—can pay dividends in the long run. For example, the Lundin Eagle Mine recently announced that KBIC has joined in the project’s Community Environmental Monitoring Program, which provides for third-party verification and monitoring of project impacts on the environment.

Third, early engagement facilitates efficient regulatory review regardless of whether federal approvals are needed. Both the federal and state governments have limited resources and different interests from a developer. Mining companies have more information about their projects and more investment in moving forward, so they should take ownership over how local communities receive their projects. And in the absence of federal jurisdiction, or in cooperation with the federal government, some states, like Michigan, are adopting tribal consultation processes that mimic the federal government’s required process. While tribes, given their sovereign status, are often reticent to consult with state governments, it behooves states to engage interested tribes as part of their permitting processes in an effort to understand and address their concerns. While such engagement cannot ensure any particular result, it can lead to a better understanding of tribal concerns and enhanced protection of tribal interests through state permitting processes.

Large resource development projects in areas of tribal interest are not going away, particularly in the mining space, because base and rare earth metals are essential for technologies needed to address climate change and other challenges. Good faith, persistent efforts to establish relationships with potentially impacted tribes are essential to the permitting of these projects and stewardship of resources in a way that maximizes the benefit of all stakeholders while minimizing the detriments to the greatest extent possible.

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it confirms that there is some basis for distinguishing between changes, such that a single change can be identified and evaluated for its “net effect.”

The importance of a clear “aggregation” policy in establishing a clear policy on “netting” was not lost on EPA. EPA made sure in its PEA guidance and proposed rule to note that the two policies should work together to allow sources to pair an emissions-decreasing project with an emissions-increasing project to ensure the combined project would not trigger NSR. And why not, particularly because the threat of NSR permitting might otherwise discourage the whole deal, despite its potential environmental benefits.

Challengers to EPA’s new PEA rule almost certainly will complain that the policy will cause more pollution by allowing more projects to proceed without oversight. However, less permitting does not necessarily mean more emissions. As noted above, the policy will only be relevant in relatively few cases, and therefore it is unlikely to have a real effect on emissions either way. To the extent it has any effect at all, EPA suggests it is more likely to reduce emissions by encouraging source owners to seek out ways of decreasing emissions so that valuable projects may proceed without the cost and delays of permitting. Creating such incentives for emission reductions should be a universally shared goal, despite the controversy that always surrounds NSR.

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Deciding where federal environmental authority should give way to state and local jurisdiction—“baking the marble cake of federalism,” as administrative law scholars put it—is admittedly a difficult task. But when it comes to bungling the federalism recipe, the Clean Water Act, well, takes the cake. Congress in 1972 and 1977 largely established the modern Clean Water Act (CWA), grandly announcing an often-quoted but rarely followed policy: “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b).

The original sin of the CWA, of course, was and remains Congress’s failure to define which sorts of waters are subject to federal jurisdiction—that is, a “water of the United States” (WOTUS) within the meaning of the statute—and which watery features are left to the states. Because the CWA requires permits for discharging pollutants from a point source into a WOTUS (pursuant to 33 U.S.C. § 1342) or dredging and filling in wetlands that fall within that definition (under 33 U.S.C. § 1344), that would be a useful bit of information. Although the statutory synonym for WOTUS is “navigable water,” it has long been agreed that Congress intended for the CWA to regulate everything the Commerce Clause would allow, and not merely oceans and navigable-in-fact rivers and streams. United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). Protection of groundwater, however, was generally viewed as an issue for the states, it being hard to picture little underground boats crossing state lines.

The larger the universe of federal “waters,” of course, the smaller the role of the states in a scheme that purportedly gave them an important role to play; one court observed that states are mere “agents for the implementation of federal water pollution control policy.” Shanty Town Assocs. Ltd. P’ship v. E.P.A., 843 F.2d 782, 792 (4th Cir. 1988).

For several decades preceding April 23, 2020—more on that date in a moment—the U.S. Supreme Court’s CWA jurisprudence has both paid tribute to the authority of states and bemoaned the lack of clarity about the reach of the CWA. The Court has regularly found efforts by the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps or USACE) to regulate WOTUS to exceed their statutory authority in the context of formal rulemaking and in response to enforcement cases. (When they are not under construction in response to a Court order or a change in administration, the parallel Corps and EPA definitions are set forth in 33 C.F.R. § 328.3 and 40 C.F.R. § 120.2, respectively.) In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 174 (2001), for instance, the Court wrote that “significant impingement of the States’ traditional and primary power over land and water use” was threatened by an attempt to exercise federal jurisdiction over an isolated gravel pit. In another wetlands case, Rapanos v. United States, 547 U.S. 715, 722 (2006), Justice Scalia’s plurality opinion lamented “the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations.”

Invoking Justice Scalia’s view of federal authority, on April 21, 2020, EPA and USACE released the Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250. The agencies asserted the rule was intended to limit “federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers, while adhering to Congress’ policy directive to preserve States’ primary authority over land and water resources.” Id. The rule adopts Justice Scalia’s Rapanos view that the CWA regulates only “relatively permanent, standing or continuously flowing bodies of water,” 547
U.S. at 739, plus “wetlands with a continuous surface connection” to them, id. at 742. The rule rejected the much-litigated Obama-era Clean Water Rule, which additionally gave the federal government jurisdiction over anything with a “significant nexus” to a traditional navigable water, as articulated in Justice Kennedy’s Rapanos concurrence. Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37,054 (June 29, 2015). The rule adopted the usual view that, wherever one draws the line with regard to jurisdiction over surface waters, regulation of groundwater is the business of the states. 85 Fed. Reg. at 22,278. EPA and the Corps had reviewed more than 1.2 million comments and 1,200 peer-reviewed scientific papers while promulgating the Clean Water Rule. See 80 Fed. Reg. at 37,057. They reviewed another 1.39 million during the process of repealing and replacing it with the Navigable Waters Protection Rule. See 85 Fed. Reg. at 22,260–61.

Regulated industry, for the most part, had hated the “significant nexus” test, believing it to be overbroad and feigning more clarity than it delivered, and welcomed its demise. Three days later, however, they suddenly had a new and bigger problem, as the Supreme Court ruled in County of Maui, Hawaii v. Hawaii Wildlife Fund that the federal government could regulate discharges to groundwater after all, depending upon application of a host of factors only partially identified in the Court’s opinion. 140 S. Ct. 1462 (2020). And the Court did so while suggesting that its test might allow regulation of discharges to groundwater up to 50 miles away from open water. Id. at 1476.

In its April 23, 2020, decision in the County of Maui case, the Court disrupted the traditional assumption that the federal government had no role under the CWA to regulate discharges into groundwater, as opposed to discharges to surface waters and areas upstream of them. The Court held that the CWA does regulate underground waters “if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.” Id. at 1468. (In Maui’s case, the underground injections were a half mile away from the Pacific Ocean, indisputably a WOTUS.) The majority opinion, written by Justice Breyer, offered negligible guidance about how to identify functional equivalence, although it did allow that “[t]ime and distance are obviously important.” Id. at 1476. In dicta, the opinion rather ungenerously added that “permitting requirements likely do not apply” to underground discharges 50 miles and “many years” away from the nearest navigable water. Id. It then breezily said the Court’s half-baked formulation could be improved upon by “ever more refined principles” developed in lower court litigation. Id. at 1477. Without a trace of irony, the opinion also urged EPA and the Corps “to provide administrative guidance (within statutory boundaries).” Id.

Justice Kavanaugh wrote a brief separate concurrence to stress his view that the ruling did not call into question Justice Scalia’s plurality opinion in Rapanos, but rather flows from it—thereby potentially importing into the groundwater context the woeful uncertainty that has plagued surface water discharges for decades. Id. at 1478 (Kavanaugh, J., concurring).

Justice Alito’s deservedly cranky dissent lambasted the majority for leaving the regulated community adrift, lamenting that the majority “adopts a nebulous standard, enumerates a non-exhaustive list of potentially relevant factors, and washes its hands of the problem.” Id. at 1491–92 (Alito, J., dissenting). He then pointedly referenced Chief Justice Roberts’ concurrence in Rapanos while adding: “We should not require regulated parties to ‘feel their way on a case-by-case basis’ where the costs of uncertainty are so great. Rapanos, 547 U.S. at 758 (Roberts, C.J., concurring).” Id.

Nebulosity or not, the test articulated in County of Maui represents a marked encroachment of federal authority into an area traditionally viewed as one left to the states.

Permitting Primacy Pursuant to Sections 402 and 404: A Marbled Morass

The second-class status of the states under the CWA is likewise reflected in the administrative criteria they must surmount to obtain primacy over the NPDES (section 402) and section 404 dredge-and-fill programs. Congress unequivocally called for states to implement at least these important provisions of the CWA. See 33 U.S.C § 1251(b) (“It is the policy of Congress that the States . . . implement the permit programs under sections 1342 and 1344 of this title.”).

While most states have obtained primacy to issue CWA permits pursuant to section 402, the process itself is demanding, and the requirements for states once they have obtained primacy are exacting. The state NPDES program requirements are set forth in 40 C.F.R. pt. 123, comprising almost 30 pages of microscopic (depending on your age) type. Alaska’s application to obtain primacy was itself 2,455 pages long, with the initial application being deemed incomplete. State Program Requirements; Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Alaska, 73 Fed. Reg. 34,746 (June 18, 2008). Idaho’s primacy application was approved relatively quickly (taking approximately two years from start to finish), but the EPA made it clear that the state’s authority would be circumscribed, noting that “EPA can object to draft IPDES [Idaho’s version of NPDES] permits proposed by IDEQ [Idaho Department of Environmental Quality] and, if the objections are not resolved, the authority to issue such permits transfers to EPA.” Approval of the Application by the State of Idaho to Administer the National Pollutant Discharge Elimination System (NPDES) and Electronic Reporting, 83 Fed. Reg. 27,769 (June 14, 2018). Further, the EPA warned that it retained enforcement authority and “may take enforcement actions if EPA determines that the State has not taken timely and/or appropriate enforcement actions for NPDES program violations[,]” id. Alaska’s approval came with similar language. State Program Requirements; Approval of Application by Alaska to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Alaska, 73 Fed. Reg. 66,243 (Nov. 7, 2008).

While, despite the strict requirements, most states have managed to assume NPDES primacy, assumption under section 404 has proven to be particularly knotty. Only two states (Michigan and New Jersey) and no tribes currently administer the section 404 program for those waters that are assumable by states pursuant to section 404(g). Why the disconnect? For one, not all WOTUS are assumable. Congress limited the scope
of assumable waters, requiring the USACE to retain permitting authority over Rivers and Harbors Act waters (as identified by The Daniel Ball test) plus adjacent wetlands, minus historic-use-only waters. See 33 U.S.C. § 1344(g)(1). This complicated guidance and lack of clarity have, for example, impacted Florida’s section 404 assumption attempt. (Florida has an extensive system of rivers, lakes, and waters affected by the tides; if the USACE were to maintain authority over a significant portion of the total, it would be difficult for it to see any of the increases in efficiency or permitting speed expected to result from state control.) Another problem is the cost of section 404 assumption: As one example, the EPA estimated that an applicant will need 520 hours just to prepare the required documentation for the EPA to determine that the applicant’s assumption is complete. Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Clean Water Act Section 404 State-Assumed Programs (Renewal), 82 Fed. Reg. 46,987 (Oct. 10, 2017). While considering section 404 assumption, Virginia estimated that it would cost (in 2012 dollars) $18 million over the first five years, and $3.4 million annually thereafter. Va. Dep’t of Env’t. Quality, Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program, at 2 (Dec. 2012). The cost borne by the states is exacerbated by the lack of federal funding for implementation of state-led programs. Id.

Section 404 permits are complex and multifaceted. The USACE will generally not issue a section 404 permit until the applicant has received a section 401 certification. The permit further constitutes a “federal action” that is reviewed under the National Environmental Policy Act, the Endangered Species Act (ESA), and other applicable requirements. Fundamentally, the section 404 program is based on the principle that no discharges of dredged or fill material will be permitted into WOTUS if (1) a workable or practicable alternative exists that is less damaging to the environment or (2) the proposed discharge would significantly degrade the waters in question. See 40 C.F.R. § 230.10. Consequently, permitting relies on the applicant demonstrating that it has taken steps to avoid impacting, has minimized potential impacts to, and will provide compensation for unavoidable impacts to WOTUS.

Arizona was one of the few states to attempt navigating section 404 assumption; however, this effort ended unsuccessfully in December 2019. Arizona provides an interesting case study in examining just why states have such a limited role in the section 404 program, illustrating why state and federal interactions under the CWA can function more like mixing acids and bases instead of baking a cake. One example: The ESA prohibits the “take” of endangered or threatened species. 16 U.S.C. § 1538(a). However, the ESA version of the “permit shield” defense allows an entity to avoid liability by obtaining an incidental take authorization from the U.S. Fish and Wildlife Service pursuant to section 7 or 10 of the ESA. One problem that arose with Arizona’s attempt at section 404 assumption was that it could not itself provide this protection from liability. This is just one area where complex interactions between the CWA and other statutes such as the ESA cause states to have difficulties with section 404 assumption.

States can also find themselves caught in a confusing web of historic preservation requirements—made even more confusing in Arizona by a layer of tribal sovereignty. Arizona would have been required to comply with Subpart F of the section 404(b)(1) guidelines requiring that the discharge’s effects on “areas designated under Federal or State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value,” 40 C.F.R. § 230.54(a), be considered and minimized/avoided. Arizona has a variety of laws related to cultural and historic resources, including its State Historic Preservation Act (SHPA). SHPA requires the identification of historic properties that would be affected by state actions—those would include, according to ADEQ, permitting by Arizona. See Ariz. Rev. Stat. § 41-863. Further complicating matters, Arizona state law not only requires a tribal consultation policy but also, pursuant to Ariz. Rev. Stat. § 41-2051(C)(2), provides for input, as “practicable” and “permitted by law,” from tribes prior to “undertaking any action or policy that will, or is reasonably believed to, have the potential to affect a tribal community or its members.” Arizona is then required to “integrate” this input “into the agency’s decision-making processes to achieve mutually acceptable solutions.” Id. § 41-2051(C)(3). How this would have been accomplished is not clear; cooperative federalism at a granular level is the battleground for various sovereigns and constituencies.

Regulated industry for the most part, had hated the “significant nexus” test, believing it to be overbroad and feigning more clarity than it delivered, and welcomed its demise. Three days later, they suddenly had a new and bigger problem, as the Supreme Court ruled in County of Maui.

Arizona’s abandonment of the section 404 process illustrates why section 404 permitting remains almost exclusively the province of the federal government and why most states have found the section 404 hurdles difficult to surmount.
From Floor to Ceiling: Various Layers of Regulation

The so-called regulatory floor/ceiling problem adds to the confusion over the appropriate extent of state and federal authority. The CWA sets a minimum level of regulatory protection (the regulatory “floor”). It also allows states to enact more stringent requirements; as one court put it, “[t]he ‘cooperative federalism’ structure of the Clean Water Act serve[s] as a regulatory floor, not a ceiling.” Bell v. Cheswick Generating Station, 734 F.3d 188, 197–98 (3d Cir. 2013). However, a substantial number of states have “no more stringent” requirements that require the CWA floor to also act as the ceiling. For example, Ariz. Rev. Stat. § 49-104(A) (16) provides that, unless Arizona’s legislature authorizes otherwise, “state laws, rules, standards, permits, variances, and orders” are to be “no more stringent than” the federal law that “addresses the same subject matter.” Consequently, changes in the scope of WOTUS may have significant effects on these states.

As was the case with the 2015 Obama Clean Water Rule, litigation challenging the Navigable Waters Protection Rule is inevitable, but with roles reversed.

Other states, including California, have moved in the opposite direction, vaulting the ceiling. California’s Water Code defines “waters of the state” (WOTS) broadly to include “any surface water or groundwater, including saline waters, within the boundaries of the state.” Cal. Water Code § 13050(e) (West). In an attempt to fill the “SWANCC gap,” in April 2019, California adopted a state plan for wetlands that is more expansive than the 2015 Clean Water Rule and includes additional waterways like playas (wetlands that may not have associated vegetation). Dredge and fill permits from the Water Boards will be required for WOTS through the Porter-Cologne Water Quality Control Act. California already regulates discharges to groundwater and has moved to make WOTUS definitional changes, such as the resolution of the County of Maui “conduit” controversy, less impactful. Given the Trump administration’s reaction to California’s version of cooperative federalism as it applies to the Clean Air Act, it will be fascinating to see the reactions to California’s take on the CWA.

Section 401 Certification, Nonpoint Source Pollution, and Groundwater

Pursuant to section 401, states and tribes must certify that a discharge to WOTUS will comply with state water quality standards in accordance with the CWA. The most common examples of permits that require certification under section 401 are section 402 NPDES permits (where the EPA administers the program), section 404 permits for the discharge of dredged or fill material (issued by the USACE), Federal Energy Regulatory Commission hydropower and interstate natural gas pipeline licenses, and Rivers & Harbors Act sections 9 and 10 permits issued by the USACE. Section 401 prevents a federal agency from issuing a license or permit to conduct any activity that might result in a discharge into WOTUS, unless the state or authorized tribe where the discharge originates either (1) issues a section 401 water quality certification finding compliance with existing water quality requirements or (2) waives the certification requirement.

While the Trump administration has advocated in favor of expanding states’ rights, some have argued that the weight accorded to states’ preferences shifts in response to the administration’s priorities, replacing cooperative federalism with fair-weather federalism. They point to the new Clean Water Act Section 401 Certification Rule, which was finalized on June 1, 2020 (to be codified at 40 C.F.R. pt. 121), as evidence of this. Section 401 itself provides that, “[i]f the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.” Clean Water Act Section 401 Certification Rule, Pre-publication version, at 5 n.2 (June 1, 2020), (quoting 33 U.S.C. § 1341(a)(1)). Given this, the EPA has stated that it will strictly enforce this provision, with discretion to establish certification timelines, so long as they are (1) reasonable and (2) do not exceed a year. In deciding what is “reasonable,” the final rule requires federal agencies to consider (1) the “complexity of the proposed project,” (2) the “nature of any potential discharge,” and (3) the “potential need for additional study or evaluation of water quality effects from the discharge.” Id. at 181.

The EPA will also limit the scope of state review to “assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements.” Id. at 149. State attempts to expand the review to include other factors (e.g., climate change or the effect on endangered species) will not be allowed. The final rule defines “water quality requirements” as “applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States.” Id. at 150. However, the rule does not require “water quality requirements” to be approved by the EPA.

This change, however, could reduce the states’ ability to negotiate permit conditions by limiting their ability to delay the issuance of permits by federal agencies. The limitation to the contents of certifications is arguably at odds with the U.S. Supreme Court’s decision in PUD No. 1 of Jefferson County v. Washington Department of Ecology, 114 S. Ct. 1900 (1994), where the Court held that section 401 conditions are not limited to those related to “discharges.” It remains to be seen how a decision concluding that “activities—not merely discharges—must comply with state water quality standards,” id. at 1909, will coexist with the new rule and how the Trump administration’s stance on section 401 certifications affects the “partnership between the States and the Federal Government.” Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).

The CWA does clearly leave some aspects of water quality to the states. Perhaps the best, if often bemoaned, example of this is nonpoint source pollution. As Senator Muskie noted, “[t]here is no effective way as yet, other than land use control, by which you can intercept that [nonpoint source] runoff and control it in the way that you do a point source.” H. Comm. on Pub. Works, 93d Cong., A Legislative History of the Waters Pollution Control Act Amendments of 1972, at 1315 (Comm. Print 1973). Such control is more difficult than control of point source discharges. Even here, however, there has been encroachment: The 1987 amendments directed states to develop and implement nonpoint pollution management programs pursuant to section 319 of the Act. County of Maui further eroded state authority over nonpoint sources: Justice Alito observed that the “functional equivalent” standard would “expand[] federal point source regulation at the expense of state non-point source regulation.” 140 S. Ct. at 1490 (Alito, J., dissenting). The net effect of this will cause states to “be saddled with the costs of increased NPDES permitting (because States generally award permits in place of the EPA), while exercising diminished control over non-point source pollution within their territory.” Id.

States have also traditionally retained jurisdiction over groundwater but have likewise faced intrusions on their regulation of groundwater based on the definitional changes to what constitutes a WOTUS. While the Senate Committee on Public Works’ report on the 1972 CWA amendments recognized the importance of groundwater pollution, the report “evidences a clear intent to leave the establishment of standards and controls for groundwater pollution to the states.” Exxon Corp. v. Train, 554 F.2d 1310, 1325 (5th Cir. 1977). The Committee chose not to adopt the recommendation to establish groundwater pollution standards “[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State[,]” S. Rep. No. 92-414 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3739.

State programs for groundwater protection are an integral part of the CWA, which provides that “after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved,” the EPA shall “prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.” 33 U.S.C. § 1252(a). Despite the existence of state programs to protect groundwater supplies and lip service paid by the Supreme Court to states’ traditional regulatory authority over groundwater, here, too, states have faced the erosion of their control, most recently—and dramatically—with County of Maui.

Reformulating the Cake: Beyond Cooperative Federalism 2.0

As was the case with the 2015 Obama Clean Water Rule, litigation challenging the Navigable Waters Protection Rule is inevitable, but with roles reversed. Industry-side criticism of the Obama-era rule contended that the rule exceeded congressional authority and called for the courts to afford the rulemaking agencies no deference under Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Defenders of the rule, including environmental groups, argued that the definitional void left by Congress was properly filled by expert agencies, whose conclusions were entitled to judicial deference.

Now that those same agencies have promulgated a rule reducing the extent of federal authority, no doubt some supporters of the rule will rediscover the wisdom of Chevron deference, while opponents will decide the courts’ recent skepticism about deference to executive branch agencies was in fact well-taken. Of course, one of the issues with County of Maui is the great uncertainty regarding what level of deference, if any, EPA and the Corps will receive when the Navigable Waters Protection Rule is challenged. The Court has already rejected that portion of the rule interpreting groundwater as nonjurisdictional, and it gave no deference to the functionally equivalent Interpretive Statement.

In the next round of litigation over the rule, perhaps the parties could simply adopt by reference the legal arguments previously made by their opponents. Foolish consistency is, of course, the hobgoblin of small minds. The litigants would hardly be alone were they to display a certain flexibility regarding their previously expressed principles. As happened in County of Maui, while consistently denying any interest in second-guessing agencies or Congress, the Supreme Court periodically feels free to disregard voluminous records while doing precisely that. In the absence of clear directions from Congress, the problem becomes even worse. Administrations and judges change, and the shifting currents act to further muddy the waters; perhaps one consequence of this is that more states will follow California’s footsteps, limiting the effects of these changes while increasing the patchiness of laws and complexity of permitting.

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Passed in 1969, the National Environmental Policy Act, or NEPA, is considered the Magna Carta of environmental laws. On its face, NEPA only sensibly requires that for “major Federal actions significantly affecting the quality of the human environment, a detailed statement” be prepared that, among other things, consider the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, and alternatives to the proposed action. 42 U.S.C § 4332. Other than this “hard look” at the environmental impacts of major federal actions, NEPA demands little. The agency need not choose the least environmentally damaging alternative, abandon, or change the project as a result of its “hard look.” Yet, the statute has been revolutionary in its vision and impact.

After decades of relatively unchecked pollution, its purpose was “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321. NEPA represented a fundamental value shift; under NEPA, the costs and impacts of our actions on the environment no longer would be ignored in decision-making processes.

Early on, courts made clear that the requirements of NEPA must be carried out “to the fullest extent possible” (see, e.g., Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971)), and that Congress was concerned with “all potential environmental effects that affect the quality of the human environment” (Hiram Clarke Civic Club v. Lynn, 476 F.2d 421, 427 (5th Cir. 1973)), including cumulative effects (Hanley v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972), cert denied, 412 U.S. 908 (1973)), and indirect effects. Minn. Public Interest Research Group v. Butz, 498 F.2d 1314, 1322 (8th Cir. 1974).

Since 1978, the mandates of NEPA have been implemented through Council of Environmental Quality (CEQ) regulations and a substantial body of federal case law that preceded and has evolved along with those regulations, as well as agency specific rules and guidance. During this time, NEPA has worked to help move federal projects in a direction that has resulted in environmental benefits and wiser use of taxpayer dollars. Now, the Trump administration has proposed sweeping changes, claiming that “the outdated regulations have slowed and impeded the development of needed infrastructure in communities across the nation.” Fact Sheet: CEQ’s Proposal to Modernize its NEPA Implementing Regulations. These changes would turn this paradigm shifting statute into a mere check-the-box exercise, effectively gutting it.
The existing CEQ NEPA regulations require all agencies to perform an environmental assessment for major federal action where the agency must determine whether to perform an environmental impact statement (EIS) or issue a finding of no significant impact (FONSI). 40 C.F.R. parts 1500-08. These regulations, inter alia, require that the agency broadly consider the direct, indirect, and cumulative impacts, as well as all reasonable alternatives of a major federal action. They also ensure meaningful opportunities to engage the public and other federal, state, tribal and local agencies in the NEPA process. The regulations further allow for many actions to escape individual review altogether through the use of categorical exclusions.

The environmental benefits of these regulations have played out in the following three water resources projects: (1) preparation of a supplemental environmental impact statement led the U.S. Army Corps of Engineers (Corps) to save more than 4,300 acres of wetlands that would have been destroyed had the Corps followed its original plan for raising levees along the Mississippi River; (2) environmental review of the proposed Bolinas Lagoon dredging project in California demonstrated that the Corps’ proposal would cause extensive harm to one of the most pristine tidal lagoons in California and was not necessary, saving taxpayers $133 million; and (3) the environmental review process exposed the devastating environmental impacts of the Yazoo Backwater Pumping Plant project in Mississippi, prompting the George W. Bush administration to veto the project. This saved taxpayers more than $220 million and protected 200,000 acres of wetlands—an area the size of all five boroughs of New York City. And the regulations have had similar beneficial effects in other projects including highways, pipelines, airports, and other federal actions.

Contrary to CEQ’s claim that the existing regulations pose a roadblock to economic growth, the vast majority of NEPA reviews are carried out in a very short time frame, in large part because of the flexible structure of the current rules. According to the Government Accounting Office, approximately 95 percent of all projects subject to NEPA are carried out through the categorical exclusion process, another four percent of projects are reviewed through environmental assessments, and less than one percent of projects are reviewed using the more comprehensive EIS. Government Accountability Office, National Environmental Policy Act: Little Information Exists on NEPA Analyses, GAO-14-370 (Apr. 2014) at 8. The Congressional Research Service thus has concluded that “there is little data available to demonstrate that NEPA currently plays a significant role in delaying federal actions.” Congressional Research Service, The National Environmental Policy Act (NEPA): Background and Implementation, RL33152 (Jan. 10, 2011) at 26.

Despite this, the Trump administration has proposed a rule that would severely hobble NEPA. Described below are some of the most significant ways in which the proposed rule would weaken NEPA.

**Eliminate NEPA review for many projects.** The proposed rule excludes many projects from NEPA review. It changes the definition of “major federal action” to allow for projects with significant impacts to escape review under certain circumstances. It also allows agencies to exempt a project from NEPA review by determining that an analysis under a different statute could serve the same purpose, even if that analysis is not as searching or the agency lacks environmental expertise.

**Ignore many impacts.** The proposed rule severely limits the types of impacts examined when a NEPA review is carried out. It boldly states that analysis of cumulative effects “is not required” (Proposed 40 C.F.R. § 1508.1(g)(2), 85 Fed. Reg. 1684, 1729 (Jan. 10, 2020)), thus likely eliminating review of a project’s role in exacerbating climate change and many other types of harm to the environment, public safety and health.

Agencies also could ignore many types of severe impacts based on the proposed rule’s elimination of all references to “indirect” effects, and its directive to review only impacts with a “reasonably close causal relationship” to the proposed action. These changes would encourage agencies to ignore long-term impacts such as toxic pollution from gold or copper mines, the risks of new levees diverting floodwaters onto other communities, and the loss of wetlands caused by reservoir management practices that starve a river of the water flows needed to sustain those wetlands.

**Significantly weaken review of alternatives.** The proposed rule significantly weakens the assessment of alternatives during a NEPA review, dramatically undermining NEPA’s fundamental purpose of exploring less environmentally harmful approaches to achieving the project purpose. The proposed rule eliminates the requirements to “rigorously explore and objectively evaluate all reasonable alternatives” and to consider reasonable alternatives not within the jurisdiction of the lead agency. It instead directs a much less extensive review, requiring only that agencies “evaluate reasonable alternatives to the proposed action.” Proposed 40 C.F.R. § 1502.14, 85 Fed. Reg. at 1721. These changes, along with the proposed changes to the “purpose and need statement” which gives undue weight to the applicants said purpose, virtually guarantee that many cost-saving, reasonable alternatives with fewer adverse environmental impacts will not be considered.

**Allow agencies to ignore critical public input.** The proposed rule would let agencies ignore public comments that they deem are not “specific” enough or do not include references to data sources or scientific methodologies. It improperly places the burden on the public to list any and all possible impacts of a proposed project, to provide specific language changes, and to “explain why an issue raised is significant” to the consideration of impacts to the environment, the economy, employment and potential alternatives. Proposed 40 C.F.R. § 1503.3(a), 85 Fed. Reg. at 1722. Comments most likely to be ignored as a result of this change include those from the general public, those from frontline communities without resources to fund technical reviews, and those that rely on traditional knowledge rather than technical data.

**Eliminates conflict of interest safeguards.** The proposed rule eliminates longstanding safeguards designed to protect the independence and integrity of environmental reviews. Under the current regulations, federal agencies prepare NEPA reviews, and agencies can only hire consultants to assist in a NEPA review after obtaining disclosures of any conflicts of interest or financial stakes the reviewing consultant may have in the
project. The proposed rule, however, lets companies proposing a project prepare their own NEPA reviews — despite their clear interest in obtaining project approval. Agencies also could hire contractors without obtaining a conflict of interest disclosure.

These extensive changes would transform NEPAs action-forcing mechanisms into little more than a paperwork “check-the-box” exercise that ignores major impacts and stylizes public input. Today, as we face unprecedented challenges of a global public health crisis and the impacts of climate change on our daily lives, the need to incorporate thoughtful consideration of how proposed projects impact our environment is more important than ever. We should be strengthening the NEPA decision-making process to better ensure that the full costs of our actions on the environment are known, not seeking to hide these costs. If we ignore these costs, one way or another, they will come due. 

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Upholding Tribal Treaties with the Clean Water Act

Amanda Rogerson and Michael Lopez

During the nineteenth century, numerous tribal nations in the Pacific and Inland Northwest signed treaties with the United States. Through these treaties, Pacific and Inland Northwest tribes ceded millions of acres of the land they had called home for millennia. These tribes also reserved to themselves, through these treaties, however, certain rights vital to their way of life, including the right to continue fishing at all traditional places for subsistence, ceremonial, and commercial purposes—a practice “not much less necessary to the existence of the Indians than the atmosphere they breathe[].” United States v. Winans, 198 U.S. 371, 381 (1905).

The bargains struck in these treaties carry overriding legal and moral weight. Legally, these bargains are enshrined in the U.S. Constitution as “the supreme law of the land.” U.S. Const. Art. VI, cl. 2. Morally, these bargains are the United States’ solemn word, and are crucial to protecting the cultural integrity of the Pacific and Inland Northwest tribal communities. Fishing and the cultural, economic, and political traditions with which it is intertwined, are central to the Pacific and Inland Northwest tribes’ identity, spirituality, and ways of life.

Unfortunately, decades of American industrial policy threaten these tribes’ carefully bargained for, constitutionally protected right to engage in fishing. Despite the passage of the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq.—the purpose of which was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”—the Pacific and Inland Northwest’s waters remain polluted. And this pollution has made it dangerous for the region’s tribal members to exercise their treaty-protected right to fish as a way of life. Tribal members who rely on fish are putting their own health and that of their family members at risk when they consume all the fish they harvest. Under recently approved water quality standards for numerous toxic pollutants in the state of Idaho, for example, Nez Perce tribal members, who are known to consume higher levels of fish than the general population, can now only consume a fraction of fish they typically harvest and eat without significantly increasing their risk of developing cancer.

This deeply unfortunate situation is at odds with the United States’ legal obligation to ensure that tribal members can continue to exercise the fishing rights they bargained for in their treaties. The United States’ legal obligation flows from numerous sources including the U.S. Constitution, which places treaties at the top of the hierarchy of American law. U.S. Const. Art. VI cl. 2 (“...all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”). It also flows from well-established contract law principles, which prohibit one party to a contract from taking actions that make it impossible for the other to enjoy the benefit of the bargain it has struck. See Restatement (Second) of Contract § 205 (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”); Robert S. Summers, The General Duty of Good Faith—Its Recognition and Conceptualization, 67 Cornell L. Rev. 810, 837 (1980) (noting that contract law principles prohibit “interference with or failure to cooperate in the other party’s performance”); see also Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 675 (1979) (“A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations”) (internal citation omitted). And, it also flows from federal case law, which has provided clear rules for properly interpreting and understanding the legal force of tribal treaties.

All treaties between the United States and Indian tribes are governed by special rules of interpretation. These rules are known as the “Indian canons of construction” and “are rooted in the unique trust relationship between the United States and the Indians.” Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (internal citations omitted). Because of this trust relationship—because the United States “has charged itself with moral obligations of the highest responsibility and trust” toward the tribes, Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (footnote omitted)—any bargain struck between the United States and a tribe must be construed according to principles uniquely protective of Indian interests. Treaties must be read “liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (internal citations omitted). They must be understood “not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians[,]” Passenger Fishing Vessel, 443 U.S. at 676. And, they must be interpreted with an eye toward accomplishing the
treaty’s fundamental purpose: to protect and promote tribal sovereignty, cultural integrity, and way of life. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980) (requiring "examination of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence").

Applying these canons, there is little doubt that when the United States promised Pacific and Inland Northwest tribes, through treaty, that they could continue to fish in their traditional places, that the United States thereby also guaranteed these tribes that it would not pursue policies that made it impossible for the tribes to engage in the cultural practices they had reserved. For the United States government to subsequently pursue policies that undermine tribal members’ fishing rights is inconsistent with its trust responsibilities toward tribes, inconsistent with the tribes’ own understanding of their treaty-reserved rights, and inconsistent with the fundamental purpose of the Pacific and Inland Northwest tribal treaties it signed. No matter what lens you choose to look through, there simply is no plausible legal theory on which the United States could guarantee the right to fish with one hand, while simultaneously undermining the conditions that make treaty-reserved fishing possible with the other.

The U.S. Environmental Protection Agency (EPA) once agreed. In implementing the Clean Water Act, a statute that expressly acknowledges the supremacy of treaties in American law, EPA previously sought to safeguard tribal treaty-reserved fishing rights in the American Northwest. 33 U.S.C. § 1371. Indeed, in 2012, EPA disapproved water quality standards developed by the state of Idaho precisely because Idaho had failed to consider available fish consumption rates among tribal members in the state. When partially disapproving Washington’s water quality standards in 2016, EPA also emphasized its then policy of requiring states to develop water quality standards that “effectuate and harmonize treaty-reserved fishing rights with the Clean Water Act.” Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 FR 85417, 88424 (Nov. 28, 2016). Under that policy, EPA prevented states from developing water quality standards that infringed on treaty-reserved rights to fish.

In the last couple of years, however, EPA has reversed course. At the urging of industry and without meaningful analysis, the agency announced that its previous approach to implementing the CWA was improperly based on a “new legal theory and framework within which EPA and states with delegated CWA authority would be required to adopt new approaches in order to “effectuate and harmonize” tribal treaty rights within the CWA . . . .” Environmental Protection Agency: Technical Support Document: EPA Approval of the State of Idaho’s New/Revised Human Health Water Quality Criteria for Toxics and Other Water Quality Standards Provisions Submitted on December 13, 2016 (2019), at 10. In the wake of this announcement and despite vehement protests from Pacific and Inland Northwest tribes, EPA has approved water quality standards in Idaho that are even more lax than the standards it had previously rejected as insufficiently protective of tribal fishing rights. EPA took similar action in the state of Washington, and approved water quality standards under the CWA that it had previously rejected. EPA did so despite the fact that it faced unanimous tribal opposition and that, under the new standards, it will be impossible for Northwest Indians to safely consume all the fish they harvest.

In light of the well-established legal principles this article has reviewed, it is obvious that EPA’s prior policy of ensuring that state water quality standards uphold tribal subsistence rights was grounded in anything but a “new legal theory and framework.” Instead, EPA’s previous policy flowed from well-established constitutional, contract, and treaty-law principles. And those principles, in turn, enshrine an obvious moral truth: when our government promises to respect a people’s central cultural practice, it cannot subsequently choose to pursue policies that make it impossible for that cultural practice to persist. Otherwise what good is our country’s word?

EPA’s recent decision to repudiate a legal framework that protects tribal treaty rights in the Pacific and Inland Northwest is extremely troubling. Simply put, the United States is not currently upholding its end of the bargain it struck with the Pacific and Inland Northwest tribes. EPA today is failing to implement the CWA in a manner that protects the health and vitality of tribal members and the tribal communities that practice subsistence fishing. In order to ensure that the United States’ supreme laws of the land and its foundational bargains with Pacific and Inland Northwest tribes are upheld, states and EPA must ensure that state water quality standards issued under the CWA do not conflict with or undermine tribal treaties. In real terms this means requiring water quality standards in the Pacific and Inland Northwest that protect tribal fishers’ treaty-reserved right to safely consume the fish they harvest.

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Juliana, Climate Change, and the Constitution

Robin Kundis Craig

Unlike a growing number of constitutions around the world and in specific states, the U.S. Constitution provides no environmental rights. It does not mention the environment, and a long history of federal court constitutional environmental jurisprudence stands squarely against the finding of such a protection. In 1971, for example, the U.S. Court of Appeals for the Fourth Circuit dismissively refused to recognize a constitutional right to environmental protection
to reinforce the newly enacted National Environmental Policy Act, *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971). Over two decades later, and despite dozens of intervening cases, the U.S. Court of Appeals for the Eighth Circuit could equally boldly assert that citizens of the United States do not “have a fundamental right to an environment free of non-natural radiation.” *Concerned Citizens of Nebraska v. Nuclear Regulatory Commission*, 970 F.2d 421, 426 (8th Cir. 1992).

Nevertheless, plaintiffs keep trying. Indeed, citizens have argued without success for almost 50 years now that the U.S. Constitution contains, *somewhere*, a right to a clean and healthy environment. Until 2016, federal courts said “no” to every possible source of a constitutional environmental right these plaintiffs proffered, including: (1) Fifth and Fourteenth Amendment rights to life, e.g. *Gasper v. Louisiana Stadium & Exposition Commission*, 577 F.2d 897, 898–99 (5th Cir. 1978); (2) the Ninth Amendment’s protection of other fundamental rights, e.g. *Concerned Citizens of Nebraska*, 970 F.2d at 426–27; (3) Fifth and Fourteenth Amendment Due Process, e.g. *Valero Terrestrial Corp. v. McCoy*, 36 F. Supp. 2d 724, 752-53 (N.D. W. Va. 1997); and (4) Fifth and Fourteenth Amendment equal protection. See, e.g., *Stop H-3 Ass’n v. Dole*, 870 F.2d 1419, 1429–30 (9th Cir. 1989). Moreover, just to ensure that all avenues are blocked, the U.S. Court of Appeals for the D.C. Circuit recently also made clear that constitutional environmental rights arising under *state* constitutions do not create rights under the U.S. Constitution. *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission*, 243 F. Supp. 3d 141, 152–53 (D.D.C. 2017), aff’d, 895 F.3d 102, 108–10 (D.C. Cir. 2018).

So, federal court precedent wasn’t exactly favorable in 2015 when a group of 21 children filed suit against the United States, claiming that a variety of federal defendants were violating their Fifth Amendment substantive due process rights by failing to address climate change. Specifically, paragraph 279 of the First Amended Complaint in *Juliana v. United States* alleges:

> Our nation’s climate system, including the atmosphere and oceans, is critical to Plaintiffs’ rights to life, liberty, and property. Our nation’s climate system has been, and continues to be, harmed by Defendants. Defendants harmed our nation’s climate system with full appreciation of the results of their acts. Plaintiffs’ substantive Fifth Amendment rights have been infringed because Defendants directly caused atmospheric CO₂ to rise to levels that dangerously interfere with a stable climate system required alike by our nation and Plaintiffs. The present CO₂ concentration and continuing CO₂ emissions—a function, in substantial part, of Defendants’ historic and continuing permitting, authorizing, and subsidizing of fossil fuel extraction, production, transportation, and utilization—endangers Plaintiffs’ lives, liberties, and property.

The children also asserted Equal Protection, Ninth Amendment, and public trust doctrine claims.

The next year, the U.S. District Court for the District of Oregon made constitutional history when it held that there is indeed a fundamental due process right to a stable climate system, because “a stable climate system is a necessary condition to exercising other rights to life, liberty, and property.” *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). It was careful, however, to limit this newfound constitutional environmental right:

In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand, the phrase “capable of sustaining human life” should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation. In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation.


After all that maneuvering, however, the Ninth Circuit’s anti-climactically decided *not* to rule on the constitutional right to a stable climate. Instead, it decided 2–1 (Judge Staton dissented) that the plaintiffs lacked Article III standing because the federal courts could not force the federal government to come up with a climate change action plan. *Id.* at 1173–74.
Notably, the court accepted the children plaintiffs’ factual claims, concluding that climate change is occurring and will wreak havoc on the planet if left unchecked, that fossil fuel combustion is the main cause of climate change, and that “the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions.” Id. at 1166. Despite such knowledge, “[t]he government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.” Id. at 1167. The court also made short work of the United States’ argument that the plaintiffs’ only remedy was the Administrative Procedure Act. Id. at 1167–68.

The court even accepted most of the plaintiffs’ Article III standing allegations. The children were suffering concrete and actual injuries in fact, such as when water scarcity forced Jaime B. to leave the Navajo Reservation and her family, or Levi D. had to flee his coastal home because of flooding. Id. at 1168. The Ninth Circuit also agreed with the district court that the plaintiffs had established causation:

The plaintiffs’ alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%. . . . And, the plaintiffs’ evidence shows that federal subsidies and leases have increased those emissions. About 25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government.

Id. at 1169.

However, the Ninth Circuit disclaimed its own authority to help these plaintiffs, even assuming a constitutional right exists. A simple declaration that the United States is violating the Constitution would do almost nothing to redress the plaintiffs’ concrete injuries. Id. at 1170. Instead, the plaintiffs’ real remedy requires the intervention of the political branches. In enjoining the federal government from permitting, authorizing, and subsidizing fossil fuel use and ordering it to prepare a climate change action plan to reduce emissions and atmospheric CO₂ concentrations, the court would not only have “to enjoin the Executive from exercising discretionary authority expressly granted by Congress, . . . but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands . . . .” Id. According to the majority, “it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs’ requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches.” Id. at 1171. As a result, the court could not redress the plaintiffs’ injuries, and they lacked standing.

Judge Staton passionately disagreed, calling on his colleagues to prevent the government from destroying the nation:

In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—not presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation.

My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary . . .

Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation’s willful destruction. So viewed, plaintiffs’ claims adhere to a judicially administrable standard. And considering plaintiffs seek no less than to forestall the Nation’s demise, even a partial and temporary reprieve would constitute meaningful redress.

Id. at 1175–76 (Staton, J., dissenting).

On March 2, 2020, the Juliana plaintiffs requested a rehearing en banc from the Ninth Circuit, so it remains to be seen if the constitutional right to a stable climate has suffered death by (lack of) standing. Hopefully not: it is both perverse and ironic that (perceived) constitutional limitations on the federal courts could prevent full litigation of this asserted constitutional right—particularly given that the judges themselves acknowledge that the United States continues to race along the path toward severe climate disruption. ☛

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Sustainability in the Electric Vehicle Supply Chain

Rachel Tennis

With the transportation sector now identified as the largest source of CO₂ emissions in the United States, it is clear that the shift to electric vehicles (EVs) is key to achieving a decarbonized economy. See EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1990–2017, at ES-23, EPA430-R-19-001

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starting at the beginning of the supply chain—stakeholders are increasingly aware of the sourcing challenges that accompany EVs powered by lithium-ion batteries. In a September 2019 hearing, members of the Senate Committee on Energy voiced concerns about the scarcity of key minerals, including cobalt and lithium. See Minerals and Clean Energy: Hearing Before the S. Comm. on Energy & Natural Resources, 116th Cong. (2019). Cobalt in particular poses challenges for companies committed to sustainable sourcing: the world’s largest known reserves are located in the Republic of the Congo and are controlled increasingly by China. In light of concerns about environmental and labor practices in these regions, supply chain due diligence is critical. Volkswagen, for example, emphasizes sustainability in supplier relationships through three pillars: requirements, qualification, and monitoring. Suppliers must meet sustainability requirements documented in a code of conduct for business partners and disclose supply chain information upon request. At the qualification stage, sustainability risks are assessed through a country risk analysis system and a self-assessment questionnaire developed for use throughout the industry by Drive Sustainability, a partnership of automotive manufacturers focused on improving the social, ethical, and environmental performance of automotive supply chains. Monitoring includes periodic self-assessments, implementation of environmental management systems for tier one suppliers, and on-site audits in high-risk cases. The supply of minerals from conflict-affected and high-risk areas receives special scrutiny. To ensure sustainable sourcing of cobalt, Volkswagen maintains close contact with companies from the mine to tier-one suppliers and works to ensure that suppliers maintain values of transparency, compliance, and sustainability. See The Volkswagen Group Sustainability Report 2018, at 33–36. On behalf of its members, Drive Sustainability has begun advocating for development of a coordinated agenda that involves actors from the entire cobalt value-chain and moves beyond a focus on transparency and compliance to include capacity-building, investment, and community development. See Press Release, Drive Sustainability, Drive Sustainability States Its Position on Tackling the Cobalt Challenge (Nov. 21, 2019).

In the middle of the supply chain, EV manufacturers are building new processes to ensure safety and environmental responsibility. To date, there are few regulatory requirements specific to lithium-ion batteries, which means that manufacturers can typically develop technology-appropriate processes while also ensuring consistency with general environment, health and safety (EHS) requirements. Key stages that require deliberate EHS planning include transportation, storage, and final disposition.

In the United States, the Pipeline and Hazardous Materials Safety Administration (PHMSA) within the Department of Transportation so far is the only federal agency that has promulgated regulations specific to lithium-ion batteries. These regulations, which specify how batteries must be packaged and labeled during transportation (among other requirements), are periodically updated to maintain consistency with international standards. Most recently, in March 2019, PHMSA made changes to reflect new International Air Transport Association restrictions on air transport, including a 30 percent state-of-charge limit and a ban on transporting lithium batteries by passenger aircraft. Hazardous Materials: Enhanced Safety Provisions for Lithium Batteries Transported by Aircraft, 84 Fed. Reg. 8006 (Mar. 6, 2019). Also in 2019, PHMSA convened an advisory committee to consider additional regulatory changes, with a particular focus on air transport. Maintaining a functioning supply chain likely requires the ability to safely transport at least some lithium batteries by air. In light of regulatory scrutiny on air transport, however, it is necessary to consider diverse supply chain solutions that do not necessarily depend on air transport to ensure timely delivery of parts.

Reducing risk during transportation has the potential to increase pressure on the “storage” link in the supply chain. As market patterns become clearer, EV manufacturers may need to restructure warehouse networks so that larger supplies of after sales batteries can be maintained near areas with the highest EV market penetration. This change may, in turn, require reevaluating warehouse design. Warehouses that supply parts for EVs may have increased space needs—an EV battery pack may weigh as much as 400 pounds, with individual modules weighing in around 60 pounds—and require tailored safety planning. At a high level, batteries need to be stored in a manner that allows for efficient transport within the warehouse and minimizes accident risks. Specialized fire suppression and containment measures may be needed to address fires or thermal runaway events.

In contrast to transportation, storage of lithium-ion batteries in the United States is not yet subject to targeted regulations. Manufacturers must ensure compliance with general Occupational Safety and Health Administration requirements, such as the general duty clause, which requires employers to furnish a place of employment free from recognized hazards that are likely to cause death or serious physical harm. 29 U.S.C. § 654. Manufacturers should also consult emerging industry standards for guidance on best practices. The National Fire Protection Association, for example, has participated in research on fire suppression methods for lithium-ion batteries in storage but so far has not published explicit standards. See Nat’l Fire Protection Ass’n, Lithium Ion Batteries Hazard and Use Assessment – Phase III (Nov. 2016).
End-of-life solutions are similarly in transition. There are a limited number of recycling vendors currently operating in the United States, and available recycling methods are expensive. Today, it costs more to recycle a lithium-ion battery than the value of the energy materials a recycler can recover. See Electric Battery Production & Waste: Hearing Before the S. Comm. on Env’t & Pub. Works, 116th Cong. 3 (2019) (testimony of James Greenberger, Executive Director, NattBatt International). There is a window for the market to mature, since EV production is still ramping up and most new vehicles will be drivable for a number of years before reaching the end of their useful life. But this window may be relatively brief. Whereas about two million EVs were sold in the United States in 2018, a recent report projects that annual sales will rise to 10 million in 2025, 28 million in 2023, and 56 million by 2040. See BloombergNEF, Electric Vehicle Outlook 2019. Existing pilot projects in the United States and Canada and publicly funded research efforts, such as those ongoing at the Department of Energy’s ReCell Center, are therefore critical to ensuring that EV batteries can be disposed of in a sustainable way as volume increases. Development of second-life applications, such as Volkswagen’s planned use of batteries in EV charging stations, is also an important piece of the puzzle. See Volkswagen, The First Power Bank for the E-Car, https://www.volkswagenag.com/en/news/stories/2018/12/the-first-power-bank-for-the-e-car.html.

Once a battery reaches the end of its useful life inside the car, how it must be managed depends on both the condition of the battery and the intended disposition. As options for recycling and second-life markets develop, available methods for managing batteries removed from a vehicle may do the same. It is possible that batteries recycled using certain methods may qualify for a solid or hazardous waste exemption or, in the case of batteries destined for second life, fall outside the scope of hazardous waste regulations. Keeping track of the interface between developing technologies and waste regulations will be important not just for EV manufacturers, but also for dealers, scrap yards, and others.

It is likely that the regulatory framework will continue to develop as the EV market expands. A central objective in developing new policies should be the promotion of safe, environmentally responsible behavior while continuing to facilitate the transition to electrification. Reducing logistics-related barriers and encouraging end-of-life innovation will be key for cost-effective supply of EVs and spare parts over the long-term.

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Waiving Historic Resources Laws at the Southern Border

Erin Flannery Keith

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 102 (codified as amended at 8 U.S.C. § 1103 note) and its amendments authorize the Department of Homeland Security (DHS) to waive all legal requirements to expedite border barrier construction. This article highlights the cultural resources and historic preservation laws whose waiver the IIRIRA authorizes, identifies how waivers already have harmed cultural and historic resources on the U.S.-Mexico border, and explains why no challenges to DHS waivers have succeeded.

IIRIRA initially waived only the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA). IIRIRA § 102(c) (1996). The REAL ID Act of 2005 expanded DHS’ waiver authority such that “the Secretary of Homeland Security shall have the authority to waive all legal requirements” that the Secretary, “determines necessary to ensure expeditious construction of the barriers and roads under this section.” REAL ID Act of 2005 § 102(c)(1), reprinted in 8 U.S.C. § 1103 note (2006) (emphasis added). The REAL ID Act gave federal district courts exclusive review of DHS’ waiver decisions, limited causes of action to only those alleging constitutional violations, and provided that “an … order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court.” Id., § 102(c)(2)(C).

Between September 2005 and April 2008, DHS issued five § 102(c)(1) waivers. President Trump issued Executive Order 13767 on January 25, 2017, directing DHS to “take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border.” 82 Fed. Reg. 8793. DHS has since issued 16 waivers.

Almost all of the 21 § 102(c)(1) waivers have waived cultural resources and historic preservation laws, including the Antiquities Act, the National Historic Preservation Act (NHPA), the statutes controlling the National Historic Landmarks Program and the National Register of Historic Places, the Archaeological and Historic Preservation Act (AHPA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). Suspending these laws’ applicability for border-related activities
eliminates well-established consultation, mitigation, public participation, and permitting procedures.

President Franklin Roosevelt established the Organ Pipe Cactus National Monument (OPCNM) in 1937, using presidential authority under the Antiquities Act to declare national monuments and reserve national monument lands from unauthorized excavation. Managed by the National Park Service (NPS), OPCNM encompasses 30 miles of the U.S.-Mexico border in Arizona. The federal agency managing a national monument establishes a foundational document/management plan identifying the monument’s fundamental resources and values, and authorized uses. One of OPCNM’s fundamental resources and values is that it “has a rich 15,000-year human history, serving as an important cultural center to the local American Indians [Hohokam and Tohono O’odham].” See “Foundation Document: Organ Pipe Cactus National Monument” (2016) at p. 3. Seven areas within the OPCNM are on the National Register of Historic Places. The management plan contemplates that NPS will issue annual forward operating base and infrastructure permits to DHS. Eighteen out of 21 waivers have waived the Antiquities Act. DHS issued a waiver including the OPCNM on May 15, 2019 (84 Fed. Reg. 21,798). Waiving the Antiquities Act in the OPCNM allows DHS to conduct border construction activities without regard to the national monument’s management plan or permitting processes. In February 2020, to prepare to build new border fences, DHS began blasting in the OPCNM, removing organ pipe and saguaro cactuses and disturbing Tohono Oodham burial sites. See Michel Marizco, “Archaeologists Say Border Wall Cuts Through Native American Burial Sites in Arizona,” NPR, Feb. 19, 2020.

The NHPA and its implementing regulations require federal agencies to “take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings.” 36 C.F.R. § 800.1. This involves identifying the historic properties that the federal undertaking could affect, consulting with relevant state or tribal historic preservation officers, assessing adverse effects, and identifying alternatives to resolve or mitigate adverse effects. The process also provides for public comment and must occur “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” 54 U.S.C. § 306108; 36 C.F.R. § 800.1(c). Twenty section 102(c)(1) waivers have waived the NHPA.

Under the National Historic Landmarks and the National Register of Historic Places programs, the federal agency responsible for any federal undertaking “directly and adversely affect[ing] any National Historic Landmark” must assess and minimize potential impacts prior to approving that undertaking and must allow the federal Advisory Council on Historic Preservation “a reasonable opportunity to comment.” 54 U.S.C. § 306107. Several National Historic Landmarks, including the Trevino Uribe Rancho in Texas and the Yuma Crossing National Historic Landmark, lie on the southern border and are susceptible to impacts from border projects. Eighteen waivers have waived these statutes.

AHPA, 54 U.S.C. § 312502, requires federal agencies whose activities “in connection with any federal construction project or federally licensed project . . . may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archaeological data” to notify the Secretary of the Interior and document, prevent, or mitigate such loss. In an area rich in Native American historic artifacts, waiving AHPAs requirements could result in unquantified archaeological losses. AHPA has been waived 18 times.

ARPA, 16 U.S.C.A. § 470cc, requires permits to “excavate or remove any archaeological resource located on public lands or Indian lands” only under certain conditions, such as if “the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest.” Id. at § 470cc(b)(2)–(4). ARPA requires notification of any Indian tribe which may consider the site as having religious or cultural importance. Id. at § 470cc(c). DHS would not have to apply for such permits on public or Indian lands on the southern border—permit applications otherwise likely to be denied. Eighteen waivers have waived ARPA.

NAGPRA, 25 U.S.C. § 3001 et seq., protects Native American sacred and funerary objects and human remains. If federal agencies inadvertently encounter Native American cultural items on federal lands during construction, they must “cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection” to the “appropriate Indian tribe.” Id. at § 3002(d)(1). Tribes then must certify that they have been notified and the federal activity may resume if the activity does not involve additional removal of cultural objects. Id. If the federal activity will involve additional cultural object removal, the federal agency must then follow NAGPRA’s intentional excavation procedures at 25 U.S.C. § 3002(c), which require ARPA permits and tribal consultation. NAGPRA waivers have the potential to be especially damaging and contrary to NAGPRA’s purpose. “The Committee intends this section to provide for a process whereby Indian tribes and Native Hawaiian organizations have an opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred object or objects of cultural patrimony.” S. Rep. No. 101-473, at 7 (1990). Seventeen waivers have waived NAGPRA.

Plaintiffs thus far have not successfully challenged DHS’ section 102(c) waivers, and few routes are available to challenge the waivers unless the Supreme Court weighs in or unless Congress amends IIRIRA to allow broader judicial review. In an early section 102(c) waiver case, Save Our Heritage Org. v. Gonzales, 533 F.Supp.2d 58, 60 (D.D.C. 2008), the court held that the DHS properly used its waiver authority for projects in California and Arizona and confirmed that the waiver authority limits causes of action. Plaintiffs alleged that waivers unlawfully allowed DHS to avoid “complying with all applicable provisions of the NHPA in designing, constructing, operating, and maintaining” the border fences, including considering the fences’ effects “on any historic site that is included or eligible for inclusion in the National Register of Historic Places.” Complaint, para. 17, 2007 WL 1568844 (D.D.C.). The court granted DHS’ motion to dismiss the complaint because “the only claims
permitted under the [IIRIRA] waiver provision are those ‘alleging a violation of the Constitution.’” 533 F. Supp. 2d 58, 60 (D.D.C. 2008).

In 2017, environmental groups and the State of California challenged two DHS waivers for border fence replacement and wall prototype construction near San Diego and Calexico, California, alleging that the waivers violated the waived statutes and that the waivers themselves were reviewable ultra vires acts. Plaintiffs claimed that the DHS waivers violated the U.S. Constitution's non-delegation, take care, and presentment clauses. The district court found that DHS had not violated any clear and mandatory statutory obligations in section 102 and confirmed that it may only hear constitutional claims. In re Border Infrastructure Envtl. Litig., 284 F. Supp. 3d 1092, 1110–1111 (S.D. Cal., 2018), cert. denied sub nom. Animal Legal Def. Fund v. Dep’t of Homeland Sec., 139 S. Ct. 594, (2018), and aff’d, 915 F.3d 1213 (9th Cir. 2019). Plaintiffs’ constitutional claims also failed. The court dismissed plaintiffs’ allegations that section 102(c) violates the non-delegation clause (U.S. Const. Art. 1 § 1) because it clearly delineated the delegation's scope by allowing DHS to waive federal, state, and local law application and enforcement during border barrier construction, as necessary. Id. at 1135. The court dismissed plaintiffs’ take care clause (U.S. Const. Art. 2 § 2) claims that the waiver determinations violated the Executive's duty to faithfully execute the waived laws’ statutory mandates, finding that the “challenged steps taken by the Secretary are ones that are plausibly called for by an act of Congress.” Id. at 1137. Finally, the court dismissed the presentment clause (U.S. Const. Art 1 § 7) claims, finding that “each of the waived statutes retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President.” Id. at 1141, quoting Defs. of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 124 (D.D.C. 2007).

In Ctr. for Biological Diversity v. McAleenan, 404 F. Supp. 3d 218 (D.D.C. 2019), the court upheld a 2018 DHS waiver that covers a 20-mile border segment in New Mexico, finding “that Congress has expressly precluded judicial review of non-constitutional claims that arise from DHS's exercise of IIRIRA’s § 102(c) waiver authority, and Plaintiffs have failed to allege facts that are sufficient to sustain their constitutional claims as a matter of law.” Id. at 235. Because the Supreme Court hears direct appeals under IIRIRA § 102(c), CBD's petition for writ of certiorari is pending and asks the Court to consider “[w]hether IIRIRA § 102(c)—which grants the Secretary of Homeland Security unfettered discretion to waive all federal, and related state, local, and tribal laws, regulations, and legal requirements, and sets forth no standards or criteria to apply in determining whether such waiver is necessary for expeditious border wall construction—violates the separation of powers, the non-delegation doctrine, and the Presentment Clause of the Constitution of the United States.” CBD, et al. v. Chad Wolf, Acting Sec. of Homeland Security, No. 19-975, Petition for Writ of Cert. at i–ii.

The Supreme Court has denied several § 102(c) certiorari petitions and seems unlikely to grant this latest petition. However, with the accelerated pace of DHS waivers between 2017 and 2020 and their immediate and dramatic impacts on historic and cultural resources, it is worth observing this emerging area of law.

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The Rule of Five: Making Climate History at the Supreme Court

Richard J. Lazarus

Belknap Press, 2020

The Rule of Five: Making Climate History at the Supreme Court by Richard J. Lazarus is not only a law nerd’s dream book (speaking as an academic law nerd), but a drama-laden and riveting narrative of one of the most important environmental law cases ever tried before and decided by the Supreme Court. This book reads like a future movie classic (think: *An Inconvenient Truth*, *A Civil Action*, *Erin Brockovich*, or *To Kill a Mockingbird*). And, although the antithesis of a traditional law text, it is a perfect read for appellate advocates, environmental law attorneys, law students, and anyone interested in climate change or the U.S. judicial system.

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court in a 5–4 decision acknowledged climate change as a serious, scientifically-demonstrated threat and ruled—contrary to the position taken by the Environmental Protection Agency—carbon dioxide constituted an air pollutant subject to regulation under the federal Clean Air Act. The book’s author explains its import:

The Justices had established for the first time the right to bring a lawsuit in federal court for injury caused by climate change. The doors were now open for climate business, paving the way for future climate lawsuits against federal, state, and local governments, as well as industrial polluters. The win on standing promised a new wave of climate-based litigation to restrict greenhouse gas emissions.

In *Rule of Five*, Richard Lazarus, a Harvard environmental law and supreme court advocacy professor, treats us to a compelling history of the landmark case from start to finish, from the deep-rooted conflicts among the advocates to the personality driven dynamics of the justices, and from the behind-the-scenes strategizing to the open court machinations. In the process, Lazarus bringing alive the grandeur, history, sacrosanct traditions, and enduring rituals of the Supreme Court.

For those new to the law or climate change advocacy, Professor Lazarus offers a jargon-free, easily understandable take on the legal issues at stake in the case. The book tackles and conveys with clarity concepts such as *Chevron* deference, Article III standing, and even basic party nomenclature conventions. There’s also a reveal of the origins and meaning of the title *Rule of Five* (but I’m no spoiler, so if you don’t know it already, you need to read the book to find out).

For litigators and environmental attorneys, the book doles out gobs of practical wisdom and practice tips. Here is just a small sampling:

§ “A lawyer presenting oral argument in any court has one job and one job only: answer the judge’s questions.”

§ “An effective brief opposing Supreme Court review has one overriding goal: to demonstrate that no important legal issue has been decided by the lower court and none is presented now for the Justices to review.”

§ “The best environmental lawyers are not the best ‘environmentalists’—they are the best ‘lawyers.’”

§ “[E]nvironmental policy is not for weenies. You don’t win your argument just by stating your arguments. You have to be persuasive and stick to it.”

*Rule of Five* also offers a deep dive into litigation strategy and judicial review. There are passages on the calculations at play in initiating and appealing big issue cases, discussions on...
collaborative brief writing, tactics for drafting cert petitions and cert oppositions, tips on oral advocacy, and insights into the backgrounds, temperaments, quirks, political leanings, and decision-making philosophies of members of the bench.

Nevertheless, what made Rule of Five such a fun read for me were the colorful and candid descriptions of the advocates, the justices, and the proceedings. There are good-humored monikers assigned key participants (from the self-named "Carbon Dioxide Warriors" to "the queen of clean air"). The outgoing Clinton publication of the petition is revealed as "the turd" ("akin to 'leaving a turd on the door of the next [administration]'") and when the Supreme Court shockingly granted the writ of certiorari, Lazarus documents the advocate reactions as "Holy @$#!," "Holy Shit," and "Now what?" The chapter titles alone (such as "Completely Confused" "Hail Mary Pass," and "A Bow-tied Jedi Master") hint at how Lazarus transforms what very easily could have been a dull, textual rendition into a captivating and lively read.

The Overstory
Richard Powers
W.W. Norton & Co., 2018

Holed up during the early weeks of the COVID-19 pandemic, I escaped for days into the complex worlds and destinies of the characters in Richard Powers' The Overstory, a lush novel intertwining the lives of humans and trees. Structured from root to trunk to crown and then to seed, the novel follows a course across seasons and centuries rather than mere human lifetimes measured by decades. Human time scales are realigned to those of redwoods, oaks, and other flora in this Pulitzer prize winning novel:

Bay laurels rim the logger-made meadows. Canyons thicken with orange madrone peeling to creamy, clammy green. Coast live oaks like the one that crippled him gather on the crags. And down in cool riparian corridors smelling of silt and decaying needles, redwoods work a plan that will take a thousand years to realize—the plan that now uses him, although he thinks it's his.

And, Powers continues:

The thing that comes for him is a genus more than six hundred species strong. Familiar, protean, setting up camp from the tropics all the way up through the temperate north: the generalist emblem of all trees. Thick, clotted, craggy, but solid on the earth, and covered in other living things. Three hundred years growing, three hundred years holding, three hundred years dying. Oak.

From first to last page, Overstory conjures up for readers the often overlooked but undeniable connection between human-kind and nature. The novel opens:

First there was nothing. Then there was everything.

Then, in a park above a western city after dusk, the air is raining messages.

A woman sits on the ground, leaning against a pine. Its bark presses hard against her back, as hard as life. Its needles scent the air and a force hums in the heart of the wood. Her ears tune down to the lowest frequencies. The tree is saying things, in words before words.

It says: Sun and water are questions endlessly worth answering.

It says: A good answer must be reinvented many times, from scratch.

It says: Every piece of earth needs a new way to grip it. There are more ways to branch than any cedar pencil will ever find. A thing can travel everywhere, just by holding still.

* * *

A chorus of living wood sings to the woman: If your mind were only a slightly greener thing, we'd drown you in meaning.

The pine she leans against says: Listen. There's something you need to hear.

These stories also remind us of the teeming life and natural systems all around us that we often fail to notice, blind to so much that is everywhere we are.

The Saturday in late spring when the cast comes off, Adam climbs up into his maple as high as he can and doesn't come down until dinner. Sun passes through the foliage, turning the air the color of a not-quite-ripe lime. It gives him a bitter comfort to gaze over the neighborhood's roofs and know how much better life is above ground level. The palmate leaves wave in the gentle breeze, a crowd of five-fingered hands. There's a sound like light rain, the shower of thousands of tiny bud scales. High above his head squirrels gnaw at the massed flow-it's a storm of words, sucking out their liquid sap, then scattering the spent reddish yellow bouquets across the ground below. Adam counts fifteen different crawling things, from mealy worms to flattened flecks with legs almost too small to see, circling his dimpled limb in search of sweet well springs. Brown- and black-hooded birds dart though, feeding on the rafts of eggs that bugs and butterflies leave all over the branchlets. A woodpecker ducks in and out of a hole it made while grub-fishing the year before. It's a stunning secret that no one in his family will ever know: there are more lives up here, in his one single maple, than there are people in all of Belleville.
This book is not a legal treatise and it’s not an environment, energy, or natural resources text, but you can experience many lives lived and revel in the strength, complexity, endurance, and transcendent embrace of trees, “just by holding still” with this book in your hands.

REPORTS

Mitigating Biodiversity Impacts of Sports Events

International Union for Conservation of Nature (IUCN), 2020

Mitigating Biodiversity Impacts of Sports Events constitutes the third and most recent report on sports and biodiversity published by the International Union for Conservation of Nature (IUCN). The first report in the series, Sport and Biodiversity, identifies the significant negative impacts on biodiversity from sports along with opportunities for conservation associated with sporting events. The second report, Mitigating Biodiversity of New Sports Venues, contains guidelines for integrating biodiversity considerations in the development, refurbishment, and decommissioning of sports venues. This latest report, Mitigating Biodiversity Impacts of Sports Events (Report), proffers recommendations for mitigating biodiversity impacts during the “concept, strategy and planning phases” of sporting events and measures for mitigating biodiversity impacts during sporting events.

What’s the focus? The Report guidelines “focus on the often complex links between biodiversity and sport,” “highlight that sports events can also benefit biodiversity,” “offer help on how to make informed choices in avoiding harmful impacts,” and reflect a “growing recognition of the need for sport and sports events to be conducted in socially and environmentally responsible ways.”

Who should read the Report? The IUCN developed the guidelines for parties involved “in the planning and delivery of sports events,” making them also relevant for lawyers representing event owners, event organizers, and public permitting and licensing authorities. The report also may be of interest, as the IUCN authors suggest, to environmental nongovernmental organizations, academics, and students interested in “better understand[ing] what is involved in staging sports events and the implications for biodiversity.”

What’s covered in the Report? The Report addresses links between sports and biodiversity, including how sports impact biodiversity (e.g., habitat loss, wildlife disturbance, soil erosion, depletions of water resources, and climate change), the benefits of biodiversity to sporting events (e.g., enhancement of spectator experience, shade and shelter, safe water sport environments, and pest control), and how sporting events can benefit biodiversity (e.g., raising biodiversity awareness through communication and media and fundraising for conservation initiatives). The Report covers planning for sporting events for sustainability from the concept phase (“the beginning of the event lifecycle”) when venue choices remain open (such as selection of a venue for a skiing championship or a new route for a cycling race) to the strategic and detailed planning stages. For each stage, the Report contains numerous detailed action items. Bidding process actions items call for “an initial environmental screening report” and “guidance on biodiversity requirements” while venue design and layout action items include “[e]nsuring that spectator routes, viewing areas and crowd flows do not impact on ecologically sensitive areas,” developing a “sustainable sourcing code,” ensuring “sustainability requirements are written into contracts,” and integrating “sustainability into workforce event training modules.” Sprinkled throughout are real-world illustrations, such as a conservation partnership between the Philadelphia Eagles and the Conservation Fund to plant trees and habitat for eagles and other wildlife, an effort to establish biodiversity-related objectives in international golfing events by the Golf Environment Organisation Foundation, and commitments to minimize carbon emissions and reduce biodiversity impacts undertaken by the Alpine World Ski Championships and the German Football Association, and many more.

Packed with detailed mitigation actions, recommendations, resources, and illustrations, Mitigating Biodiversity Impacts of Sports Events offers guidelines and guidance for ensuring biodiversity conservation as part of an environmentally responsible approach to sporting event management.

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Are We Getting It Right?
Mark A. Ryan

“Cartoon. A sketch or drawing, usually humorous, as in a newspaper or periodical, symbolizing, satirizing, or caricaturing some action, subject, or person of popular interest.”
—Webster’s Unabridged Dictionary of the English Language (1985)

When I took over as the Back Page editor in 2009, the Back Page consisted of a list URLs of interest to the readership. That feature started in the early days of the internet, before Google made it remarkably easy to find just about any website with a few quick keystrokes. I thought the URL idea had outlived itself, and the magazine would benefit from a short-format op ed piece to counterbalance the long, in-depth articles that normally populate Natural Resources & Environment.

I also thought, for variety, a cartoon would be a fun diversion from the typical NR&E article on post-Keynesian economic impacts of CERCLA regulation in eastern seaboard bauxite mines. I just made that up, but you get that point. When I originally pitched the idea to the NR&E Board, it was met with skepticism. We’re a professional journal. It wouldn’t fit. It could be controversial. When I asked how many of the Board members read The New Yorker Cartoons before the articles, the deal was done. We had a cartoon.

The cartoons are a bit of a team effort. I come up with the cartoon idea for each issue, and Steven Mach, our talented artist, cleverly turns my ideas into the drawings you see. We’ve enjoyed a wonderfully symbiotic working relationship over the years (in spite of me once asking him to painstakingly rearrange the animals playing Supreme Court Justices in our cartoon to match the real Justices’ seating chart). The cartoon themes flow straight from my day-to-day experience working in environmental law. Source material is plentiful, so ideas are not hard to come by. Whether they are clever or relevant is another matter. Paula Schauwecker, a fellow NR&E Board member, acts as the sounding board for my ideas. She has the good sense to know when to kill the bad ones and has contributed invaluable tweaks, encouragement, and advice over the years. Jonathan Scoll took over for a time as Back Page editor from 2015 to 2019 and did a great job carrying on with the new format.

Are the cartoons sometimes controversial? Yes, of course. I aim for the middle, but it’s an elusive target, and a completely neutral cartoon would lack punch. It would be boring. Because of the nature of what we do, many of these cartoons are necessarily political in nature. Charlie Brown, they’re not. They’re topical. They are designed to reflect current policy or issues we face in environmental and resource law. They are meant to make us think, and, hopefully, to incite discussion. And they’re meant to entertain. We occasionally get a complaint about the cartoon being too biased. Guilty as charged. I now represent mostly business and agricultural interests, but my years of training as environmental scientist, followed by many more years as an EPA attorney shaped my world view in ways I can’t undo.

Good cartoons are thought provoking. They pack more punch than many 650-word op ed pieces. They graphically make us question our values. They give us a perspective on the world we may not naturally have. In a quick glance, they make us think. When they feel a bit uncomfortable, I would argue, they’re most effective. The recent cartoon on the burning Cuyahoga River (with an observer bragging about the stock market) dusts off and reimagines the age-old tension between economics and the environment. An earlier cartoon with two fish jumping up a fish ladder with one saying “Damned if we do, dammed if we don’t” tells a big, complex story in eight words. You may not agree with the simplistic message, and it may strike you as an unfair interpretation of the issue, but it gets your attention. It makes you ask, for just a moment, are we getting it right?

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Environmental Litigation
Law and Strategy, Second Edition

Kegan A. Brown and Andrea M. Hogan, Editors

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—Abraham Lincoln

“So the competition isn’t once you got the license, running the station; it’s getting the license.”

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“The board is not going to make any decision before permits are issued.”

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