Saint Louis University Law Journal

Volume 66
Number 3 *Teaching During a Changing Administration (Spring 2022)*

Article 5

2022

Teaching Environmental Law After Trump

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TEACHING ENVIRONMENTAL LAW AFTER TRUMP

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ABSTRACT

This Article addresses some of the challenges in teaching environmental law after the administration of President Donald Trump. The Trump Administration mounted a relentless, aggressive, and largely deregulatory overhaul of the nation's major environmental regulatory efforts, particularly the efforts of the prior Obama Administration. Many of these efforts by the Trump Administration have been challenged in court, some successfully, while others have been reversed or are in the process of reversal by the administration of President Joseph Biden. For teachers of environmental law, these actions present opportunities to demonstrate how regulatory agencies (under the direction of presidents), rather than Congress, have become the driving force of change in environmental regulation and the limits of that approach to addressing the nation's environmental issues. The Article surveys recent administrative action under the National Environmental Policy Act, the Clean Water Act, and the Clean Air Act and how these matters were addressed in a basic environmental law survey course.

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INTRODUCTION

In the United States, regulation to protect the environment, despite its bipartisan roots, has for decades been a highly partisan issue.[1] Democrats and Republicans have been at odds on just about every environmental policy issue of any significance. With few exceptions, Congress has passed no new, significant environmental legislation since the 1990 amendments to the Clean Air Act ("CAA").[2] Nonetheless, the shape and content of environmental regulation continues to evolve and change as different presidential administrations, acting through federal agencies, principally the Environmental Protection Agency ("EPA"), shape policy and law. This is formally done by exercising statutorily-conferred authority through rulemaking, guidance, adjudications, and enforcement priorities and policies.[3] In most cases, EPA enjoys considerable discretion about the content of its actions, a consequence of Congress's proclivity to delegate broadly to agencies.[4] How that agency discretion is exercised is often informed and shaped by the commitments and policy preferences of the incumbent president—a result that the federal courts generally recognize as legitimate and consistent with our constitutional form of government.[5]

It is not surprising, therefore, that the Republican administration of President Donald J. Trump sought to reverse or revise some of the regulatory measures put in place by EPA and other federal agencies under Democratic President Barack Obama or other, preceding administrations.[6] Indeed, in his 2016 presidential campaign, Donald Trump repeatedly pledged to pursue an

1. *See* Jaime Fuller, *Environmental Policy is Partisan. It Wasn't Always.*, WASH. POST (June 2, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/06/02/support-for-the-clean-air-act-has-changed-a-lot-since-1970/.

2. *See* Richard J. Lazarus, *Environmental Law Without Congress*, 30 J. LAND USE & ENV'T L., 15, 27 (2014) (noting absence of new legislation since 1990). Since Professor Lazarus's 2014 article, Congress in 2016, in a rare bipartisan moment of environmental policymaking, enacted the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114–182, 130 Stat. 448 (2016) (codified at 15 U.S.C. §§ 2601–2629). This legislation significantly amends the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601–2629 (2012)).

3. *See* CRAIG N. JOHNSTON ET AL., LEGAL PROTECTION OF THE ENVIRONMENT 98–110 (LEG, Inc. d/b/a West Academic 4th ed. 2018) [hereinafter LEGAL PROTECTION].

4. *See, e.g.*, Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474–76 (2001) (discussing broad delegations of authority to agencies).

5. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices"); Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) (noting that "[t]he authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking.").

6. Richard J. Lazarus, *The Super Wicked Problem of Donald Trump*, 73 VAND. L. REV. 1811, 1844 (2020).

aggressive dismantling of Obama-era regulations, particularly those relating to efforts to control pollutants that contribute to global climate change.[7] Trump even went so far as to suggest dismantling EPA itself.[8]

It is common for new administrations to pursue environmental regulation and policy that differs from that of preceding administrations. For example, the Obama Administration aggressively used its authority under the CAA to regulate emissions of pollutants that contribute to climate change in ways that the preceding Bush Administration declined to pursue.[9] But the Trump Administration moved much more rapidly and much more aggressively than preceding administrations to rework the landscape of environmental regulation, pursuing a broad and deep overhaul of regulations spanning the field of environmental law.[10] Indeed, Trump's efforts to deregulate have been described as "relentless."[11] During its four years in power, the Trump Administration "officially reversed, revoked or otherwise rolled back" nearly 100 environmental rules.[12] An additional dozen or so regulatory rollbacks were in progress but not completed when Joseph R. Biden Jr. assumed the presidency in 2021.[13] Even these numbers understate the significance of Trump's deregulatory

7. *See* Samantha Gross, *What is the Trump Administration's Record on the Environment?*, BROOKINGS INST. (Aug. 4, 2020), https://www.brookings.edu/policy2020/votervital/what-is-the-trump-administrations-track-record-on-the-environment/ ("The Trump administration has been particularly focused on rolling back actions intended to deal with climate change.").

8. *See* Lazarus, *supra* note 6, at 1840–43, 1847 (describing candidate Trump's positions on climate change); Robert V. Percival, *Environmental Law in the Trump Administration*, 4 EMORY CORP. GOVERN. & ACCOUNTABILITY REV. 225, 225, 230 (2017) (describing candidate Trump's campaign promises relating to environmental law).

9. *See* Cass R. Sunstein, *Changing Climate Change, 2009-2016*, 42 HARV. ENV'T L. REV. 231, 241–68 (2018) (discussing Bush and Obama Administrations' climate change actions). To illustrate the breadth of Trump's attack on existing environmental regulation, the Trump Department of Energy moved to repeal or roll back energy efficiency requirements for light bulbs. *See* John Schwartz, *Trump Administration Blocks Energy Efficiency Rule for Light Bulbs*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/climate/trump-light-bulb-roll back.html.

10. For a catalogue of the Trump administration's action on the environment, see HARVARD LAW SCHOOL, ENVIRONMENTAL AND ENERGY LAW PROGRAM, REGULATORY TRACKER, https://eelp.law.harvard.edu/portfolios/environmental-governance/regulatory-rollback-tracker/ (last visited Mar. 1, 2022) [hereinafter REG. TRACKER].

11. Lisa Friedman, *Trump's Move Against Landmark Environmental Law Caps a Relentless Agenda*, N.Y. TIMES (Jan. 13, 2020), https://www.nytimes.com/2020/01/09/climate/trump-nepa-environment.html.

12. Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com /interactive/2020/climate/trump-environment-rollbacks-list.html.

13. *Id*.

efforts.[14] For example, the Trump Administration reduced funding for EPA and introduced procedural reforms and policies that could have a lasting impact on the Agency's ability to address environmental issues.[15] Some have also noted that the exodus of employees at EPA during the Trump Administration, resulting in a "loss of critical and longstanding agency expertise[,] may well be the single most harmful, long-lasting impact on environmental protection of the Trump Presidency."[16]

The nature and extent of the Trump Administration's assault on existing environmental regulation pose some challenges for those of us that teach courses in environmental law, particularly basic survey courses like the one I teach at Saint Louis University School of Law.[17] In this Article, I will describe how some of these actions were addressed during the course I offered in the fall semester of 2020.

I. SITUATING ENVIRONMENTAL REGULATION & CHANGE WITHIN THE BROADER STRUCTURE OF ADMINISTRATIVE LAW

To understand and analyze the Trump Administration's deregulatory efforts, it is important, first, to know that these efforts were not pursued by way of legislation but, instead, through administrative action, including presidential action and agency rulemaking. Particularly with respect to agency rulemaking, students need a rudimentary understanding of the broader structure of administrative law and the opportunities it offers for, as well as the constraints it imposes on, regulatory change.

Many students in environmental law survey courses may have little or no background in basic administrative law. At my school, for example, we recommend that students take administrative law prior to enrolling in the basic environmental law course, but administrative law is not a required prerequisite for the course. Environmental law casebooks typically include some basic materials on administrative law and its relation to environmental law.[18] I

14. *See* ENVIRONMENTAL LAW INSTITUTE, ENVIRONMENT 2021: WHAT COMES NEXT? 10–14 (2020), https://www.eli.org/sites/default/files/eli-pubs/environment-2021_0.pdf (discussing Trump executive orders, including procedural impacts).

15. *See id*.

16. Lazarus, *supra* note 6, at 1848; *see also* Inara Scott et al., *Environmental Law. Disrupted.*, 49 ENV'T L. REP. 10038, 10054 (noting that "the [Trump] Administration is also disrupting federal environmental law by dismantling the agencies that carry out those laws.").

17. The coverage included in this basic course generally focuses on federal law and includes the National Environmental Policy Act, the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. I also include materials on common law actions for environmental harm and a brief discussion of constitutional limitations on environmental regulation and litigation in the federal courts.

18. *See* LEGAL PROTECTION, *supra* note 3, at 98–110.

commonly devote at least one class period early in the course to providing students with an administrative law mini-course, focusing primarily on administrative procedure and the scope of judicial review of agency actions. Since it is vital for environmental law students to understand the procedural requirements agencies must observe when pursuing regulatory initiatives, as well as the forms litigation takes when agency actions are challenged, spending a little class time on administrative law basics has proved to be an investment with real dividends.

Students must first appreciate that binding regulatory requirements, even longstanding agency rules, can be altered by an agency vested with the statutory authority to do so.[19] But agencies may not simply revoke or revise existing rules by decree; they must follow certain procedural requirements, some of which can be time-consuming and require significant investment of agency resources.[20] Indeed, "administrative law checks and balances work to limit [a new presidential administration's] ability to change a rule based on purely political factors . . . ."[21]

Since most environmental regulation comes by way of informal agency rulemaking rather than more formal rulemaking processes or through case-by-case adjudication, the general "notice and comment" rulemaking procedures of the Administrative Procedure Act ("APA") typically apply.[22] The APA defines rulemaking to include not only the "formulat[ion]" of a rule, but also the "process for . . . amending, or repealing a rule."[23] The APA also includes procedural requirements that govern all rulemakings, including repeals of existing rules, unless a specific exception is applicable.[24] These notice and

19. Another way that agency regulations can be altered is through the legislative process. Congress can, of course, repeal existing rules, provided that the President signs such legislation or the Congress overrides a presidential veto. In some cases, a fast-track procedure known as the Congressional Review Act, 5 U.S.C. §§ 801–808, can be employed to void recently promulgated regulations, and it has been used in recent presidential transitions. For a discussion of the Congressional Review Act, see Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 14–23 (2019). The Congressional Review Act was recently used to void a Trump administration EPA rule that rescinded or revised volatile organic compounds and methane regulatory requirements for oil and gas facilities. This action effectively restored regulations promulgated by the Obama administration to control emissions of these two pollutants. *See* Jeff Brady, *Biden Signs Bill to Restore Regulations on Climate-Warming Methane Emissions*, NAT'L PUB. RADIO: MORNING EDITION (June 30, 2021), https://www.npr.org/2021/04/28/991635101/congress-votes-to-restore-regulations-on-climate-warming-methane-emissions.

20. Stephen M. Johnson, *Killing WOTUS 2015: Why Three Rulemakings May not be Enough*, 64 ST. LOUIS U. L.J. 373, 374 (2020) [hereinafter *Killing WOTUS*].

21. *Id*.

22. *See* 5 U.S.C. § 553 (establishing procedural requirements for "rulemaking").

23. 5 U.S.C. § 551.

24. *See* Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 101 (2015) (noting that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").

comment procedures generally require the responsible agency to undergo a public process in which interested parties may participate in the rulemaking.[25] Students must appreciate that the notice and comment process provides an opportunity for lawyers (and others) to submit evidence and argument to the agency in support of their clients' positions on a proposed rule. Participation in the rulemaking process may also be necessary to preserve any objections to the agency's action should judicial review of that agency action later be sought.[26]

In the environmental law context, students must also be aware that the APA's procedural requirements may be supplemented or replaced by more particular procedures included in environmental legislation, such as the Clean Air Act.[27] The CAA, like the APA, specifies procedures governing both the "promulgation or revision" of most rules issued by EPA under the CAA.[28] These procedures are like those required by the APA, but in many particulars are more stringent than the bare APA requirements governing notice and comment rulemaking.

In terms of judicial review, I focus primarily on approaches to reviewing agencies' interpretations of law—specifically interpretations of the agency's enabling act—and the "arbitrary and capricious" standard of review governing agency fact-finding and policy choices. But since this is an environmental law course, not an administrative law course, my review necessarily must be truncated. Two prominent cases can provide students with some basics as well as insights about how courts review efforts by agencies to change their rules and policies—*Chevron U.S.A., Inc. v. Nat. Res. Def. Council*[29] and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*[30]

Chevron is, of course, a foundational case in which the Court articulated the well-known two-part "test" for courts to apply when reviewing agency interpretations of the statutes Congress has charged the agencies to implement.[31]

25. *See generally* Admin. Conf. of the U.S., Recommendation 2018–7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019), https://www.govinfo.gov/content/pkg/FR-2019-02-06/pdf/2019-01284.pdf.

26. The failure to raise issues or challenges during the agency rulemaking process can result in denial of judicial review of the issue or challenge. *See, e.g.*, Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554, 562 (D.C. Cir. 2002) ("It is well established that issues not raised in comments before the agency are waived and this Court will not consider them.").

27. *See* 42 U.S.C. § 7607(b) (establishing procedural requirements for most rulemakings under the Clean Air Act).

28. *See id*.

29. 467 U.S. 837 (1984).

30. 463 U.S. 29 (1983).

31. The Court in *Chevron* held, "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed

I reserve detailed and more sophisticated treatment of *Chevron* for courses in administrative law. For purposes of the environmental law course, it is sufficient for students to understand that in many circumstances, it is up to agencies (including EPA), rather than the courts, to determine how ambiguous statutory language may be interpreted in service of appropriate policy and regulatory objectives. But *Chevron* also provides an opportunity to explore how an agency, in the exercise of its discretionary authority, can interpret statutory language to support changes that the incumbent administration deems desirable to pursue. The famous "bubble concept" at the heart of the rule being reviewed in *Chevron* was, after all, a significant effort at deregulation fueled by the Reagan Administration's government-wide regulatory review.[32] To explore an agency's ability to reverse or amend polices, I typically ask students whether EPA, at the insistence of a new President, could revoke the bubble concept and the plant-wide definition of "stationary source," which the Court approved in *Chevron*. I ask them to consider the Court's statement:

> The fact that the agency has from time to time changed its interpretation of the term 'source' does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.[33]

I also ask them to consider what limits might cabin the agency's discretionary authority. What kind of explanation must the agency provide to make its interpretation of ambiguous statutory language "reasonable"?

Like *Chevron*, *State Farm* arises in the context of the Reagan Administration's efforts to reduce regulatory requirements for businesses—in

the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842–43 (internal citations omitted). The scholarly literature on *Chevron* is voluminous. For some recent articles and commentary, see Cass R. Sunstein, *Chevron as Law*, Geo. L.J. 1613 (2019); Kristine E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, Duke L.J. 931 (2021).

32. In the rulemaking adopting the bubble concept for nonattainment areas, EPA stated, "The decision to reconsider the [bubble concept for] . . . nonattainment area new source review has been made in the context of a Government-wide reexamination of regulatory burdens and complexities that is now in progress. . . The Agency has concluded that the . . . rules being proposed today will substantially reduce the burdens imposed on the regulated community without significantly interfering with timely achievement of the goals of the Clean Air Act." Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 16,281 (Mar. 12, 1981).

33. *Chevron*, 467 U.S. at 863–64.

this case, the automobile manufacturing industry.[34] The National Highway Traffic Safety Administration ("NHTSA") conducted a rulemaking to revoke the agency's passive restraint standard—a regulation that required automobile manufacturers to install either automatic seatbelts or airbags.[35] In setting aside this agency action, the Court importantly held that an agency's revocation or modification of a rule is subject to the same standard of review as an agency's promulgation of a new rule—here, the APA's "arbitrary and capricious" standard.[36] The Court notes that "the direction in which an agency chooses to move does not alter the standard of judicial review established by law" and "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change . . . ."[37] In this case, NHTSA "failed to present an adequate basis and explanation for rescinding the passive restraint requirement . . . ."[38]

The Court in *State Farm* provided a classic formulation of the arbitrary and capricious standard, one that can advance students' understanding about what to look for in making arguments for or against a challenged agency action.[39] The Court helpfully explained that while "review under the arbitrary and capricious standard is narrow," agencies have a responsibility to provide a "rational connection between the facts found and the choice[s] made"[40] by the agencies and whether the agencies have "considere[d] . . . the relevant factors" or made "a clear error of judgment."[41] The Court also noted:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. . . . We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[42]

34. For an interesting review of the *State Farm* decision, see Jerry L. Mashaw, *The Story of* Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.*: Law, Science and Politics in the Administrative State*, *in* ADMINISTRATIVE LAW STORIES 335, 335 (Peter L. Strauss ed., 2006).

35. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 37–38 (1983).

36. *Id.* at 41–42.

37. *Id.* at 42.

38. *Id.* at 34.

39. *Id.*

40. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U. S. 156, 168 (1962)).

41. *Id.* at 43 (quoting Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U. S. 281, 285 (1974)).

42. *Id.*

Together, *Chevron* and *State Farm* provide a good starting point for analyzing many of the cases encountered in a basic environmental law survey course. They are especially helpful for probing the legal basis for the Trump Administration's deregulatory efforts as well as potential vulnerabilities those efforts may encounter when challenged in federal court. As others have demonstrated, many of the Trump Administration's deregulatory efforts have been thwarted by the courts due to agencies' failures to observe basic administrative law requirements.[43]

II. TRUMP'S EFFORTS TO DISMANTLE ENVIRONMENTAL REGULATION

Despite the wide-ranging nature of Trump's assault on environmental regulation, the basic environmental law course I offer provides only limited opportunities to explore these deregulatory efforts. Nonetheless, the opportunities that do exist involve some of the most critical issues in contemporary environmental law and arise under key statutory programs: the National Environmental Policy Act, the Clean Water Act, and the Clean Air Act.

A. Environmental Impacts, Public Information, & Agency Decisionmaking—Narrowing the Scope of the National Environmental Policy Act

My students' first extended encounter with an environmental statute and an agency's efforts to implement it involves the National Environmental Policy Act ("NEPA") and the Council on Environmental Quality's ("CEQ") influential regulations.[44] Our study of NEPA also provides a first look at the Trump Administration's attack on environmental regulation.

NEPA, viewed by many as the "Magna Carta of global environmental law,"[45] requires "all agencies of the Federal Government" to prepare "a detailed statement . . . on the environmental impact" of any "major Federal action[]" that may be proposed by those agencies if the proposed action may "significantly affect[] the quality of the human environment."[46] The detailed statement has become known as an "EIS" or environmental impact statement. The NEPA process "is intended to help government make informed decisions, encourage the public to participate in those decisions, and make the government

43. *See, e.g.*, *Killing WOTUS*, *supra* note 20, at 396–99. Professor Johnson reports that, "[w]hile federal agencies historically have prevailed in about 70% of the cases brought against them alleging violations of the Administrative Procedures Act, federal agencies in the Trump Administration only prevailed in about 6% of the cases decided by March, 2019." *Id.* at 396.

44. The CEQ regulations are binding on other federal agencies. 40 C.F.R. § 1500.3 (2020). The courts extend considerable deference to these regulations when entertaining NEPA cases. *See, e.g.*, Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 372 (1989) (noting that "CEQ regulations . . . are entitled to substantial deference.").

45. Robert L. Glicksman & Alejandro E. Camacho, *The Trump Card: Tarnishing Planning, Democracy, and the Environment*, 50 ENV'T L. REP. 10281, 10281 (2020).

46. 42 U.S.C. § 4332(2)(C)(i).

accountable for its decisions."[47] Indeed, "[p]ublic participation is a central part of the NEPA process."[48] Thus, the EIS and information generated by agencies during NEPA processes contribute to more transparent and more informed agency decisions. In some cases, NEPA also fuels controversy and can yield confrontational encounters between a federal agency and interested members of the public. Litigation over an agency's compliance with NEPA, while representing a very small percentage of all agency actions subject to NEPA, is common.[49]

NEPA does not require agencies to avoid or mitigate the environmental impacts of their proposals. Although the Supreme Court has characterized NEPA as "action-forcing" legislation, it has also held that "NEPA itself does not mandate particular results, but simply prescribes the necessary process."[50] While the agency must identify, consider, and evaluate environmental impacts, including alternatives to the proposed action,[51] "the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[52]

To achieve the benefits of transparency, public participation, and agency accountability, it is undoubtedly true that NEPA adds to the costs of implementing and the completion times for federal actions. Those costs may, of course, be offset by the benefits of reducing environmental impacts by implementing a less environmentally destructive alternative or measures to mitigate adverse environmental impacts. But an EIS can take several years to complete and run into the hundreds of pages.[53] It should be noted, however, that these delays affect a very small number of proposed agency actions. NEPA compliance generally does not require the completion of a full-blown EIS; indeed, CEQ has estimated that less than one percent of federal agency project

47. GOV. ACCOUNTABILITY OFF., NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES, GAO-14-369, at 15 (Apr. 2014).

48. *Id.* at 15–16. *See also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.").

49. *See* John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 NAT. RES. & ENV'T 14, 16 (2020) (estimating that .22% of NEPA decisions by agencies are subject to litigation).

50. *Methow Valley Citizens Council*, 490 U.S. at 350.

51. 42 U.S.C. § 4332(2)(C)(iii).

52. *Methow Valley Citizens Council*, 490 U.S. at 350.

53. A recent report by the CEQ found that for the period 2013–2018, the average length of an EIS was 661 pages, while the median length was 447 pages. COUNCIL ON ENV'T QUALITY, LENGTH OF ENVIRONMENTAL IMPACT STATEMENTS 1 (June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2020-6-12.pdf. Data on the government-wide costs of preparing EISs are not readily available, though some agencies do have some cost data. *See* GAO-14-369, *supra* note 38, at 10–13. The same report notes that data for 2012 showed that the average preparation time for EISs was 4.6 years. *Id.* at 13.

proposals require (or at least yield) an EIS.[54] Most agency proposals—as many as ninety-five percent—are excluded from the EIS requirement because they fall within categories of actions which the agencies have pre-determined do not normally have the potential for significant environmental impacts.[55] The process for avoiding an EIS in this way is known as a "categorical exclusion" ("CE").[56] Many additional projects are found to have no significant impacts after an "environmental assessment," or EA, which is a less intensive analysis of environmental impacts than an EIS and can usually be completed quickly and at a fraction of the costs of an EIS.[57]

Projects that do require the preparation of an EIS are typically large, complex projects and may be high-profile actions or large infrastructure projects. These projects generate considerable official and public attention, like the Keystone XL and Dakota Access pipeline projects.[58] Especially in these kinds of projects, the costs and time associated with NEPA compliance may be increased by litigation over the agency's compliance with NEPA.[59] At the same time, it is generally these projects that are controversial precisely because of the significant environmental impacts they will have if completed. Often the need

54. *See id.* at 7.

55. GAO-14-369, *supra* note 38, at 7.

56. *See id.* at 3. The categorical exclusions are authorized by the CEQ's NEPA regulations, see 40 C.F.R. §§ 1507.3(e)(2), 1508.1(d). Categorical exclusions are normally adopted by an agency through a notice and comment rulemaking process. *See, e.g.*, Nuclear Regulatory Commission, Categorical Exclusions from Environmental Review, Advance Notice of Proposed Rulemaking, 86 Fed. Reg. 24,514 (May 7, 2021).

57. The CEQ regulations authorize EAs when the agency's proposed action is not likely to have significant environmental impacts or when the impacts are unknown and neither a categorical exclusion applies nor has the agency decided to prepare an EIS. 40 C.F.R. § 1501.5(a). The regulations define an EA as "a concise public document prepared by a Federal agency to aid an agency's compliance with the Act and support its determination of whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.1(h). If an EA finds that the proposed project will have significant environmental impacts, the agency must prepare an EIS. 40 C.F.R. § 6.200(a).

58. *See* Indigenous Env't Network v. Dep't of State, 347 F. Supp. 3d 561, 591 (D. Mont. 2018), *vacated as moot*, 2019 WL 2542756 (9th Cir. 2019) (Keystone XL project); Standing Rock Sioux Tribe v. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 111 (D.D.C. 2017) (Dakota Access pipeline). *See* Or. Nat. Desert Ass'n v. Jewell, 840 F.3d 562, 565 (9th Cir. 2016) (Challenges on NEPA grounds to large infrastructure projects span the gamut, including wind farms), Grand Canyon Trust v. Fed. Aviation Admin., 290 F.3d 339, 339–40 (D.C. Cir. 2002) (airports), Utahns for Better Transp. v. Dep't of Transp., 319 F.3d 1207, 1161 (10th Cir. 2003) (major highway projects), Backcountry Against Dumps v. Chu, 215 F. Supp. 3d 966, 972 (S.D. Cal. 2015), *app. dismissed*, 2018 WL 1989500 (9th Cir 2018) (electrical transmission projects).

59. For an effort to assess the effects NEPA has on agency decisionmaking and litigation, see Ruple & Tanana, *supra* note 40.

for, and benefits of, such projects are highly contested.[60] And in these circumstances, transparency, public participation, and agency accountability may be especially warranted.

Over the years since NEPA was enacted and across several Congresses and presidential administrations, efforts have been made to streamline the NEPA process to reduce its costs and delays.[61] This is understandable for a variety of reasons—some good, some more questionable. In many cases, the push to streamline NEPA is understandable because political leaders benefit from large infrastructure projects that are highly visible and provide tangible benefits to some of their constituents; in these circumstances, leaders will want to get projects done quickly to ensure they receive credit for them. By contrast, there may be little opposition to streamlining in some cases because the environmental costs of such projects may be less visible and less immediate, or may be distributed among the population in ways that do not generate significant political opposition, perhaps raising significant environmental justice concerns.[62] The Trump Administration, however, mounted a sustained effort to reduce NEPA's influence and its ability to be used as a legal tool to question the need or wisdom of major federal projects. In the process, those efforts have likely reduced the effectiveness of NEPA as an "action-forcing" statute that promotes agency transparency, reasoned and informed agency decisionmaking, and robust public participation in agency actions.[63]

President Trump's assault on existing NEPA practices began almost immediately. On January 30, 2017, just ten days after assuming office, Trump signed Executive Order 13766, which announced a policy "to streamline and expedite, in a manner consistent with law, environmental reviews and approvals

60. Kevin DeGood, *The Importance of NEPA Review for Infrastructure Projects*, Report, CTR. FOR AM. PROGRESS (Aug. 16, 2018), https://www.americanprogress.org/article/importance-nepa-review-infrastructure-projects/.

61. For a review of some of those efforts, see Sam Kalen, *NEPA's Trajectory: Our Waning Environmental Charter from Nixon to Trump?*, 50 ENV'T L. REP. 1039 (2020).

62. "The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations." Mid States Coal. For Progress v. Surface Transp. Bd., 345 F.3d 520, 541 (8th Cir. 2003). For a recent example of a court finding an agency's NEPA analysis inadequate in respect to environmental justice concerns, see *Standing Rock Sioux*, 255 F. Supp. 3d at 136–40. CEQ has issued guidance to agencies on how to address environmental justice in NEPA analysis. COUNCIL ON ENV'T QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (Dec. 10, 1997), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf. For a summary, see ENV'T PROT. AGENCY, ENVIRONMENTAL JUSTICE AND NATIONAL ENVIRONMENTAL POLICY ACT https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act (last visited Mar. 1, 2022).

63. *See, e.g.*, Glicksman & Camacho, *supra* note 36, at 10289.

for all infrastructure projects."[64] Additional executive orders followed.[65] In Executive Order 13783, President Trump directed CEQ to rescind its Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in [NEPA] Reviews.[66] The order also rescinded an interagency working group's determinations and protocol regarding how the social cost of carbon may be calculated and used in regulatory impact analysis.[67]

An interesting question I raised for my class concerned the effect of these executive orders on agencies' NEPA analyses and judicial review of those analyses. The orders themselves all include boilerplate language to the effect that they are not to be construed to affect or impair agencies' legal authority, but their effect on an agency's discretionary authority remains somewhat uncertain.[68] At the time of my class, a number of courts had entertained NEPA challenges after these executive orders were issued. Some considered the manner in which agencies addressed the impact of their proposed actions in terms of greenhouse gas emissions and climate change.[69] For example, in *Sierra Club v. FERC*, the D.C. Circuit held that an EIS was inadequate because the agency failed to provide a quantitative estimate of the downstream greenhouse gas emissions resulting from its approval of a natural gas pipeline project.[70] The court also directed the agency to consider on remand whether using a social cost of carbon methodology might usefully link the quantified emissions to climate change impacts.[71] While Executive Order 13783 is briefly mentioned in the court's opinion,[72] it had no apparent impact on the court's review of the agency's compliance with NEPA.

More recent cases suggest that the Trump Administration's efforts to streamline NEPA processes by rescinding key guidance and protocols, such as those relating to climate change, may backfire. For example, in *Wild Earth Guardians v. Bernhardt*, the court expressly considered the effects of Executive Order 13783 on the agency's NEPA obligations.[73] The court held that the Bureau of Land Management failed to take the required "hard look" under

64. Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 30, 2017).

65. *See* Exec. Order No. 13783, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017); Exec. Order No. 13,087, 82 Fed. Reg. 40,463, 40,466 (Aug. 24, 2017).

66. 82 Fed. Reg. at 16,094.

67. *Id.* at 16,095.

68. *See, e.g.*, *id.* at 16096.

69. For a short summary, see Christy Goldfuss et al., *12 Climate Wins From the National Environmental Policy Act*, (May 29, 2019), https://www.americanprogress.org/issues/green/news/2019/05/29/470374/12-climate-wins-national-environmental-policy-act/.

70. 867 F.3d 1357, 1374 (D.C. Cir. 2017).

71. *Id.* at 1375.

72. *Id*.

73. Wild Earth Guardians v. Bernhardt, No. CV 17-80-BLG-SPW, 2021 WL 363955, at *9 (D. Mont. Feb. 3, 2021).

NEPA at the costs of the greenhouse gas emissions associated with its granting of a coal mining lease, and, additionally, failed to adequately explain why it refused to quantify those costs.[74] In addressing the executive order, the court held:

> Federal agencies cannot ignore more accurate scientific information when it is available. . . . While Executive Order No. 13783 withdrew the technical support documents for [social cost of carbon protocol], it did not change the nature of the scientific information forming the basis for the Protocol. *California v. Bernhardt,* 472 F. Supp. 3d 573, 611 (N.D. Cal. July 15, 2020) ("In other words, the President did not alter by fiat what constitutes the best available science. The Executive Order in and of itself has no legal impact on the consensus that IWG's estimates constitute the best available science about monetizing the impacts of greenhouse gas emissions."). Thus, the [social cost of carbon protocol] remains a viable model tool for monetizing the costs of greenhouse gas emissions despite Executive Order No. 13783.[75]

The court's decision in *Wild Earth Guardians* makes clear that the executive orders do not relieve agencies of their NEPA responsibilities to evaluate the environmental impacts of their actions, even if those impacts may be difficult to assess and quantify, such as climate change impacts.[76] While the prior guidance was not legally binding on agencies, it may have provided a normalizing and acceptable method to reduce the vagaries of and opportunities for litigation involving agencies' responsibility to comply with NEPA mandates. By rescinding previous guidance about how agencies may comply with that responsibility, the Trump executive orders may inadvertently have provided new opportunities for litigating these issues in court, which of course may delay the implementation of proposed agency actions.[77]

I also focused on the efforts by the Trump CEQ to engage in a comprehensive review of its 1978 NEPA implementing regulations, which were prompted in part by Executive Order 13087. CEQ issued a final rule adopting significant revisions on July 16, 2020.[78] The key features of the regulations included:

74. *Id.* at *8.

75. *Id.* at *9–10.

76. *Id.* at *10.

77. *See* Sharon Buccino, *Understanding Trump's Harmful Attack on NEPA*, NAT. RES. DEF. COUNCIL (July 15, 2020), https://www.nrdc.org/experts/sharon-buccino/understanding-trumps-harmful-attack-nepa (explaining that "[o]ne irony of the Trump administration's regulatory attack on NEPA is that while it's aimed at fast-tracking approvals for pipelines, coal mines, and oil drilling, it's actually going to lead to more of a legal mess that will slow down all kinds of projects.").

78. 85 Fed. Reg. 43,304 (July 16, 2020).

- Reversing decades of precedent and assigning independent significance to the term "major" in determining whether a proposed agency action requires the preparation of an EIS[79]
- Expanding the (already widespread) use of categorical exclusions ("CEs") by allowing agencies to use CEs even in some "extraordinary circumstances"[80]
- Eliminating the requirement for agencies to consider cumulative and indirect impacts when making judgments about CEs and findings of no significant impacts, as well as in preparing EISs[81]
- Narrowing the range of alternatives to a proposed action that an agency must consider[82]
- Placing time limits (generally two years for an EIS and one year for an EA) and page limits on EISs (generally 150 pages or, for "proposals of unusual scope or complexity," 300 pages)[83]
- Including restrictive provisions designed to reduce or limit opportunities for litigation and/or remedies for NEPA noncompliance[84]

While each one of these categories of revisions may hamper the goals of transparency, public participation, and agency accountability, perhaps the most

79. 40 C.F.R. § 1508.1(q). The 1978 CEQ regulations provided that the term "Major reinforces but does not have a meaning independent of significantly." *See* 43 Fed. Reg. 55,978, 55,989 (Nov. 29, 1978) (explaining that "[t]he Council determined that any Federal action which significantly affects the quality of the human environment is 'major' for purposes of NEPA"); *see also* City of Davis v. Coleman, 521 F.2d 661, 673 n.15 (9th Cir. 1975) (giving the term "major" independent significance "does little to foster the purposes of [NEPA]").

80. 40 C.F.R. § 1501.4(b)(1).

81. *See* 85 Fed. Reg. at 43,343–44 (discussing "cumulative" and "indirect" effects). The 1978 regulations required agencies to consider direct, indirect, and cumulative impacts. 40 C.F.R. § 1508.25(c) (2018). Cumulative impact was defined as "the impact on the environment which results from the incremental impact of the action when added to past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* 1508.7.

82. The 1978 regulations stated that the alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14 (2018). The old regulations also included a requirement that EISs "[r]igorously explore and objectively evaluate all reasonable alternatives," *id.* § 1502.14(a), and "include reasonable alternatives not within the jurisdiction of the lead agency." *Id.* § 1502.14(c). These provisions have been eliminated in the new regulations. As if to underscore the departure from the previous regulations, the Trump CEQ revisions include a requirement that agencies "[l]imit their consideration to a reasonable number of alternatives." 40 C.F.R. § 1502.14(f) (2021).

83. 40 C.F.R. §§ 1501.10(b)(1)–(2), 1502.7.

84. *See id*. §§ 1500.3(b) (exhaustion requirement), 1500.3(c) (authorizing agencies to require posting of bond), 1500.3(d) (no presumption that injunctive relief is appropriate for NEPA violations and harmless error rule), 1503.3(b) (exhaustion).

significant revision relates to the elimination of an explicit requirement for EISs to include a discussion of a proposed project's cumulative and indirect environmental impacts. The new regulations define "effects" or "impacts" as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives . . . ."[85] Additionally, the new regulations also provide that "[a] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain."[86] And in another departure from the 1978 rules, the new rules provide that "[e]ffects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action."[87]

The rather clear target of these revisions is the agency's obligation to consider a proposed action's effect on greenhouse gas emissions and global climate change. As Professors Glicksman and Camacho have concluded,

> There is little doubt that both the intention and effect of these revisions would be to minimize agency responsibilities to consider climate change, given the complexity of the causal chains between some human activities and the resulting climate effects, and the length of time it may take for climate effects to manifest.[88]

Relatedly, the Trump CEQ had earlier issued draft guidance to agencies on how to consider greenhouse gas emissions in their NEPA reviews.[89] This guidance replaces and weakens Obama-era guidance, which, as noted above, CEQ was directed to rescind by President Trump's Executive Order 13783.

One of the primary difficulties that teachers of environmental law may have in addressing the CEQ revisions relates to their potential longevity or impact on NEPA litigation. Whether the courts will accept these revisions as consistent with the statute and not arbitrary and capricious remains to be seen. It may be that the courts will dismiss present challenges in light of Biden Administration actions.[90] The Biden CEQ has rescinded the draft guidance on greenhouse gas emissions and is currently reconsidering the Trump revisions to the NEPA regulations.[91] It has asked a federal court to remand without vacating the challenged regulations as the agency reconsiders them.[92]

85. *Id*. § 1508.1(g).

86. *Id.* § 1508.1(g)(2).

87. *Id*.

88. Glicksman & Camacho, *supra* note 37, at 10285.

89. 84 Fed. Reg. 30,097 (June 26, 2019).

90. The CEQ revised regulations have been challenged in four separate lawsuits. *See* REG. TRACKER, *supra* note 10.

91. *See id*.

92. *Id*.

B. The Vagaries of Cooperative Federalism: Trump & the Clean Water Act

One of the common features of the major federal environmental programs, like the Clean Water Act ("CWA"), is a commitment to "cooperative federalism."[93] In the CWA, for example, Congress declared a goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[94] At the same time, Congress deemed it a national policy to "recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . . ."[95] The role of the States in controlling water pollution and protecting water quality depends both on the responsibilities States may assume under the CWA and the jurisdictional limits placed on federal agencies in terms of the waters they may protect and the activities they may regulate. In the absence of federal jurisdiction, the quality of waters will depend on the willingness of States to regulate polluting activities, the efficacy of any efforts they may undertake to do so, and the extent to which State authority is preempted by federal legislation or regulatory action.[96]

The Trump Administration promulgated two rules that address the cooperative federalism approach of the CWA, including concerns about preserving the States' role in controlling water pollution. The first rule, known as the Navigable Waters Protection Rule, addresses the scope of EPA's and the Army Corps of Engineers' ("Corps") jurisdiction over "navigable waters" under the CWA.[97] The second rule addresses the States' authority to impose conditions on federal licenses and permits to protect water resources within their respective jurisdictions.[98] Together, these rules paint a vague and inconsistent view of the CWA's cooperative federalism structure.

93. *See, e.g.*, Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'") (quoting 33 U.S.C. § 1251(a)); Am. Farm Bureau Fed'n v. Env't Prot. Agency, 792 F.3d 281, 288 (3d Cir. 2015) ("Under [the Clean Water Act], the EPA and the states participate in a 'cooperative federalism' framework working together to clean the Nation's waters."); *see* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1147, 1174–76 (1995) (describing cooperative federalism model in environmental law).

94. 33 U.S.C. § 1251(a).

95. *Id.* § 1251(b).

96. For a discussion of cooperative federalism in the Clean Water Act, see Douglas R. Williams, *Toward Regional Governance in Environmental Law*, 46 AKRON L. REV. 1047, 1064–69 (2013).

97. 85 Fed. Reg. 22,250 (Apr. 21, 2020).

98. 85 Fed. Reg. 42,210 (July 13, 2020).

1. The Scope of the CWA's Jurisdiction over "Navigable Waters"

The key jurisdictional limitations on federal authority can be gleaned from Section 301 of the CWA, which declares that "the discharge of any pollutant by any person shall be unlawful," unless the discharge meets the requirements of various provisions of the CWA, including a requirement to obtain a discharge permit.[99] The CWA defines the term "discharge of a pollutant" to include only discharges that add pollutants from "point sources" into "navigable waters."[100] Thus, for federal jurisdiction to attach, the polluting activity must be a point source discharge, must add pollutants, and must be into a navigable water. Polluting activities such as non-point source pollution, including urban and agricultural runoff, and all discharges into waters deemed not to be "navigable," may be regulated, if at all, only by the States, though there are provisions in the CWA that provide incentives for the States to address these problems.[101] Additionally, the CWA gives the States primary authority to promulgate water quality standards, including the designated uses of water resources and criteria to ensure those uses are protected.[102] States may also administer a permitting program within their respective States, so long as the program meets minimum federal standards; otherwise EPA is charged with administering the permit program.[103] The CWA also provides that applicants for federal licenses and permits for activities that may result in a discharge into navigable waters must obtain a certification from the relevant State that the discharge will comply with various provisions of the CWA, including water quality standards, and "any other appropriate requirement of State law."[104]

The CWA's key geographic jurisdictional term, "navigable waters," has been notoriously controversial.[105] Congress, rather unhelpfully, defined "navigable waters" as "waters of the United States, including the territorial seas."[106] The Supreme Court has addressed the scope of this jurisdictional term repeatedly, but the most important decisions by the Court are *United States v. Riverside Bayview Homes*,[107] *Solid Waste Agency of the Northern Cook County*

99. 33 U.S.C. § 1311(a).

100. *Id*. § 1362(12).

101. *Id.* § 1329.

102. *Id*. § 1313(a)(3).

103. *Id*. § 1342(b).

104. *Id*. § 1341(d).

105. *See generally Killing WOTUS*, *supra* note 20; Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 ENV'T L. 277 (2016); Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Navigable Waters" Element of the Clean Water Act Offense*, 45 ENV'T L. REP. NEWS & ANALYSIS 10548 (2015).

106. 33 U.S.C. § 1362(7).

107. 474 U.S. 121 (1985).

v. Army Corps of Engineers (*SWANCC*),[108] and *Rapanos v. United States*.[109] Likewise, EPA and the Corps, which share key and respectively distinctive roles under the CWA, have jointly promulgated various definitions of "waters of the United States" ("WOTUS") over the years. Their efforts during the Trump Administration included a series of actions to delay the implementation of a 2015 rule and, eventually, a new rule dramatically narrowing the scope of the CWA's jurisdiction from what it was under the 2015 Obama Administration rule.[110]

Most of the class time I devote to discussing the CWA's geographic jurisdiction focuses on the three Supreme Court cases mentioned above. The combined effect of the Court's decisions in *Riverside Bayview Homes*, *SWANCC*, and *Rapanos* has been growing uncertainty both about which "waters" fall within the jurisdiction of the CWA, as well as the amount of deference the courts should extend to EPA's and the Corps' efforts to draw the regulatory boundaries.

In *Riverside Bayview Homes*, the Court confronted the issue of whether the CWA's jurisdiction extended to wetlands determined by the Corps to be "adjacent" to a navigable body of water—in this case, Lake St. Clair in Michigan—and thus, a "water of the United States" under then-existing regulations. The Court agreed with the Corps that the wetlands in question were "adjacent" within the meaning of the regulations.[111] It then considered whether the CWA permitted the Corps to extend its jurisdiction to such wetlands. In considering that question, the Court first noted that "an agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."[112] Applying this standard, the Court held that including adjacent wetlands in the definition of "waters of the United States" was a reasonable interpretation of the CWA.[113] The Court noted that, given "the breadth of federal regulatory authority" under the CWA and the "inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [CWA]."[114]

108. 531 U.S. 159 (2001).

109. 547 U.S. 715 (2006).

110. The Trump-era rule, known as the "Navigable Waters Protection Rule," was published in the Federal Register on April 21, 2020. 85 Fed. Reg. 22,250 (Apr. 21, 2020). The Obama-era rule, known as the "Clean Water Rule," was promulgated in June 2015. 80 Fed. Reg. 37,054 (June 29, 2015). The complicated history of the Clean Water Rule and the Navigable Waters Protection Rule is detailed in REG. TRACKER, *supra* note 10.

111. *Riverside Bayview Homes*, 474 U.S. at 130–31.

112. United States v. Riverside Bayview Homes, 474 U.S. 121, 131 (1985).

113. *Id.* at 134–35.

114. *Id.* at 134.

Riverside Bayview Homes thus suggests that courts should defer to the Corps' efforts to mark the boundaries of its jurisdiction under the CWA so long as the basis for its decisions implicates a reasonable "ecological" judgment about the relationship between the waters in question and traditional "navigable" waters. This suggestion is further supported by the Court's conclusion in *Riverside Bayview Homes* that CWA jurisdiction over "adjacent" wetlands could properly attach "even when the moisture creating the wetlands does not find its source in the adjacent bodies of water."[115] This is because the Corps could reasonably conclude that such wetlands "may function as integral parts of the aquatic environment," performing such services as improving water quality, containing surface runoff, preventing or limiting flooding, and providing food and habitat for a variety of aquatic species.[116] In another important conclusion, the Court concluded that the Corps may regulate all such adjacent wetlands, even in those instances in which the wetlands "are not significantly intertwined with the ecosystem of adjacent waterways" because "the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as 'waters.'"[117] In the Court's view, when the Corps does encounter such a wetland, it may "always allow development . . . for other uses simply by issuing a permit."[118]

In *SWANCC*, the Court rejected the Corps' efforts to assert jurisdiction over an abandoned gravel pit that, over time, evolved into a series of seasonal and permanent ponds ranging in size from under one-tenth of an acre to several acres. The Corps premised its jurisdiction over these waters on the basis that they served as habitat for hundreds of migratory birds and a regulation that defined waters of the United States to include "waters such as intrastate lakes, rivers, streams . . . , mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce."[119] In the preamble to that regulation, the Corps (and EPA) had stated that the CWA's jurisdiction extended to intrastate waters used as habitat for migratory birds.[120] This statement became known as the "Migratory Bird Rule."[121]

The Court refused to defer to the Corps' interpretation of the statute. Concluding that the statute was "clear,"[122] the Court went on to apply the avoidance canon, noting that "where an otherwise acceptable construction of a

115. *Id.* at 135.

116. *Id.* at 134–35.

117. United States v. Riverside Bayview Homes, 474 U.S. 121, 135 n.9 (1985).

118. *Id*.

119. Solid Waste Agency of the Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 163 (2001) (quoting 33 C.F.R. § 328.3(a)(3) (1999)).

120. 51 Fed. Reg. 41,217.

121. *SWANCC*, 531 U.S. at 164.

122. *Id.* at 172.

statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress."[123] It concluded that the Corps application of the statute to the waters in question raised "significant constitutional questions" about the reach of Congressional power under the Commerce Clause. It therefore held that the "Migratory Bird Rule" exceeded the Corps authority under the CWA.

The Court distinguished *Riverside Bayview Homes*, concluding that "[i]t was the significant nexus between the wetlands and 'navigable waters'" that rendered the Corps' jurisdiction in that case appropriate.[124] By contrast, to support the Corps' jurisdiction over the waters in *SWANCC,* the Court would have to "assume that 'the use of the word navigable in the statute . . . does not have any independent significance,'" which the Court was unprepared to do.[125] Thus, even though *Riverside Bayview Homes* had concluded that the term "navigable" in the CWA was of "limited import,"[126] for the Court in this case, "navigable" made clear that "nonnavigable, isolated, intrastate waters" were not to be considered "waters of the United States."[127]

SWANCC also introduced another set of concerns about the scope of CWA jurisdiction not raised in *Riverside Bayview Homes*. As mentioned above, *SWANCC* expressed doubts about whether Congress wanted to test the limits of its Commerce Clause authority in the CWA and chose to avoid a construction of the act that would force the Court to address those limits. This concern was also tied in *SWANCC* to the Court's then-resurgent "federalism" jurisprudence, echoing concerns expressed in other cases about congressional efforts to diminish and intrude into areas of "traditional State concern."[128] Thus, the Court reasoned that "[p]ermitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[129]

SWANCC and *Riverside Bayview Homes* differ significantly in both tone and reasoning, and the cases left EPA and the Corps—and just about everyone

123. *Id*. at 173 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

124. Solid Waste Agency of the Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 167 (2001).

125. *Id.* at 172.

126. *Id.* at 172 (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 133(1985)).

127. *Id*.

128. *See* United States v. Morrison, 529 U.S. 598, 615–16 (2000); United States v. Lopez, 514 U.S. 549, 564–65 (1995). For a discussion of how concerns about state authority and federalism influenced the Rehnquist Court, see Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1769–87 (2006) and Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 37–38 (2004).

129. Solid Waste Agency of the Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 174 (2001).

else—in considerable doubt about the extent of CWA's jurisdiction.[130] The Court's decision in *Rapanos* did little to clarify the reigning uncertainty and, in fact, significantly exacerbated it.

Rapanos was decided by a badly fractured Court, with a concurring opinion by Justice Kennedy providing the key deciding vote.[131] Justice Kennedy did not join a four-Justice plurality opinion authored by Justice Scalia. The plurality concluded that under the CWA, the Corps could exercise jurisdiction over wetlands only if the Corps could establish that the wetlands "have a continuous surface connection" with "a relatively permanent body of water connected to traditional interstate navigable waters."[132] Justice Kennedy sharply disagreed with Justice Scalia's reasoning, but agreed with the plurality that a remand was appropriate because the Corps had not established a "significant nexus" between the wetlands in question and "navigable waters in the traditional sense."[133] Four Justices dissented, and applying *Chevron*, concluded that the Corps' could reasonably interpret "waters of the United States" to include wetlands adjacent to a tributary of traditional navigable waters, such as the wetlands at issue in the case. [134]

Justice Scalia's plurality opinion relied heavily on a dictionary definition of waters to conclude that only "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes'" could be considered "waters of the United States."[135] As for wetlands, Justice Scalia acknowledged that they could be considered "waters of the United States" under *Riverside Bayview Homes*, but he interpreted that case to permit jurisdiction only in those circumstances in which there was "ambiguity in defining where water ends and abutting ('adjacent') wetlands begin."[136] It was this ambiguity that, in Justice Scalia's view, informed SWANCC's idea of a "significant nexus between the wetlands and 'navigable waters.'"[137] Indeed, Justice Scalia read *SWANCC* as "reject[ing] the notion that the ecological considerations upon

130. In the wake of *SWANCC*, the agencies made some effort to initiate a rulemaking to clarify and redefine "waters of the United States," but eventually abandoned that effort. Instead, the agencies issued "interim guidance" that required field offices to seek guidance from the Corps' headquarters before asserting jurisdiction over any isolated, non-navigable water. *See* LEGAL PROTECTION, *supra* note 3, at 200–01.

131. Rapanos v. United States, 547 U.S. 715 (2006).

132. *Id.* at 742 (plurality opinion).

133. *Id.* at 779, 783 (Kennedy, J., concurring).

134. *Id.* at 788 (Stevens, J., dissenting) ("The Corps' . . . decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision.").

135. *Id*. at 739 (plurality opinion) (quoting Webster's New International Dictionary 2882 (2d ed. 1954)).

136. Rapanos v. United States, 547 U.S. 715, 742 (2006).

137. *Id*.

which the Corps relied in *Riverside Bayview* . . . provided an *independent* basis for including entities like 'wetlands' (or "ephemeral streams") within the phrase 'the waters of the United States.'"[138] Accordingly, "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so [] there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[139]

Like Chief Justice Rehnquist in *SWANCC*, Justice Scalia placed considerable emphasis on federalism concerns he believed were implicated by the Corps' assertion of jurisdiction in *Rapanos*. He concluded that deference to the Corps' interpretation of the CWA was inappropriate because the statute was clear, and for two additional reasons: (1) affirming the Corps' jurisdiction "would 'result in a significant impingement of the States' traditional and primary power over land and water use;'"[140] and (2) the Corps' interpretation would raise significant constitutional questions about the scope of Congress's powers under the Commerce Clause.[141]

Justice Kennedy, disagreeing with the plurality, interpreted the "significance nexus" theory in *SWANCC* as referring to ecological connections between wetlands and other waters. He therefore concluded that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other waters more readily understood as 'navigable.'"[142] In terms of the Corps' regulatory authority, Justice Kennedy concluded that "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[143] He added that the Corps could issue regulations that,

> [I]dentify categories of tributaries that, due to their volume of flow . . . , their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.[144]

138. *Id.* at 741.

139. *Id.* at 742.

140. *Id*. at 738 (quoting Solid Waste Agency of the Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 174 (2001)).

141. Rapanos v. United States, 547 U.S. 715, 738 (2006).

142. *Id.* at 780 (Kennedy, J., concurring).

143. *Id.* at 782.

144. *Id.* at 781.

In Justice Kennedy's view, his interpretation "does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption."[145]

Chief Justice Roberts wrote a concurring opinion bemoaning the Corps' failure to promulgate more tailored regulations in the wake of the *SWANCC* decision.[146] He noted that under *Chevron*, and "[g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority."[147]

Finally, the four dissenters concluded that the Corps' assumption of jurisdiction over wetlands adjacent to tributaries of navigable waters was based on appropriate ecological concerns consistent with the CWA and was owed deference, as in *Riverside Bayview Homes*.[148] The dissenters also rejected the idea that federalism or constitutional considerations could appropriately override the deference owed by the Court to the Corps' interpretation of the CWA.[149]

Eventually, EPA and the Corps would take up Chief Justice Roberts' suggestion and revise its regulations defining "waters of the United States." The result was the 2015 Obama Administration Clean Water Rule.[150] At the center of this new rule was the "significant nexus" standard advanced by Justice Kennedy in *Rapanos*.[151] The Trump Administration went through a series of rulemakings[152] and eventually replaced the Clean Water Rule with the Navigable Waters Protection Rule.[153] This time, the "significant nexus" standard, as articulated by Justice Kennedy, was jettisoned in favor of the approach outlined in Justice Scalia's plurality opinion in *Rapanos,* as President Trump suggested in Executive Order 13778.[154] This is an approach followed by none of courts of appeals that decided cases in the wake of *Rapanos*.[155]

145. *Id.* at 782.

146. Rapanos v. United States, 547 U.S. 715, 757–58 (2006) (Roberts, C.J., concurring).

147. *Id.* at 758.

148. *Id.* at 788, 792 (Stevens, J., dissenting).

149. *Id.* at 803–04.

150. Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015).

151. *Id.* at 37,061 ("[EPA and the Corps] utilize the significant nexus standard, as articulated by Justice Kennedy's opinion and informed by the unanimous opinion in Riverside Bayview and the plurality opinion in *Rapanos* . . . to interpret the scope of the statutory term 'waters of the United States.'").

152. *See Killing WOTUS*, *supra* note 20, at 399–402 (describing the Trump administration's rulemaking process).

153. Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020).

154. *See id.* at 22,273.

155. *See* N. Cal. River Watch v. Wilcox, 633 F.3d 766, 769 (9th Cir. 2011) (applying the Kennedy test); Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288 (4th Cir. 2011)

The primary regulatory differences between the 2015 Clean Water Rule and the Navigable Waters Protection Rule lie in the way two key terms are defined: "tributaries" and "adjacent" waters, including wetlands.[156] The Navigable Waters Protection Rule eliminates jurisdiction over a significant number of streams and wetlands that would have fallen within EPA's and the Corps' jurisdiction under the Clean Water Rule.[157] These regulatory differences were fueled in part by very large differences in the Trump and Obama agencies' understandings of the role of federalism and the States under the CWA.

In fashioning the Navigable Waters Protection Rule, EPA and the Corps relied heavily on the federalism concerns expressed by the Court in *SWANCC* and by Justice Scalia in *Rapanos*.[158] In addition, however, the agencies adopted an interpretation of the CWA that treats federal efforts to achieve the CWA's objective of "restor[ing] and maintain[ing] the physical, chemical, and biological integrity of the Nation's waters"[159] to be limited by Section 101(b) of the CWA's "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."[160] As Professor Johnson has argued, this approach to statutory interpretation makes critical errors, particularly in treating the "policy" as controlling the extent to

(same); United States v. Donovan, 661 F.3d 174, 180 (3d. Cir. 2011) (holding that CWA jurisdiction may be established under the Kennedy or Scalia test); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009) (same); United States v. Cundiff, 555 F.3d 200, 208 (6th Cir. 2009) (either the Kennedy or Scalia test); United States v. Lucas, 516 F.3d 316, 326–27 (same); United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) (Kennedy test); United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) (Kennedy test); United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (Kennedy or Scalia test).

156. Under the Navigable Waters Protection Rule, tributaries must be "intermittent" or "perennial." 85 Fed. Reg. at 22,339. By contrast, the Clean Water Rule defined tributaries more broadly to include even some ephemeral streams, so long as they are "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 80 Fed. Reg. at 37,106. To be considered "adjacent" under the Navigable Waters Protection Rule, a wetland would have to "abut" or have a "direct hydrologic connection" with other jurisdictional waters. *See* 85 Fed. Reg. at 22,307. By contrast, the Clean Water Rule defined "adjacent" broadly to include wetlands "neighboring" other jurisdictional waters and defined "neighboring" to include wetlands within one of three "distance thresholds." *See* 80 Fed. Reg. at 37,080. For a more detailed discussion of the differences in these rules, see *Killing WOTUS*, *supra* note 20, at 419–20; Adam S. Ward & Riley Walsh, *New Clean Water Act Rule Leaves U.S. Waters Vulnerable*, EOS (Feb. 11, 2020), https://eos.org/opinions/new-clean-water-act-rule-leaves-u-s-waters-vulnerable.

157. *See, e.g.*, Evan Richards, *Debunking the Trump Administration's New Water Rule*, CTR. FOR AM. PROGRESS (Mar. 27, 2019), https://www.americanprogress.org/issues/green/news/2019/03/27/467697/debunking-trump-administrations-new-water-rule/ (noting that the rule would eliminate jurisdiction over eighteen percent of stream and river miles and fifty-one percent of wetlands); *see also Killing WOTUS*, *supra* note 20, at 421.

158. *See, e.g.*, Navigable Waters Protection Rule, 85 Fed. Reg. 22,250, 22,253 (Apr. 21, 2020).

159. 33 U.S.C. § 1251(a).

160. *Id.* § 1251(b).

which a statute's objective may be pursued.[161] An appropriate interpretation would recognize that if the CWA's objectives can be met in different ways, some of which intrude upon the authority of the States and others that do not, the agencies should select the approach that does not intrude upon State authority. What the agencies should not do, as EPA and the Corps did in the Navigable Waters Protection Rule, is "to advance states' rights when it interferes with achieving the objectives of the statute."[162]

While it is impractical to explore the federalism issues raised by the Court in *SWANCC* and *Rapanos* and by the agencies in the Navigable Waters Protection Rule in any depth in an environmental law course, students must understand that these issues are likely to continue to inform the agencies' and the Court's interpretation of the CWA, particularly the term "waters of the United States." But it is also important to highlight how federalism concerns may be malleable and vary across the different regulatory authorities included in the CWA. In other words, in other CWA programs, the agencies may not be as inclined to protect "the States' traditional and primary power over land and water use" as they were in the Navigable Waters Protection Rule. One of those programs is Section 401, a certification procedure that the Trump Administration targeted as an impediment to infrastructure and other projects that require a federal license or permit. To highlight differences in how federalism impacts the agencies' regulatory approaches in the CWA, I spend some time exploring the Section 401 program and contrast it with how "waters of the United States" has been interpreted.

2. Section 401 State Certification & the Trump Administration's Narrowing of State Authority

In contrast to the rather explicit effort to expand the States' role under the CWA in the Navigable Waters Protection Rule (by limiting federal jurisdiction), the Trump EPA rather doggedly *limited* State authority in another rulemaking—this under Section 401 of the CWA which governs state certification of federal permits and licenses.[163]

Section 401 requires any applicant for a "Federal license or permit . . . which may result in any discharge into the navigable waters . . . [to] provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply" with various provisions of the CWA, including those requiring discharges to comply with approved state water quality standards.[164] In performing its certification responsibilities, a State may impose requirements to ensure that the

161. *See Killing WOTUS*, *supra* note 20, at 423–25.

162. *Id.* at 425.

163. *See* Navigable Waters Protection Rule, 85 Fed. Reg. 22,250, 22,254 (Apr. 21, 2020).

164. 33 U.S.C. § 1341(a)(1).

applicant for the permit or license will comply with various limitations imposed by the CWA "and with any other appropriate requirement of State law."[165] The requirements imposed by the certifying State then become conditions on the federal license or permit,[166] and the federal agency administering the permit or license program may not issue the license or permit without including these conditions.[167] Moreover, the relevant federal agency lacks authority to review state-imposed conditions to determine whether those conditions are properly within the State's authority under Section 401.[168]

The Supreme Court has addressed several important issues under Section 401 and has consistently interpreted the States' certification authority broadly. The key issues addressed by the Court include Section 401's triggering mechanism for State certification—namely, a "discharge into navigable waters"—and the scope of State authority once certification has been triggered. More recently, the courts of appeals have addressed another important issue under Section 401—how the time and waiver provisions of Section 401 limit State certification authority. The Trump EPA addressed these issues (and more) in a rulemaking that revisited the States' Section 401 authority and procedures for the first time since 1971. In doing so, the agency acted in ways that dramatically alter the legal landscape under Section 401 and significantly reduce the States' role in that program.

In *S.D. Warren Co. v. Maine Bd. Of Environmental Protection*,[169] the Court entertained a challenge to a state certification involving the renewal of a license from the Federal Energy Regulatory Commission ("FERC") to operate a dam as a hydroelectric facility. The state certifying authority required the applicant to maintain a minimum stream flow in bypassed portions of the river on which the dam was constructed, as well as other measures protective of migratory fish, and FERC imposed these requirements as conditions on the license renewal. The applicant for the license claimed that because the dam's discharges did not involve the "addition" of any pollutants that were not already present in the affected waters, . . . no regulable "discharge" would result from the project and, thus, no certification was required.[170] In essence, this argument interprets the term "discharge" in Section 401 to be coterminous with the term "discharge of a pollutant," which governs the CWA's Section 402 permit program.[171]

165. *Id*. § 1341(d).

166. *Id*.

167. Keating v. FERC, 927 F.2d 616, 619 (D.C. Cir. 1991).

168. American Rivers, Inc. v. FERC, 129 F.3d 99, 111 (2d Cir. 1997); *see, e.g.*, Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 ECOLOGY L. Q. 201, 258–59 (1996) (discussing agency authority to review state conditions).

169. 547 U.S. 370 (2006).

170. *Id*. at 379.

171. Cases decided under Section 402 hold that a typical discharge from a dam is not a "discharge of a pollutant" because the discharge does not "add" any pollutants to the relevant

The Court rejected the applicant's argument. It held that the term "discharge," though not defined in the CWA, is broader than "discharge of a pollutant," which as mentioned above, is defined in the CWA and requires the addition of a pollutant from a point source.[172] Giving the statutory term its "ordinary or natural meaning,"[173] the Court interpreted "discharge" to mean a "flowing or issuing out"[174]—an interpretation that supports the State's certification authority in this case. Importantly, the Court noted that "State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution."[175] Accordingly, "[c]hanges in the river like [those at issue in the dam's license renewal] fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns."[176]

Despite the broad reading given the term "discharge" by the Court in *S.D. Warren*, some lower courts have continued to interpret the term restrictively to exclude nonpoint source discharges from the reach of Section 401. The leading case is the Ninth Circuit's decision in *Oregon Natural Desert Assoc. v. U.S. Forest Service*, in which the court held that grazing permits issued by the Forest Service are not subject to the State certification procedure established in Section 401 by virtue of the nonpoint source water pollution generated by grazing operations.[177] In adhering to a prior decision on the issue, the court of appeals concluded that "[n]either the ruling nor the reasoning in *S.D. Warren* is inconsistent with this court's treatment of nonpoint sources in Section 401 . . . ."[178] In the court of appeals' view, *S.D. Warren* itself involved a point source discharge and could not be read to alter the court of appeals' prior conclusion, which rested on the CWA's disparate treatment of nonpoint sources and point sources.[179] As the court correctly noted, "the CWA generally does not exercise jurisdiction over . . . nonpoint sources," preferring instead to leave this pollution problem to the State's traditional authority to regulate land uses.[180] This is a curious argument for denying State certification authority over nonpoint sources, which if granted would permit the States to exercise at least some of their traditional authority in the context of activities that may otherwise preempt

waters, as required by the CWA's definition of the term. *See, e.g.*, Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).

172. *S.D. Warren*, 547 U.S. at 375–76.

173. *Id*. at 376 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)).

174. S.D. Warren Co. v. Maine Bd. Of Environmental Protection, 547 U.S. 370 (2006) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 742 (2d ed.1954)).

175. *Id*. at 386.

176. *Id.* (citing 33 U.S.C. § 1251(b)).

177. 550 F.3d 778 (9th Cir. 2008).

178. *Id.* at 785.

179. *Id*.

180. *Id*.

State authority[181] and to treat nonpoint source controls as an "appropriate requirement of State law" pursuant to Section 401(d). The ruling also leaves a potentially significant number of activities that contribute to pollution problems in waters of the United States generally beyond the reach of State and federal regulatory authority.[182]

The restrictive decision in *Oregon Natural Desert* is also a bit at odds with (but not necessarily inconsistent with) a more significant Supreme Court decision—*PUD No. 1 v. Washington Dep't of Ecology*.[183] In this case, as in *S.D. Warren*, the Court entertained a challenge by an applicant for a hydroelectric license from FERC.[184] The applicant had applied for state certification of the project from the Washington Department of Ecology ("WDEC").[185] The state agency imposed minimum stream flow requirements in its certification, to which the applicant objected.[186] The applicant argued that the minimum stream flow requirements exceeded WDEC's authority under Section 401 for two reasons: (1) the requirements were unrelated to the discharges that triggered the State's authority under Section 401 and, therefore, not authorized by the CWA; (2) the minimum stream flow requirements were not a proper application of the State's water quality standards because the State had not applied specific water quality criteria in imposing such a requirement, choosing instead to rely on use designations and an antidegradation policy as bases for minimum stream flows.[187]

The Court rejected both arguments and upheld the minimum stream flow requirements as a proper requirement imposed by the State under Section 401.[188] The Court first held that WDEC had authority to impose water quality requirements on the project as a whole even if those requirements were unrelated to the discharges that triggered the State's authority under Section 401.[189] The Court relied on Section 401(d), which authorizes a State to impose "'any effluent limitations and other limitations . . . necessary to assure that *any applicant*' will

181. On the preemptive effect of federal licenses, see, e.g., California v. FERC, 495 U.S. 490, 506 (1990) (holding that FERC license preempts State minimum stream flow requirements).

182. Some federal licensing and permitting agencies may have statutory authority to impose pollution-reducing conditions on permits and licenses, so it may be possible for those agencies to address nonpoint source pollution. For example, the Corps of Engineers issues permits for the discharge of dredge and fill material into waters of the United States under Section 404 of the CWA. 33 U.S.C. § 1344(a). As part of this authority, the Corps conducts a wide-ranging environmental review and may require mitigation measures to offset the harmful effects of the permitted activity. To date, however, the agencies have shown no inclination to do so.

183. PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 722 (1994).

184. *Id.* at 703.

185. *Id*.

186. *Id*.

187. *Id.* at 720.

188. PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 720 (1994).

189. *Id.* at 722.

comply with various provisions of the Act and appropriate state law requirements."[190] The Court reasoned that the reference to "any applicant," rather than to the discharges that trigger certification, is "most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[191] This result will tend to ensure that the "applicant" and whole project is in compliance with appropriate federal and state standards, as required by the language of Section 401(d).[192] The Court added that its interpretation of Section 401(d) followed EPA regulations implementing Section 401, and that EPA's interpretation was entitled to deference under *Chevron*.[193]

The Court then considered whether the minimum stream flow requirements were an appropriate condition under Section 401.[194] It held that they were.[195] States' efforts to ensure compliance with state water quality standards is "a proper function of § 401 certification."[196] The Court noted that because water quality standards under the CWA must include both use designations and water quality criteria based on such uses, the CWA's language is

> [M]ost naturally read to require that a project be consistent with *both* requirements, namely, the designated use *and* the water quality criteria.[197] Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.[198]

Hence, WDEC could condition certification of the licensed activity to protect the uses designated for waters under those standards; the State was not limited to ensuring only that the standards' water quality criteria were satisfied.[199] The Court also concluded that because, absent conditions, the activity would interfere with or injure existing beneficial uses of the affected waters, the minimum stream flow requirements could be imposed pursuant to Section 401 under the State's antidegradation policy.[200]

190. *Id*. at 711.
191. *Id*. at 712.
192. *Id.* at 711.
193. PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 712 (1994).
194. *Id.* at 715.
195. *Id.* at 713–14.
196. *Id*.
197. *Id.* at 715.
198. PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 715 (1994).
199. *Id*.
200. *Id.* at 719. The state's antidegradation policy is required by EPA regulations. *See* 40 C.F.R. § 131.12. As the Court noted, "EPA has explained that under its antidegradation policy, 'no activity is allowable . . . which could partially or completely eliminate any existing use.'" *PUD No. 1*, 511 U.S. at 718 (quoting EPA, QUESTIONS AND ANSWERS ON ANTIDEGRADATION 3 (Aug. 1985)).

Justice Thomas authored a dissenting opinion, which Justice Scalia joined. Justice Thomas disagreed with the majority on the two key issues. First, Justice Thomas would limit the states' authority under Section 401 to address only the water quality impacts of the discharges that trigger the states' certification. In his view, the majority's holding that permitted the project as a whole to be regulated undermined Congress's decision to permit State involvement only when there is discharge into navigable waters.[201] Second, Justice Thomas agreed with the applicant that if a state chooses to enforce its water quality standards through the Section 401 certification process, it may rely only on water quality criteria; a state may not base its conditions solely on the beneficial uses to be protected by its water quality standards.[202] In the dissenters' view, permitting states to base certification conditions on beneficial uses of waters effectively removed any constraints on the states.[203]

The broad authority States enjoy under the Supreme Court's decisions in *S.D. Warren* and *PUD No.1* is, however, subject to waiver. Under the terms of Section 401, "[i]f the State . . . 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."[204] Given the complexity of many projects for which federal licenses and permits are needed, and the variety of water quality effects these projects, the one-year time limit can sometimes be challenging for state authorities. In some cases, the states reached agreements with applicants that allowed the states to defer acting on certification requests through a process of having the applicant withdraw and later resubmit the certification request (sometimes repeatedly). The state would then claim that each renewed submission started a new one-year (or "reasonable time") certification clock.

This withdrawal/resubmission process was challenged in *Hoopa Valley Tribe v. FERC*.[205] In that case, the D.C. Circuit concluded that a "coordinated withdrawal-and-resubmission scheme"[206] of the type described above could not extend the statutory certification period beyond the one year maximum; accordingly, the state, having failed to complete its certification within the prescribed period of time, waived its certification authority.[207] Importantly, the court noted that the resubmitted certification requests were not "new" requests in the sense that they differed in content from previous ones.[208] It declined to

201. *Id*. at 726–27.
202. *Id*. at 730.
203. PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 731–32 (1994).
204. 33 U.S.C. § 1341(a)(1).
205. 913 F.3d 1099, 1003 (D.C. Cir. 2019).
206. *Id*.
207. *Id.* at 1105.
208. *Id.* at 1101.

address whether a "new" request would restart the certification clock, or how much different a submitted request must be from a previously submitted one to be considered a truly "new" request.[209]

In Executive Order 13,868, President Trump directed EPA to review and propose revisions to the agency's existing regulations governing Section 401 certifications, claiming that existing regulations "are causing confusion and uncertainty and are hindering the development of energy infrastructure."[210] In response, EPA published final regulations on July 13, 2020.[211] The final rule departs markedly from the Court's decision in *PUD No. 1* and dramatically restricts the States' authority under Section 401. The rule's key provisions include:

- Establishing that certification is required only when a project requiring a federal license or permit may result in a discharge from a point source; nonpoint sources discharges do not trigger the state certification requirement.[212]
- Employing "a holistic analysis of the text and structure of the CWA, the language of section 401, and the amendments made between 1970 and 1972" to reject the Court's interpretation in *PUD No. 1* that would permit states to impose conditions on the project as a whole, not just on the discharges that trigger certification;[213] under the rule, "[t]he scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."[214]
- Relatedly, concluding that states may not impose conditions on projects subject to certification to protect state waters (not considered navigable waters under the CWA) from point and nonpoint source discharges from the federally permitted or licensed activity.[215]
- Concluding that the range of "water quality requirements" that may form the basis for certification conditions is limited to applicable provisions

209. *Id.* at 1104.

210. Executive Order No. 13,868, 84 Fed. Reg. 15,495, 15,496 (Apr. 15, 2019).

211. Environmental Protection Agency, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020). For my class, I asked students to work in groups to identify key aspects of the Section 401 certification rulemaking and to prepare a PowerPoint presentation that included their findings.

212. 40 C.F.R. § 121.1(f) (2021).

213. 85 Fed. Reg. at 42,233. The agency went to some length to explain why *PUD. No. 1* does not foreclose its narrower interpretation of State authority. *See id*. at 42,233–34. It justified the narrower interpretation not on policy grounds, however; instead, it simply viewed the narrower interpretation as "reasonable and the most appropriate reading of the statute and related legal authorities." *Id.* at 42,233.

214. 40 C.F.R. § 121.3 (2021).

215. 85 Fed. Reg. at 42,235.

of the CWA and "state or tribal regulatory requirements for point source discharges into waters of the United States."[216]

- Authorizing federal agencies to review state certifications and conditions to ensure that they conform to the "procedural" requirements of the rule, and creating a new, non-statutory basis for waivers of certification authority if those requirements are not satisfied.[217]
- Adhering to a strict interpretation of the time limits for certification, concluding that the certification "clock does not toll for any reason,"[218] and prohibiting the states from requesting project proponents to withdraw a certification request or to extend the certification period without the approval of the relevant federal agency.[219]

In making these changes to its existing rule, the Agency barely addressed the federalism issues raised by several commenters, summarily concluding that "the final rule does not infringe upon the roles of States as co-regulators, nor does it undermine cooperative federalism."[220] Unlike the Navigable Waters Protection Rule, there is virtually no analysis from EPA explaining with particularity how the new rule protects the States' traditional authority over land and water uses. Plainly, the rule diminishes that authority, at least with respect to projects requiring federal permits or licenses. In fact, the new rule runs counter to both the objectives—protecting the integrity of the nation's waters—and the policies—preserving traditional state authority—Congress articulated in the CWA.

The two Trump Administration rulemakings, and their inconsistent treatments of federalism issues under the CWA, leave many students (and instructors) a bit bewildered about what role such federalism concerns should play in the CWA's various regulatory programs. The consistent theme of both the Navigable Waters Protection Rule and the Section 401 Certification Rule is, however, one of reducing regulatory barriers to infrastructure and development projects, with little regard for the overall impact these rulemakings may have on the quality of the nation's water resources.

The two Trump rulemakings discussed in this Section have both been challenged in numerous filings in the federal courts.[221] EPA and the Corps have announced their intention to revise the Navigable Waters Protection Rule and to

216. 40 C.F.R. § 121.13.

217. *Id.* § 121.16.

218. Environmental Protection Agency, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,262 (July 13, 2020).

219. 40 C.F.R. § 121.30.

220. 85 Fed. Reg. at 42,226.

221. For a list of the challenges to the Navigable Waters Protection Rule, see REG. TRACKER, *supra* note 7. For challenges to the Section 401 certification rule, see 85 Fed. Reg. at 42,226.

seek remands from the courts in which challenges to the rule have been raised.[222] It is very likely that neither of these rules will survive under the Biden Administration. Accordingly, when teaching the CWA, these Trump Administration rulemakings serve as examples of the volatile and partisan character of environmental regulatory programs. They also provide an opportunity to review the functioning of our overall legal system in the face of dramatic regulatory changes not induced by legislative action.

C. Undoing the Obama Climate Change Program

The last, but perhaps most dramatic, of the Trump Administration's attack on environmental regulation I consider in my class relates to the control emissions of pollutants—greenhouse gases ("GHGs")—that contribute to global climate change under the Clean Air Act ("CAA"). The full extent of the Trump Administration's assault on the Obama Administration's climate change programs—both regulatory and nonregulatory, domestic and international—has been discussed in other recent scholarship.[223] Here, I focus on two areas: rules and practices restricting GHG emissions from new motor vehicles and the Trump EPA's efforts to repeal the Obama Administration's Clean Power Plan.

The transportation sector accounts for the largest portion of the nation's overall GHG emissions.[224] In the wake of the Supreme Court's decision in *Massachusetts v. EPA*,[225] which rejected EPA's efforts to eliminate the CAA as a regulatory tool to address GHG emissions from motor vehicles,[226] the Obama EPA took three important actions to address GHG emissions from new motor

222. *See* Press Release, Env't Prot. Agency, Army Announce Intent to Revise Definition of WOTUS (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

223. *See, e.g.*, Lazarus, *supra* note 6; Nathan Richardson, *The Rise and Fall of Clean Air Act Climate Policy*, 10 MICH. J. ENV'T & ADMIN. L. 69 (2020); Cinnamon B. Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U.L. REV. 387 (2019); Melissa Powers, *Zero-Sum Climate and Energy Politics Under the Trump Administration*, 49 ENV'T L. REP. NEWS & ANALYSIS 10870 (2019); Brigham Daniels, *Come Hell or High Water: Climate Change Policy in the Age of Trump*, 13 FIU L. REV. 65 (2018); Albert C. Lin, *President Trump's War on Regulatory Science*, 43 HARV. ENV'T L. REV. 247 (2019). For more popular accounts, see Alejandra Borunda, *The most consequential impact of Trump's climate policies? Wasted time*, NAT'L GEOGRAPHIC (Dec. 11, 2020), https://www.nationalgeographic.com/environment/article/most-consequential-impact-of-trumps-climate-policies-wasted-time; Zack Colman & Alec Guillen, *Trump's Climate Change Rollbacks to Drive up U.S. Emissions, Climate Change Rollbacks*, POLITICO (Sept. 17, 2020), https://www.politico.com/news/2020/09/17/trump-climate-rollbacks-increase-emissions-417311.

224. *See* ENV'T PROT. AGENCY, SOURCES OF GREENHOUSE GAS EMISSIONS, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Mar. 1, 2022).

225. 549 U.S. 497 (2007).

226. In *Massachusetts*, EPA argued that greenhouse gases did not qualify as "air pollutants" under the CAA and, therefore, could not be regulated under that statute. The Court rejected that argument, concluding that "[t]he statutory text forecloses EPA's reading." *Id.* at 528.

vehicles. First, the Agency made an "endangerment finding"[227] in which it concluded that GHG emissions from new motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" within the meaning of Section 202(a)(1) of the CAA.[228] Second, in concert with the National Highway Traffic Safety Administration ("NHTSA") acting under the Energy Policy and Conservation Act ("EPCA"),[229] EPA issued standards that would dramatically reduce emissions from new light duty motor vehicles.[230] The motor vehicle standards would require reductions of approximately five percent per year, yielding a cumulative reduction in GHG emissions equivalent to two billion metric tons through 2025.[231] Effectively, the standards would require light duty vehicles to achieve average fuel economy of approximately fifty miles per gallon of gasoline.[232] Finally, the Obama EPA, pursuant to Section 209(b) of the CAA,[233] granted waivers of preemption for California's GHG and zero emissions vehicle standards,[234] enabling California and other states to adopt more stringent motor vehicle standards than those required under federal law.[235]

EPA's endangerment finding set in motion additional regulatory efforts by the Obama EPA to address GHG emissions under the CAA. Most of those efforts related to controlling GHG emissions from stationary sources. First, because GHGs had become "regulated pollutants" by virtue of the motor vehicle emission standards, the Agency attempted to treat new and modified stationary sources of GHG emissions as "major" sources under the CAA's Prevention of Significant Deterioration, which would subject those sources to permitting and

227. 74 Fed. Reg. 66,496 (Dec. 15, 2009).

228. 42 U.S.C. § 7521(a)(1).

229. NHTSA has statutory responsibility for promulgating Corporate Average Fuel Economy (CAFÉ) standards under EPCA. *See* 49 U.S.C. § 32902(a). In *Massachusetts*, the Court rejected EPA's argument that it could not regulate GHG emissions from motor vehicles because such regulation would inevitably tighten fuel economy standards—which are governed by NHTSA's CAFÉ standards under the EPCA. The court noted, "that [NHTSA acting for] DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities," adding that "there is no reason to think [NHTSA and EPA] cannot both administer their obligations and yet avoid inconsistency." 549 U.S. at 532.

230. 77 Fed. Reg. 62,623 (Oct. 12, 2012).

231. *Id*. at 62,627.

232. *See id*. (noting the standards will achieve the equivalent of 54.5 miles per gallon).

233. 42 U.S.C. § 7543(b). Under this statutory provision, EPA is directed to grant California a waiver of preemption if the State's standards are "at least as protective of public health and welfare as applicable Federal standards," unless EPA finds that the State's standards are "arbitrary and capricious," unnecessary "to meet compelling and extraordinary conditions," or "are not consistent with [Section 202(a)] of the CAA]."

234. 78 Fed. Reg. 2111 (Jan. 9, 2013).

235. *See* 42 U.S.C. § 7507 (authorizing other states to adopt California motor vehicle standards under certain conditions).

regulatory requirements.[236] In *Utility Air Regulatory Group v. EPA*, the Court rebuffed that effort, holding that new or modified stationary sources could not be considered "major" stationary sources, and thus subject to regulation under the CAA's Prevention of Significant Deterioration ("PSD") program, solely on the basis of the sources' GHG emissions.[237] Nonetheless, the Court held that EPA may require sources otherwise subject to the PSD program (due to emissions of other, non-GHG pollutants) to employ "best available control technology" to reduce GHG emissions.[238]

Then EPA promulgated the most ambitious and controversial piece of the Obama Administration's climate plan, the Clean Power Plan ("CPP"),[239] which included standards governing the largest class of stationary source contributions of GHG emissions—existing power plants.[240] The CPP, adopted under Section 111(d) of the CAA,[241] established emission guidelines for states to adopt in their plans for regulating GHG emissions from existing fossil fuel-fired electricity generating units within their jurisdiction. The emission guidelines were based on what EPA identified as the "best system of emission reduction" ("BSER") for these facilities.[242] The BSER selected by EPA included three components, or "building blocks":

- Heat rate improvements at coal-fired power plants
- Substituting electricity generation from higher-emitting coal-fired units with generation from lower-emitting natural gas-fired units
- Substituting increased generation from zero-GHG-emitting renewable energy capacity for generation from affected fossil fuel-fired plants.[243]

Under Section 111(d) of the CAA, States develop and implement plans for setting emission limitations for the affected facilities within their jurisdictions. Those plans are subject to EPA approval.[244] If States fail to develop and implement acceptable plans, the CAA authorizes EPA to develop and enforce a plan of its own for those States.[245]

236. The PSD program applies to areas that have attained one or more national ambient air quality standards and requires new and certain modified existing "major" stationary sources to obtain permits that include various regulatory requirements. *See* 42 U.S.C. § 7475(a).

237. 573 U.S. 302, 325–28 (2014).

238. *Id.* at 328–34.

239. 80 Fed. Reg. 64,661 (Oct. 23, 2015).

240. *See* ENV'T PROT. AGENCY, SOURCES OF GREENHOUSE GAS EMISSIONS, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Mar. 1, 2022).

241. 42 U.S.C. § 7412(d); *see* 80 Fed. Reg. 64,661 (Oct. 23, 2015).

242. 80 Fed. Reg. at 64,663–64.

243. *Id*. at 64,667.

244. 42 U.S.C. § 7411(d)(1).

245. *Id.* § 7411(d)(2). For a discussion of Section 111(d), see Am. Lung Ass'n v. EPA, 985 F.3d 914, 930–32 (D.C. Cir. 2021).

The second and third building blocks of EPA's BSER under the CPP, often referred to as "generation-shifting" methods of controlling GHG emissions,[246] proved to be especially controversial. Opponents argued that these components of BSER required actions beyond the physical site of the affected facilities and, for that reason, exceeded EPA's authority under Section 111(d). They claimed that EPA's authority is "limited to measures that are integrated into the source's design or operations"[247] or, as EPA would later characterize it, controls that "can be put into operation *at* a building, structure, facility, or installation."[248]

The Trump Administration revoked or revised each of the Obama-era climate change initiatives, building on President Trump's campaign pledge to dismantle climate regulations. The Trump EPA addressed GHG emissions from motor vehicles in the Safer Affordable Fuel-Efficient ("SAFE") Vehicle Rule, which it issued in two parts.[249] In Part One, the Agency withdrew its waiver of preemption under the CAA for California's GHG and zero emission vehicles standards, depriving California and other states of the ability to adopt motor vehicle emissions limitations more stringent than those required by federal law.[250] At the same time, NHTSA finalized a rule concluding that "any law or regulation of a State or political subdivision of a State regulating or prohibiting" or "having the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles" is expressly preempted by the EPCA.[251]

NHTSA's preemption rule was based on the EPCA's preemption clause, which provides:

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.[252]

In NHTSA's view, "a State or local requirement limiting tailpipe carbon dioxide emissions from automobiles has the direct and substantial effect of regulating fuel consumption and, thus, is 'related to' fuel economy standards."[253] Similarly, the agency concluded that "since carbon dioxide emissions constitute the overwhelming majority of tailpipe carbon emissions, a State regulation of all

246. *See Am. Lung Ass'n*, 985 F.3d at 936 (citing 80 Fed. Reg. 64,661, 64,728–29 (Oct. 23, 2015)).

247. 80 Fed. Reg. at 64,767.

248. *Am. Lung Ass'n*, 985 F.3d at 938 (quoting 84 Fed. Reg. at 32,523–24).

249. 84 Fed. Reg. 51,310 (Sept. 27, 2019) (Part One); 85 Fed. Reg. 24,174 (Apr. 30, 2020) (Part Two).

250. 84 Fed. Reg. at 51,337.

251. *Id.* at 51,362 (Appendix B to Part 531 – Preemption, §§ (a)(2)–(3)).

252. 49 U.S.C. § 32919(a).

253. 84 Fed. Reg. at 51,313.

tailpipe greenhouse gas emissions from automobiles or prohibiting all tailpipe emissions is also 'related to' fuel economy standards and preempted by EPCA."[254]

For its part, EPA added that a waiver of preemption under the CAA does not also waive preemption under the EPCA.[255] And for good measure, EPA concluded that the CAA does not permit other states to adopt California GHG emissions and zero emission vehicle standards under Section 177. The agency concluded that Section 177 is intended only to address state planning for controlling pollutants for which areas in the state are not attaining a national ambient air quality standard; it was not intended to address "global air pollution" like GHG emissions.[256] Accordingly, states may adopt California standards only if EPA grants a waiver of preemption for those standards, and only if the California standards "address air pollutants that affect local or regional air quality and not those relating to global air pollution like GHGs."[257]

The Part One actions in the SAFE Vehicle Rule were broadly justified by EPA and NHTSA as "the only way to create one actual, durable national program," which requires "GHG and fuel economy standards to be set by the Federal government, as was intended by Congress in including express preemption provisions in both the Clean Air Act (for new motor vehicle emissions standards) and EPCA (for fuel economy)."[258] The agencies reached this conclusion notwithstanding two decisions by federal district courts, each of which concluded that California's GHG and zero emission vehicle standards were not preempted by the EPCA.[259] These courts both concluded that California's standards were not "related to" CAFÉ standards within the meaning of the EPCA's preemption provision.[260]

In the second part of the SAFE Vehicles Rule, EPA and NHTSA dramatically scaled back the GHG reductions called for in the Obama motor vehicles emission rules. The new standards require GHG reductions to increase in stringency by 1.5% per year from the standards governing Model Year 2020

254. 84 Fed. Reg. 51,310, 51,313 (Sept. 27, 2019) (Part One).

255. *Id.* at 51,324.

256. *Id*. at 51,351.

257. *Id*.

258. *Id*. at 51,311, 51,316–17 (discussing importance of "one national standard").

259. *See* Green Mountain Chrysler v. Crombe, 508 F. Supp. 2d 295 (D. Vt. 2007); Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

260. *See Green Mountain Chrysler*, 508 F. Supp. 2d at 354 (California regulation does not "relate to" fuel economy within the meaning intended by Congress"); *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1176 (holding that "a law that requires substantial improvement in average fleet mileage standards incidentally to its purpose of protecting public health and welfare does not constitute a *de facto* regulation of fuel economy standards unless there is a narrow one-to-one correlation between the pollution reduction regulation and the fuel efficiency standard" and concluding that the California standards lacked such a correlation).

vehicles over model years 2021–2026,[261] less than one-third of the reductions required under the Obama rule. The agencies acknowledged that their standards could result in over 900 million metric tons more of GHG emissions than the Obama standards, the agencies maintained that the overall benefits of the new standards outweighed these (and other) costs.[262] This conclusion was based, in part, on differing methods employed by the agencies for calculating the costs and benefits of the standards than the methods used by the Obama-era agencies.[263]

The Trump EPA revoked the Clean Power Plan and promulgated the Affordable Clean Energy Rule ("ACE") in its place.[264] The revocation of the CPP was necessary, in EPA's view, because it was inconsistent with the limitations placed on EPA's authority by the "only permissible reading" of Section 111(d) of the CAA—the source of EPA's authority to regulate GHG's emissions from existing power plants.[265] EPA explained that "[S]ection 111 unambiguously limits the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation,"[266] and "the BSER . . . may not be premised on a system of emission reduction that is implementable only through the combined activities of sources or non-sources."[267] Because the Clean Power Plan's BSER was based on generation-shifting building blocks (and emissions trading among sources), EPA concluded that it "contravenes the plain language of CAA [S]ection 111(a)(1) [—which defines "best system of emissions reduction"—] and must be repealed."[268]

In place of the revoked CPP, EPA promulgated the ACE, which concluded that the BSER for existing coal-fired power plants should consist solely of heat-rate improvement technologies and other practices that may be applied at these plants.[269] These improvements generally improve a plant's efficiency, enabling more energy to be produced with lower amounts of coal. EPA did not address BSER for plants using other fossil fuels, such as natural gas. The Agency acknowledged that its chosen BSER technologies could result in greater GHG emissions at some plants due to the "rebound effect."[270] This effect occurs when "sources increase . . . generation . . . as a result of lower operating costs from the adoption of candidate technologies to improve their efficiency."[271]

261. 85 Fed. Reg. 24,174–75 (Apr. 30, 2020).
262. *Id*.
263. *See id*. at 24,230–36.
264. 84 Fed. Reg. 32,520 (July 8, 2019).
265. *Id.* at 32,529.
266. *Id.* at 32,524.
267. *Id.*
268. *Id.* at 32,527.
269. 84 Fed. Reg. 32,520, 32,525, 32,537 (July 8, 2019).
270. *Id.* at 32,542.
271. *Id.*

Notwithstanding this obviously undesirable result, the agency concluded its BSER was appropriate because it "improves the emissions rate of designated facilities and results in overall reductions."[272]

All of the Trump Administration's climate-related actions discussed above are being reviewed by the Biden Administration and are likely to be revised or replaced.[273] In addition, in a recent decision, the D.C. Circuit vacated and remanded the ACE rule to EPA, concluding that EPA had misinterpreted the CAA.[274] The court held that "Section [111 of the CAA] does not, as the EPA claims, constrain the Agency to identifying a best system of emission reduction consisting only of controls 'that can be applied at and to a stationary source."[275] Thus, the court concluded that "EPA here 'failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law.'"[276] The Biden Administration has not yet proposed a new Section 111(d) rule to replace the ACE rule.

I do not devote a great deal of class time to the actions taken by the agencies under the CAA and EPCA. I focus primarily on the actions described above, emphasizing how the respective administrations' policy preferences can yield dramatically different results from the same statutory programs, sometimes at the cost of legality or careful analysis. These differing approaches to implementing our environmental laws underscore the fragility of our overall system of environmental protection and the relatively non-existent role played by the nation's primary policy-making body—namely, Congress.

CONCLUSION

In our current era of highly partisan understandings of the need for and desirability of environmental regulation, a change in presidential administrations offers rich opportunities to revise and reshape the nation's overall approach and policies relating to protecting our shared environment. This is particularly true due to relative absence of any new legislative initiatives. At times, changes in the wake of presidential elections can be dramatic and, to many, disheartening, as was the case with President Trump's relentless assault on existing environmental regulations, particularly the attacks on regulatory programs put in place by the Obama Administration. Our challenge as educators and environmental law scholars in our current political environment is determining which of the many candidate actions can appropriately and effectively be considered in the courses we offer to our students. We should make such

272. *Id.* at 32,543.

273. For the Biden administration's actions on motor vehicle emissions, see REG. TRACKER, *supra* note 7.

274. Am. Lung Ass'n v. EPA, 985 F.3d 914, 944 (D.C. Cir. 2021).

275. *Id.* (quoting 84 Fed. Reg. 32,520, 32,534 (July 8, 2019).

276. *Id.* (quoting Prill v. NLRB, 755 F.2d 941, 956 (D.C. Cir. 1985)).

decisions based on how the actions we select for our classes deepen and enrich our students' understanding of how our current system functions, including its doctrinal commitments and policy fluctuations, as well as the ways in which it fails to function effectively and consistently. Teaching environmental law after Trump makes these decisions more difficult, but potentially more rewarding and informative.