

# SHARED REGULATORY SPACE AT THE NEXUS OF GREEN ENERGY AND GREEN LAWS: RETHINKING ADMINISTRATIVE DEFERENCE

*Samantha Strimling\**

## ABSTRACT

*Clean Water Act § 401 requires applicants for a federal license or permit for any activity that “may result in any discharge into navigable waters” to seek from the state or tribal authorities certification of compliance with their water quality standards. Specifically, § 401(a) (1) provides that the state or tribal environmental agency where the project is located has one year to review the project and certify compliance (or impose conditions), after which it must pass authority to a federal agency, such as FERC, to license the project. Recent conflict over the bounds of the time period for review has highlighted the way in which Chevron deference systematically biases resolution of conflict over § 401 in favor of EPA as the administrator of the statute, thereby inhibiting the ability of the judiciary to strike the proper balance between infrastructure development and environmental review. Taking as a model the additions to NEPA proposed by § 321(b) of the Fiscal Responsibility Act, this Note proposes an alternative model for assigning deference: an extra-statutory “wrapper” applied at the project level. If such a wrapper were to form the basis for assigning deference, existing case law would suggest that EPA’s interpretation of § 401 should be entitled to Skidmore rather than Chevron deference.*

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## INTRODUCTION

For over a decade, Democratic politicians<sup>1</sup> have advocated for the transition to renewable energy,<sup>2</sup> reflecting emerging public awareness about the hazards of climate change and increased recognition that fossil fuel emissions are a primary driver of such effects.<sup>3</sup> Most recently, the Biden Administration passed two historic pieces of legislation through budget reconciliation. In November 2021, President Biden signed into law the bipartisan Infrastructure Investment and Jobs Act (“IIJA”),<sup>4</sup> a roughly \$550 billion funding package,<sup>5</sup> including funding for renewable energy projects, such as electric

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1. Though not the focus of this Note, numerous international organizations have similarly called for an energy transition in recent years. For example, the International Financing Corporation (a division of the World Bank) has identified climate finance as “a strategic pillar” and has vowed “to grow[] its climate-related investments to an annual average of 35 percent of its own-account long-term commitment volume between 2021 and 2025.” *Climate Finance*, INTERNATIONAL FINANCE CORPORATION, <https://perma.cc/7LE9-68NK>.
  2. One year into taking office, the Obama Administration attempted (but failed) to pass legislation which sought to address climate change primarily through cap-and-trade but also included mandates for energy efficiency and renewable fuel. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. §201-299I (2009); see also Cass Sunstein, *Changing Climate Change, 2009-2016*, 42 HARV. ENVTL L. REV. 231, 245-47 (2018).
  3. See, e.g., *Causes and Effects of Climate Change*, UNITED NATIONS, <https://perma.cc/W4X6-GLTD> (noting that fossil fuels account for over 75 percent of total greenhouse gas emissions); *Remarks by President Biden on Actions to Tackle the Climate Crisis*, THE WHITE HOUSE (Jul. 20, 2022), <https://perma.cc/54FF-W4CV> (speech acknowledging that a coal plant in Massachusetts “like many others around the country, had another legacy: one of toxins, smog, greenhouse gas emissions, the kind of pollution that contributed to the climate emergency we now face today”).
  4. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) [hereinafter *IIJA*].
  5. *UPDATED FACT SHEET: Bipartisan Infrastructure Investment and Jobs Act*, THE WHITE HOUSE (Aug. 2, 2021), <https://perma.cc/VK8M-JUTT>.

vehicle charging infrastructure,<sup>6</sup> carbon capture and storage,<sup>7</sup> and clean hydrogen.<sup>8</sup> The Inflation Reduction Act (“IRA”),<sup>9</sup> passed in August 2022, provides funding (via the tax code) for a wide variety of renewable energy projects, including wind and solar as well as more emergent technologies, such as clean hydrogen, carbon sequestration and storage, biofuel, and battery storage.<sup>10</sup> While several features of the IRA make it difficult to estimate its exact value,<sup>11</sup> analysts estimate that the bill will result in approximately \$390 billion<sup>12</sup> to \$1.2 trillion<sup>13</sup> of government spending, and trigger potentially trillions of additional dollars in private spending.<sup>14</sup>

However, executing the transition from fossil fuels to renewable energy will take more than throwing money at the problem. Environmentalists have long relied

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6. *IIJA* §§ 11109, 11401.

7. *Id.* §§ 40302–40308, 41004, 80402.

8. *Id.* § 40314. While more of a near-term band-aid than a long-term solution, the IIJA also contains necessary funding to make existing infrastructure more resilient to extreme weather. *See, e.g., id.* § 11105 (allocating funding to the National Highway Performance Program and allowing up to 15% to be used for features that reduce damage from extreme weather events); *id.* § 11405 (additional funding for improving infrastructure resiliency).

9. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022) [hereinafter *IRA*].

10. More precisely, the IRA expanded the scope and extended the duration of the existing investment tax credit and production tax credit, which traditionally have primarily covered wind and solar; under the Act, the original credits will be replaced with provisions that provide similar credit amounts for any project, regardless of technology, generating zero carbon dioxide equivalent (CO<sub>2</sub>e). *See* 26 U.S.C. §§ 45, 45Y, 48, 48E. The IRA also added a series of additional credits targeting particular technologies, many of which are novel, including electric vehicle refueling, *id.* § 30C, carbon sequestration and storage, *id.* § 45Q, nuclear power, *id.* § 45U, clean hydrogen, *id.* § 45V, battery storage, *id.* § 45X, and clean fuel production, *id.* § 45Z. For a much more extensive summary of the IRA credits, *see generally* Samantha Strimling, *Renewable Energy Tax Credits & Changes Made by the IRA*, ENVIRONMENTAL & ENERGY LAW PROGRAM (Nov. 20, 2023), <https://perma.cc/AUE8-7Y6J>.

11. In particular, the tax credits are uncapped, meaning there is no limit to how many renewable energy projects may take advantage of them. *See* Strimling, *supra* note 10. Additionally, the expiration date for the new tech-neutral credits added by the IRA is tied to 2022 annual greenhouse gas (“GHG”) emissions: specifically, the credits are set to begin phasing out (over three years) on the *later* of 2032 or the year in which annual GHG emissions total 25% of the 2022 levels. *Id.* The uncertainty about when the credits will begin phasing out further complicates the calculation of how much the IRA is expected to cost.

12. *See CBO Scores IRA with \$238 Billion of Deficit Reduction*, COMM. FOR A RESPONSIBLE FED. BUDGET (Sept. 7, 2022), <https://perma.cc/F8L3-QVCJ> (summary from a nonpartisan NGO breaking down the final scoring); *see also The Inflation Reduction Act: Here's what's in it*, MCKINSEY & Co. (Oct. 24, 2022), <https://perma.cc/6HRL-HSB8> (estimating total energy security expenditures under the IRA will cost \$394 billion).

13. *The US is poised for an energy revolution*, GOLDMAN SACHS (Apr. 17, 2023), <https://perma.cc/42VD-8HTY>.

14. *Id.* In brief, the IRA “triggers” private spending by allowing projects to go forward that would be financially infeasible without the tax credits. *See* Strimling, *supra* note 10 (explaining how tax credits are used within the entire project capital stack).

on environmental laws passed in the 1970s—including the National Environmental Policy Act (“NEPA”),<sup>15</sup> the Endangered Species Act (“ESA”),<sup>16</sup> the Clean Water Act (“CWA”),<sup>17</sup> and the Clean Air Act (“CAA”)—to challenge implementation of highways, pipelines, and fossil fuel extraction projects.<sup>19</sup> Renewable energy infrastructure is not exempt from the environmental reviews required by these laws.<sup>20</sup> In fact, some of the earliest cases brought under these major environmental statutes were in opposition to clean fuel projects, including both hydropower<sup>21</sup> and nuclear

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15. 42 U.S.C. §§ 4321–4370m-12. Sometimes dubbed the “magna carta” of environmental law since it was the first of the modern environmental laws to pass, *see* RICHARD LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 68 (1st ed., 2008), NEPA’s stated aim was to “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a). NEPA attempted to do so by requiring the “responsible official” to “include in every recommendation or report or on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on . . . the environmental impact of the proposed action,” including “any adverse environmental effects which cannot be avoided should the proposal be implemented” and “alternatives to the proposed action.” *Id.* § 4332(c).
  16. 16 U.S.C. §§ 1531–1544. The ESA declares it the policy of Congress to “conserve endangered species and threatened species,” and specifically to “resolve water resource issues in concert with conservation of endangered species.” *Id.* § 1531(c).
  17. 33 U.S.C. §§ 1251–1389. The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* § 1251(a). For a detailed review of the history and structure of the CWA, *see infra* Part I.A.
  18. 42 U.S.C. §§ 7401–7675. The purpose of the CAA is, *inter alia*, “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” *Id.* § 7401(b).
  19. James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport*, 80 OHIO ST. L.J. 263, 279–80 (2019) (discussing challenges to energy transport projects).
  20. *See generally* J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?* 44 VT. L. REV. 693 (2020).
  21. The conflict between environmentalists and hydropower in fact predates modern environmental law. *See* *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 616 (2d Cir. 1965) (holding that a local group of public citizens had standing to challenge the Federal Power Commission’s licensing of a hydroelectric project on the Hudson River to ensure that the Commission “adequately protect[s] the public interest in the aesthetic, conservationist, and recreational aspects of power development”). However, the conflict between hydropower and modern environmental law is most clearly illustrated by the saga of the Tellico Dam, a hydroelectric project on the Little Tennessee River that the Tennessee Valley Authority began constructing in 1967. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 157 (1978). Environmentalists successfully enjoined the dam due to non-compliance with NEPA in 1972, forcing the Tennessee Valley Authority to submit a more comprehensive environmental impact statement in order to proceed with the project. *Id.* at 158 (citing *Env’t Def. Fund v. Tenn. Valley Auth.*, 339 F. Supp. 806 (E.D. Tenn.), *aff’d*, 468 F.2d 1164 (6th Cir. 1972)). While the injunction was in effect, the environmentalists discovered a particular species of snail darter that lived exclusively in the portion of the Little Tennessee River where the dam was to be constructed, and, shortly after the injunction was lifted, they petitioned the Secretary of the Interior to list the newly discovered species as endangered under the ESA. *Id.* at 158–62. The environmentalists then secured a permanent injunction against the nearly complete project based on the inflexible language in § 7 of the final version of the ESA. *Id.*

power.<sup>22</sup> However, many environmental laws are inherently in tension with green energy development: though shifting away from fossil fuels would dramatically reduce carbon emissions, renewable energy sources are not without adverse environmental consequences. Hydroelectric systems may separate fish from their spawning areas, flood areas surrounding rivers, and change the timing and quantity of water flows in ways that may impact temperature, turbidity, and oxygen levels.<sup>23</sup> Even relatively lower-impact types of renewable energy, such as wind and solar,<sup>24</sup> often also produce less energy per acre of land used;<sup>25</sup> thus, conversion to these lower-impact energy sources would require significant habitat clearance.<sup>26</sup> Finally, connecting renewable energy from the site of production to distant households will require the construction of new transmission lines,<sup>27</sup> which may also require habitat clearance.<sup>28</sup>

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at 185–88 (“The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of [other] federal agencies.”). In doing so, the Supreme Court rejected the position taken by the Tennessee Valley Authority—and relied upon by Congress in appropriating federal funds for the project—that the ESA could not be used to prevent the development of a dam that was over 50% complete. *Id.* at 163–65.

22. *See, e.g.,* Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971) (early NEPA challenge to the Atomic Energy Commission (the predecessor to the Nuclear Regulatory Commission) for relying on project applicants’ environmental analyses, rather than completing an independent evaluation of that analysis); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978) (early NEPA challenge to a nuclear power plant).
23. Daniel Pollak, *Adaptive Management in Hydropower Regulation*, 39 ENV’T L. REP. NEWS & ANALYSIS 10979, 10979 (2009).
24. Low-impact does not mean no impact: wind turbines blades may reach speeds of up to 170 miles per hour, threatening various bird species, such as passerines and raptors. *See* GEORGE LEDEC ET. AL., GREENING THE WIND: ENVIRONMENTAL AND SOCIAL CONSIDERATIONS FOR WIND POWER DEVELOPMENT 15 (2011), <https://perma.cc/BR9K-ALE2>.
25. Some calculations estimate hydropower to be approximately half the cost of utility-scale solar, and approximately one-fifth the cost of rooftop solar, in generating an equivalent amount of MWh. *See* David Robert, *Reckoning with Climate Change Will Demand Ugly Tradeoffs from Environmentalists — and Everyone Else*, Vox (Jan 27, 2018), <https://perma.cc/FKT8-5FLS>; *see also* Dan Tarlock, *Hydro Law and the Future of Hydroelectric Power Generation in the United States*, 65 VAND. L. REV. 1723, 1724 (2019) (noting reliability and availability of hydropower).
26. John Copeland Nagle, *Green Harms of Green Projects*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 59, 65–67 (2013) (noting that wind turbines would require ecosystem modifications threatening species ranging from bears to turtles, and large-scale solar development would impact desert species, such as tortoises and bighorn sheep). *See also* Uma Outka, *The Renewable Energy Footprint*, 30 STAN. ENV’T L.J. 241, 243 (2011) (“[L]and impacts could be greater still if policies to advance renewable energy are expanded. The reason for this is simple: renewable energy requires more land to produce the same amount of power as the fossil fuel sources altering our climate.”)
27. *See IRA* §§ 50151–50153 (funding allocated under the IRA for the construction of new transmission lines).
28. For example, in 2020, environmental and outdoor recreation groups brought a high-profile legal challenge to a transmission line in Maine, which would have connected

Still, given the pace of impending climate catastrophe, continued reliance on fossil fuels—and a continuously warming atmosphere—is hardly a recipe for environmental protection.<sup>29</sup> In order to avoid irreversible ecosystem damage, the transition to a renewable energy based economy is not only necessary but urgent.<sup>30</sup> Thus, while statutorily prescribed environmental review plays an important role in ensuring that renewable energy infrastructure complies with environmental standards and mitigates environmental harm to the maximal extent practicable, such reviews cannot come at the expense of building any infrastructure at all.

Much of the current action around decreasing the timing, length, and extent of environmental review has focused on NEPA. In 2020, the Council for Environmental Quality (“CEQ”), which implements NEPA,<sup>31</sup> issued new guidelines for compliance for the first time since 1978.<sup>32</sup> Among other changes, the new regulations set time limits as well as page limits for environmental

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hydropower generated in Quebec to the New England grid, based on concerns about damage to surrounding forests and aquatic resources. See Gabrielle Mannino, *Injunction Filed to Stop Construction of CMP Corridor*, NEWS CTR. ME. (Nov. 12, 2020), <https://perma.cc/D42K-QV4V>. Such legal challenges will likely become more common if large-scale renewable energy comes to make up a more substantial portion of the total energy in the grid.

29. In a 2018 report, the United Nations Intergovernmental Panel on Climate Change (“IPCC”) concluded that fossil fuels were “the main contributor to rising greenhouse gas emissions,” and that mitigating human-induced climate change would likely involve not only reduction in agricultural emissions and energy demand but also “decarbonization of electricity and other fuels, electrification of energy end use . . . and some form of [carbon dioxide removal] with carbon storage on land or sequestration in geological reservoirs.” INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C 53, 95 (2018), <https://perma.cc/5BRS-QUTL>.
30. The most recent report from the IPCC, published in March 2023, provided the following warning: “The likelihood and impacts of abrupt and/or irreversible changes in the climate system, including changes triggered when tipping points are reached, increase with further global warming . . . . As warming levels increase, so do the risks of species extinction or irreversible loss of biodiversity in ecosystems including forests . . . coral reefs . . . and in Arctic regions.” INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT 18 (2023), <https://perma.cc/SJD2-NW7Y>.
31. NEPA established the CEQ, 42 U.S.C. § 4342. Rather than explicitly granting authority to one central agency to administer the statute, it instead instructs “all agencies of the Federal Government” to “identify and develop methods and procedures, in consultation with the [CEQ]” to comply with the statutory requirements. *Id.* at § 4332. While the statute is otherwise silent on CEQ’s regulatory authority, its authority to promulgate regulations has never been challenged by the Supreme Court, and it is presumed to have this authority. See, e.g., *Council on Environmental Quality*, WHITE HOUSE <https://perma.cc/E4HP-Y36A> (describing CEQ as “the agency responsible for implementing NEPA”); *What is the National Environmental Policy Act?*, EPA (last updated Oct. 26, 2022), <https://perma.cc/CQ6Y-8XUM> (enumerating CEQ’s duties, including “[i]ssuing regulations and other guidance to federal agencies regarding NEPA compliance”).
32. 85 Fed. Reg. 43304 (Jul. 16, 2020).

assessments and environmental impact statements.<sup>33</sup> Though President Biden pledged to reconsider these guidelines upon taking office,<sup>34</sup> the Biden Administration CEQ explicitly rejected the full reversion to the 1978 regulations proposed by numerous commenters,<sup>35</sup> instead choosing to issue new regulations in two phases, with only three particularly high-urgency changes in Phase 1.<sup>36</sup> This suggested that the Biden Administration was also weighing the proper balance of environmental conservation and environmental justice considerations against the need to streamline the permitting process. Additionally, surprising support for permitting reform from several left-leaning and mainstream media outlets<sup>37</sup> suggested there was at least the possibility of wider public support for rethinking the content of NEPA regulations.

This past summer both Congress and the CEQ revised NEPA's requirements. Most recently, the Proposed Phase 2 Regulations, released in July 2023,<sup>38</sup> would keep in place many of the revisions implemented by the 2020 regulations, while also imposing additional reporting requirements related to environmental justice.<sup>39</sup> Additionally, the Fiscal Responsibility Act ("the FRA")<sup>40</sup>—passed in June 2023 and considered in additional depth in Part II.C—codifies several of

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33. 40 C.F.R. § 1501.10 (setting time limits: one year for EAs and two years for EISs); *id.* § 1501.5 (setting page limits: 75 pages for EAs and 150 pages for EISs (or 300 if particularly complex)).
  34. See *Fact Sheet: List of Agency Actions for Review*, THE WHITE HOUSE (Jan. 20, 2021), <https://perma.cc/VKT2-VF9Z>
  35. 87 Fed. Reg. 23453, 23456 (Apr. 20, 2022).
  36. 87 Fed. Reg. 23453 (Apr. 20, 2022). The three changes include: (1) removing 2020 edits to the purpose of the statute, 40 C.F.R. § 1502.13, which had emphasized the procedural nature of the statute; (2) removing 2020 edits preventing agencies from developing more stringent regulations than under the uniform NEPA regulations, 40 C.F.R. § 1507.3; (3) removing 2020 edits stating that agencies need not consider cumulative or indirect effects, 40 C.F.R. § 1508.1. *Id.* In addition to these three changes, EPA published an interim final rule in June 2021, giving agencies additional time to draft agency-specific NEPA procedures, such that they need not conform their procedures to the 2020 regulations while under review and revision. 86 Fed. Reg. 34154, 40 C.F.R. § 1507.3(b) (Jun. 29, 2021).
  37. See Colin Mortimer, *Manchin's permitting reform effort is dead. Biden's climate agenda could be a casualty*, Vox (Dec. 16, 2022), <https://perma.cc/X5KZ-Y3KH> (commenting on an earlier permitting reform bill proposed by Senator Joe Manchin); *Without this, the country's climate plans are in danger*, WASHINGTON POST (Sept. 28, 2022), <https://perma.cc/3PH2-233S> (same); Ezra Klein, *Government Is Flailing, in Part Because Liberals Hobbled It*, N.Y. TIMES (Mar. 13, 2022), <https://perma.cc/34B5-L6LH> (general liberal critique of NEPA, predating Senator Manchin's permitting reform package).
  38. 88 Fed. Reg. 49924 (Jul. 31, 2023).
  39. See Hannah Perls, *Key Changes in CEQ's Proposed Phase 2 Regulations Implementing NEPA*, ENVIRONMENTAL & ENERGY LAW PROGRAM (Aug. 23, 2023), <https://perma.cc/Q9GE-9EB5> (summarizing the key provisions in the Phase 2 regulations).
  40. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 39-46 (Jun. 3, 2023) (portions of the Act amending NEPA) [hereinafter *FRA*].

the Trump regulations into legislation.<sup>41</sup> The FRA marks the first time Congress has amended NEPA since it was passed in 1970.

This Note highlights the way in which the current regime of administrative deference, by forcing courts to resolve ambiguous legal questions through deference to the agency assigned authority under the particular statute giving rise to the question, inhibits the ability of the judiciary to strike the balance between infrastructure development and environmental review that the larger statutory scheme would suggest proper. The transition to renewable energy envisioned by the recent legislative allocation of funds will require that environmental agencies like the Environmental Protection Agency (“EPA”) and energy-focused agencies like the Federal Energy Regulatory Commission (“FERC”) cooperate rather than compete,<sup>42</sup> requiring fair adjudication of conflicts between these interests.

To make this conflict concrete, this Note will center around CWA § 401,<sup>43</sup> the scope of which is hotly debated by FERC and EPA, along with state environmental agencies to which EPA delegates authority. CWA § 401 requires applicants for a federal license or permit for any activity that “may result in any discharge into the navigable waters” to seek from the state or tribal authorities<sup>44</sup>

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41. In general, the revisions in FRA adhere more closely to those in the Trump regulations, but with significant concessions. For example, the Trump regulations contained page limits for both EAs and EISs; however, the page limit provision for EAs under the regulations explicitly excepted appendices, 40 C.F.R. § 1501.5(f) (2020), while the same exception was conspicuously absent from the page limit provision for EISs, *id.* § 1502.7. While the FRA codified the page limits from the Trump regulations—seventy-five for EAs and 150 for EISs—it excludes both citations and appendices from the page totals. *FRA* at 137 Stat. 42 (codified as 42 U.S.C. § 4336a(e)). Additionally, the FRA, like the Trump regulations, defines which “major Federal action(s)” are subject to NEPA reporting requirements. *Id.* at 137 Stat. 45 (codified as 42 U.S.C. § 4336e(10)). However, while the Trump regulations limited reporting to “[m]ajor Federal actions . . . subject to federal control and responsibility,” 40 C.F.R. § 1508.1(q), the FRA caveats that only “substantial federal control” is needed (though does not define this further). *FRA* at 137 Stat. 45 (codified as 42 U.S.C. § 4336e(10)) (emphasis added).

42. The divide between energy and environmental law—for which FERC and EPA are, respectively, the chief responsible federal agencies—is deeply rooted in both statute and common law, with, historically, “energy law largely treat[ing] public health and environmental harms as externalities which environmental law is designed to address.” Jody Freeman, *The Uncomfortable Convergence of Energy and Environmental Law*, 41 HARV. ENVTL L. REV. 339, 346 (2017). The two agencies also have starkly divergent histories, agency structures (independent versus executive, headed by a Commission versus single Administrator), and relationships with states, all of which inform the different perspectives these agencies take to particular environmental provisions, such as § 401. *Id.* at 347–51. The capacity of both FERC and EPA to frustrate the other’s mission—not only in the context of CWA § 401 but also in terms of both infrastructure development and electricity market regulation more broadly—underscores the importance of fairly mediating conflicts that arise.

43. 33 U.S.C. § 1341.

44. While the text of § 401 refers only to states, 33 U.S.C. § 1341, the 1987 amendments to the CWA added § 518(e), providing that Native American tribes shall be treated as states for the purposes of a number of provisions in the Act, including § 401, where the tribe



certification of compliance with their water quality standards.<sup>45</sup> As written, § 401(a)(1) provides a one-year period for a state or tribal environmental agency to review the project and certify compliance.<sup>46</sup> A federal agency—often FERC<sup>47</sup>—must then incorporate any conditions required by the state environmental agency into the federal license.<sup>48</sup> Recent conflict over the bounds of this time period has highlighted the way in which *Chevron* deference<sup>49</sup> systematically

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has demonstrated that it (1) “has a governing body carrying out substantial governmental duties and powers”; (2) exercises functions “pertain[ing] to the management and protection of water resources . . . held by [the] tribe”; and (3) “is reasonably expected to be capable, in the Administrator’s judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of [the CWA] and of all applicable regulations.” 33 U.S.C. § 1377(e); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 76–77 (1987). Another section of the CWA, 33 U.S.C. § 1313(c) (pertaining to state water quality standards), is accompanied by regulations implementing a process for a tribe to be treated as a state, and EPA has taken the position in regulation that where a tribe has shown itself to be “eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act Section 401.” 40 C.F.R. § 131.4(c). Additionally, EPA’s recent Final Rule for administering § 401 established an additional process by which a tribe may achieve treatment as a state for the purposes of § 401, even if it has not done so for the purposes of § 303(c). Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66558, 66651–53 (Sept. 27, 2023).

45. 33 U.S.C. § 1341(a),(d). Applicants must seek certification from the state or tribe where the discharge will occur, as well as from affected downstream states or tribes. *Id.* § 1341(a)(1)–(2). *See also* *Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992) (confirming EPA’s long-standing position that “EPA-issued NPDES permits also comply with § 401(a) . . . [which under] Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State’s water quality requirements can be ensured”).
46. 33 U.S.C. § 1341(a)(1).
47. This Note focuses on FERC because of its expansive authority to license hydroelectric projects under the Federal Power Act, *see infra* text accompanying note 80, as well as for the construction and operation of natural gas pipelines under the Natural Gas Act of 1938, 15 U.S.C §§ 717a(9), 717b, 717f. The authority granted to FERC under these statutes makes it one of the federal agencies most commonly subject to § 401 certification. *See* Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35318, 35327 (Jun. 9, 2022). FERC’s authority over hydropower also gives it an especially crucial role in the development of renewable energy infrastructure specifically. However, other agencies also depend on timely § 401 review to effectuate their respective mandates. For example, the Army Corps of Engineers must seek § 401 review before issuing a § 404 permit, *see infra* text accompanying notes 107 and 118. Additionally, several agencies within the Department of Interior are also engaged in water-related projects that may require § 401 review, including the Bureau of Land Management (managing resource extraction and some renewable energy projects on federal lands), the Bureau of Ocean Energy Management (managing offshore federal lands), and the Bureau of Reclamation (building and maintaining federal dams). *See* Freeman, *supra* note 42, at 351–52.
48. 33 U.S.C. § 1341(d).
49. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See infra* text accompanying notes 219–220.

biases resolution of the conflict in favor of EPA by deferring to it as the administrator of the statute.

Part I of this Note dives into relevant legislative history and judicial precedent in order to place § 401 within the larger context of the CWA and explain its relevance to hydropower, an area in which the conflict between environmental regulation and infrastructure development often unfolds. Part I also details the current conflict between state regulatory agencies and FERC surrounding the timeframe for environmental review—primarily of hydropower projects—and explains how current principles of administrative law systematically tilt resolution of the problem toward the environmental agencies rather than FERC, thus overprioritizing environmental regulation at the expense of necessary infrastructure development. Part II proposes a solution to this issue: a novel extra-statutory structure—herein referred to as a “wrapper”—applied on a project-by-project basis, which would formally acknowledge the role of multiple agencies in constructing and licensing a given project and would supersede the statute in determining whether and how to assign deference. Part II also presents existing case law surrounding the allocation of deference where agencies share administration over a single statute and applies it to the conflict over § 401 review, assuming EPA and FERC jointly administer the extra-statutory wrapper.

## I. CLEAN WATER ACT § 401

Section 401 of the Clean Water Act is poised to act as a significant hurdle in the national government’s efforts to promote a transition to a more sustainable economy because it authorizes state and tribal governments to require certain federally licensed activities to comply with state and federal water quality standards.<sup>50</sup> Historically, environmentalists have cheered such state and tribal supervision over federal government activities that might adversely affect water quality.<sup>51</sup> The risk now presented, however, is that this same supervision may unduly hinder the federal government’s ability to address the potentially overriding need to address climate change on an expedited basis through development of renewable energy infrastructure.

Understanding the role of § 401 within the larger context of the CWA is crucial to grasping the stakes of the conflict over the timeline of review. For the first two decades after the Act was passed in 1972, environmentalists focused on other provisions applying effluent limitations to water pollution discharged at point sources.<sup>52</sup> Section 401 meanwhile remained a “potent, but infrequently

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50. As this Note discusses, *infra* Part I.B, even where the state agencies ultimately approve such federal projects, they may do so with significant delays, slowing eventual completion.

51. See generally *infra* Part I.A.1 (discussing historical efforts by environmentalists to increase opportunities for state and tribal review and certification of federal projects).

52. See *infra* notes 102–103 and accompanying text.

wielded” mechanism for enforcing a secondary scheme of preventing water pollution under the CWA, which relied on states and tribes to promulgate more stringent water quality standards addressing both point and nonpoint source pollution.<sup>53</sup> While this secondary scheme had earlier roots in the pre-1972 design of water pollution regulation, which intentionally vested primary regulatory authority in the states,<sup>54</sup> an innovation of the CWA was to place this scheme within a “cooperative federalism” framework, giving the newly created EPA<sup>55</sup> a central role in coordinating with state regulatory agencies and approving the state standards.<sup>56</sup> This in turn endowed the state water quality standards with a “federal character” and gave them a central role in federal water pollution regulation.<sup>57</sup> Once the inherent confines of the effluent limitations were realized,<sup>58</sup> and after the landmark case *PUD No. 1 of Jefferson County v. Washington Department of Ecology*<sup>59</sup> clarified the broad scope of state and tribal certification authority under § 401,<sup>60</sup> § 401 emerged as the “sleeping giant” with great potential to protect wetlands and other aquatic resources.<sup>61</sup>

Part I.A details this history, in order to place the provision in context before Part I.B delves into the current conflict surrounding the timing of review. Part I.C sets up the discussion in Part II by explaining how, despite the importance of timely § 401 review to FERC’s ability to execute on its mandate of developing renewable energy infrastructure, *Chevron* deference unduly prioritizes EPA’s interpretation of § 401 due to its location within the CWA, which EPA administers.

### A. Section 401 in Historical Context

#### 1. History: The Path to the Modern Clean Water Act

The history of CWA § 401 charts the transition from federalist water pollution regulation—in which Congress saw its role as “recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of the

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53. Debra Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 *ECOLOGY L.Q.* 201, 203–04 (1996). For additional detail on the secondary system of pollution regulation, see *infra* notes 109–111 and accompanying text.

54. See *infra* Part I.A.1.

55. See *infra* note 72.

56. See *infra* notes 113–116 and accompanying text.

57. See *infra* note 117 and accompanying text.

58. See Donahue, *supra* note 53, at 203 (noting in 1995 that “according to some commentators, ‘we are actually going backward in our efforts to restore the health of our aquatic ecosystems,’ when one considers our inability to curb polluted runoff and the ongoing destruction of important wetland and aquatic habitats”).

59. 511 U.S. 700 (1994).

60. See *infra* Part I.A.3.

61. See generally Katherine Ransel, *The Sleeping Giant Awakens: PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 25 *ENV’T. L.* 255 (1995).

States in controlling water pollution”<sup>62</sup>—to a “cooperative federalist” framework in which EPA, a federal agency, set national standards and relied principally on state-level implementation. Absent historical context, the text of CWA § 401 appears to be an attempt to *give* power to the states by allowing them to evaluate and certify whether or not a federal project complies with their water quality standards.<sup>63</sup> However, when drafted as part of the final amendments to the Federal Water Pollution Control Act of 1948 (“FWPCA”), § 401 was envisioned as an incremental step in the transition from state control to cooperative federalism.<sup>64</sup> That said, it was only in the context of the full-scale revision that transformed the FWPCA into the modern-day CWA,<sup>65</sup> that § 401—one of the few provisions to be preserved nearly verbatim<sup>66</sup>—came to assume the power it holds today. This subsection briefly traces the evolution of clean water regulation in order to shed light on § 401’s role within the modern CWA.

Two statutes concerned with water quality predate the CWA: the Rivers and Harbors Act of 1899 (“RHA”)<sup>67</sup> and the FWPCA. The RHA addressed “refuse” in interstate waterways,<sup>68</sup> but its chief objective was not pollution control but rather the prevention of impediment or obstruction to navigable waterways key to interstate commerce.<sup>69</sup> The FWPCA did specifically address water pollution, but it limited the federal role to providing technical research and financial aid in the form of grants to states and municipalities for the “formulation and execution of their stream pollution abatement programs.”<sup>70</sup>

Though the original FWPCA was amended five times between 1948 and 1970, it continued to vest administrative authority primarily in the states,<sup>71</sup> with the exception of three new provisions. First, the 1965 Amendments added § 10(c), which allowed the federal administrator of the Act<sup>72</sup> to either approve

62. Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155, 1155 (1948) [hereinafter FWPCA].

63. See *supra* notes 43–48 and accompanying text.

64. See *infra* note 74 and accompanying text.

65. For context regarding the revision generally, see *infra* note 99.

66. For a detailed accounting of the differences between current CWA § 401 and its predecessor, § 21(b) of the Water Quality Improvement Act, see *infra* note 112.

67. Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121 (1899).

68. *Id.* § 407 (“It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state . . .”).

69. *Id.*

70. Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155, 1155 (1948).

71. The Act was amended in 1956, 1961, 1965, 1966, and 1970. See generally Frank Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970).

72. All revisions of the FWPCA prior to the CWA in 1972 predate EPA, which President Richard Nixon established in October 1970. See Reorganization Plan No. 3, 35 Fed. Reg. 15623 (Oct. 6, 1970). The Act was originally administered by the Surgeon General. Administration

interstate water quality standards proposed by designated state officers or propose his or her own standards instead.<sup>73</sup> Second, the 1970 Amendments<sup>74</sup> contained nascent effluent limitations, specifically for prevention of “discharge of untreated or inadequately treated sewage into or upon . . . navigable waters.”<sup>75</sup> Third, the 1970 amendments also added § 21(b), which allowed state authorities to certify federal projects for compliance with state water quality standards.<sup>76</sup> Section 21(b) from the beginning extended to hydroelectric projects. The Federal Power Act of 1920<sup>77</sup> created the Federal Power Commission<sup>78</sup> (the predecessor to FERC<sup>79</sup>) and endowed it with authority to issue licenses “for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development, transmission, and utilization of power.”<sup>80</sup> While the § 21(b) certification program still primarily vested administrative authority in the States, it allowed the federal administrator to play a limited role

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was transferred to the Secretary of Health, Education, and Welfare in 1953 and to the Secretary of the Interior in 1966. Barry, *supra* note 71, at 1107 n.18. To the extent that the FWPCA survived the full-scale revision that became the CWA, *see infra* note 99 and accompanying text, the authority vested in the Secretary of the Interior was transferred to the Administrator of EPA. *See* 33 U.S.C. § 1251(d).

73. Water Quality Act of 1965, Pub. L. No. 89-234, § 5, 79 Stat. 907–10 (Oct. 2, 1965); *see also* Barry, *supra* note 71, at 1115.
74. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (Apr. 3, 1970).
75. *Id.* § 13(b)(1).
76. *Id.* § 21(b). Sections 21(c)–(d) also pertain to the permit program, limiting its reach.
77. 16 U.S.C. §§ 791a–823g.
78. *Id.* § 792.
79. *See* Department of Energy Organization Act of 1977, Pub. L. No. 95–91, 91 Stat. 582–585, §§ 401–402 (Aug. 4, 1977) (establishing FERC as an independent agency within the Department of Energy and assigning to it the functions of the Federal Power Commission).
80. 16 U.S.C. § 797(e). This section also restricts FERC’s jurisdiction to development of “bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam.” *Id.* While beyond the scope of this paper, the boundaries of the Waters of the United States (“WOTUS”)—and thus FERC’s jurisdiction—have been hotly contested, with several significant developments over the past year. EPA announced a Final Rule defining the Waters of the United States on December 30, 2022. Most recently, the Supreme Court limited WOTUS to include “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes,’” and “to adjacent wetlands that are ‘indistinguishable’ from those bodies of water due to a continuous surface connection.” *Sackett v. EPA*, 598 U.S. 651, 671, 678–84. (2023) (citing *Rapanos v. United States*, 547 U. S. 715, 739, 755 (2006) (Scalia, J., writing for the plurality)). This interpretation directly contradicted that expressed by a Final Rule published by EPA in January 2023, which defined WOTUS more broadly. 88 Fed. Reg. 3004 (2023). On September 8, 2023, EPA updated the prior released rule to conform with *Sackett*. 88 Fed. Reg. 61964 (2023).

in coordinating between states,<sup>81</sup> and to oversee the certification program in unique circumstances where “a State or interstate agency has no authority to give such a certification,” such as where the administrator proposed the standards under § 10(c).<sup>82</sup>

Though the amendments to the FWPCA marked an early effort to carve out a limited federal regulatory role, efforts to creatively apply the RHA toward water pollution ultimately prompted the development of a more comprehensive federal scheme for water pollution regulation. Beginning in the late 1960s, Americans became increasingly aware of environmental harms—in part through widely publicized calamities such as the Cuyahoga River fire and Santa Barbara oil spill, both in 1969.<sup>83</sup> In reaction, House Representative Henry Reuss started to conceive of the RHA as a possible vehicle for targeting pollution.<sup>84</sup> Reuss commissioned his staff to publish a report entitled “Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent their Destruction and Pollution,” exploring the possibility of private citizens bringing suits *qui tam* under the RHA.<sup>85</sup> Environmentalists—including Reuss himself<sup>86</sup>—responded by bringing a number of lawsuits making such claims.<sup>87</sup> While several lower courts held that the statutory language prevented private enforcement of the RHA,<sup>88</sup>

81. The licensing or permitting agency must notify the Secretary “upon receipt” of the application and certification, and the Secretary must also determine whether a project will affect the quality of water in downstream states and notify the applicant if so. Water Quality Improvement Act of 1970, § 21(b)(2).

82. *Id.* § 21(b)(1).

83. LAZARUS, *supra* note 15, at 59.

84. See Andrew Franz, *Crimes Against Water: The Rivers and Harbors Act of 1899*, 23 TULANE ENV'T L.J. 255, 261 (2010).

85. H.R. REP. NO. 917, 91st Cong., 2d Sess. (1970). *Qui tam* actions were actions under English common law that allowed private parties to sue on behalf of the Crown and collect a portion of the penalty; such suits eventually became central to British legislative policy as a tool for monitoring and detecting violations. See Dan D. Pitzer, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 TEX. INT'L. L.J. 415, 418 (1972). Though an intellectual pre-cursor to the sort of citizen suit provisions found throughout environmental statutes, see, e.g., 33 U.S.C. § 1365 (permitting citizen suits under the CWA); 42 U.S.C. § 7604(e) (permitting citizen suits under the CAA), the RHA contained no such provision. The House report thus was suggesting an innovative legal strategy, as yet untested in the courts. See Charles N. Drennan, *Qui Tam Actions under the 1899 Refuse Act: Possibility of Individual Legal Action to Prevent Water Pollution*, 36 MO. L. REV. 498, 508–09 (1971).

86. *Reuss v. Moss-Am., Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971).

87. In total, sixty-six suits were brought from October 1969 to April 1970. William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENV'T L. J. 215, 258 (2003). See also Pitzer, *supra* note 85, at 415 n.1 (listing 11 *qui tam* suits brought under the RHA in District Courts across the country from 1970 to 1971).

88. Pitzer, *supra* note 85, at 415–16 (describing as “illustrative” *Reuss v. Moss-Am.*, in which the court sustained Defendants’ motion to dismiss on the grounds that RHA § 18 (33 U.S.C. § 413) provided exclusive prosecutorial authority to the Department of Justice). Pitzer also

Reuss's efforts raised awareness about the potential to prosecute water pollution under the RHA. The Supreme Court responded, holding in two opinions both written by Justice Douglas—*United States v. Republic Steel Corp.*<sup>89</sup> and *United States v. Standard Oil*<sup>90</sup>—that the plain meaning of RHA § 13 prohibited the deposit of pollutants including industrial solids and fuel.<sup>91</sup>

In the wake of *Republic Steel Corp.* and *Standard Oil*, President Richard Nixon passed Executive Order 11574,<sup>92</sup> calling for a permitting program to provide industry with protection for activities undertaken in reliance on lax water pollution regulation (and due to the sheer volume of activity that would need to be addressed under this new, expansive reading of the RHA).<sup>93</sup> The Order envisioned a permitting program based around § 21(b) of the revised FWPCA, in which “a permit shall be denied where the certification prescribed by section 21(b) of the Federal Water Pollution Control Act has been denied.”<sup>94</sup> However, the Order proposed a unique structure in which the Administrator of EPA would review the state certifications under § 21(b) but the Secretary of the Army would retain ultimate permitting authority; the Secretary was in turn directed to accept the “findings, determinations, and interpretations” of the Administrator and supplement the Administrator’s judgment concerning “factors[] other than water quality.”<sup>95</sup> The D.C. District Court ultimately struck down the nascent permitting program in *Kalur v. Resor*.<sup>96</sup> The District Court found the requirement that the Secretary defer to the judgment of state water quality standards (as reviewed by the Administrator of EPA), rather than conduct his own independent analysis, to be non-compliant with NEPA.<sup>97</sup> Still, the

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notes the courts’ dismissal of the RHA suits based on the incorrect understanding that criminal penalties cannot be enforced by private actors. *Id.*

89. 362 U.S. 482 (1960).

90. 384 U.S. 224 (1966).

91. 33 U.S.C. § 407; *Republic Steel Corp.*, 362 U.S. at 490–91; *Standard Oil*, 384 U.S. at 229–30.

92. Exec. Order No. 11574, 35 Fed. Reg. 19627 (Dec. 25, 1970).

93. Andreen, *supra* note 87, at 258–59.

94. Exec. Order No. 11574 at 19627, § 2(a)(1)(2)(A).

95. *Id.* § 2(a)(1)(2). The Secretary of the Army was given authority to implement the permitting program because it administered the RHA, which contained its own permitting program. *See* RHA § 11 (codified at 33 U.S.C. § 403). Given this history, the direction to consider factors other than water quality may be logically read as preserving the Secretary’s authority to make the judgments it normally exercised in administering the RHA, such as determining whether waterways were obstructed.

96. 335 F. Supp. 1, 15 (D.D.C. 1971).

97. *Id.* at 13. The court analogized this requirement to the process used by the Atomic Energy Commission to evaluate applications for nuclear power plants, under which “the Commission [did] not independently examine [] any problem of water quality,” but rather deferred to the applicants’ own studies, noting that this practice had been found non-compliant just five months prior in *Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971), a landmark case establishing the power of NEPA’s procedural requirements. *Id.* at 13–14. *See also supra* note 22 (providing additional information on the role of *Calvert Cliffs* with regard to judicial interpretations of NEPA generally).

early efforts to give the RHA teeth, combined with President Nixon's attempt to establish the permitting program, precipitated demand among industry for more specific and comprehensive regulations outlining compliance requirements.<sup>98</sup>

2. *Section 401 in Context: The Structure of the Modern Clean Water Act*

The final version of the CWA—passed with widespread bipartisan support in both houses of Congress<sup>99</sup> and sustained over President Nixon's veto<sup>100</sup>—is significantly more ambitious than the FWPCA, which Congress nominally amended but structurally upended.<sup>101</sup> The revised Act grants significant power to EPA to promulgate a series of effluent limitations for point source discharges,<sup>102</sup> requiring industrial polluters across the country to reduce pollution to the level achieved by technologies used by the best performers in the industry at large.<sup>103</sup>

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98. Twelve bills were proposed initially, demonstrating the demand for more comprehensive water pollution regulation. *See* Andreen, *supra* note 87, at 260. However, the Senate Committee on Public Works postponed action on these initial proposals in order to focus its efforts on passing the Clean Air Act. *Id.*

99. The final bill passed the Senate 74 to 0 and the House 366 to 11. Andreen, *supra* note 87, at 285. For a more comprehensive account of the legislative history leading up to passage, *see generally id.* at 261–284.

100. President Nixon vetoed the bill on October 17, 1971, which the Senate voted overwhelmingly (52 to 12) to override that same day; the House overrode the veto the following day by the similarly wide margin of 247 to 23. *Id.* at 285–86.

101. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 877 (Oct. 18, 1972); *see also History of the Clean Water Act*, EPA, <https://perma.cc/XG9C-6LJD> (describing the major amendments made to the FWPCA as part of the 1972 enactment of the CWA).

102. Section 502(14) defines “point source” to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged,” and to exclude “agricultural stormwater discharges and return flows from irrigated agriculture.” 33 U.S.C. § 1362(14).

103. The CWA requires that existing point sources other than publicly owned treatment works (POTWs) meet the standard achieved by the *average* of the best performers in the industry. 33 U.S.C. §§ 1311(b)(1)(A), 1314(b); Organic Chemicals and Plastics and Synthetic Fibers Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 52 Fed. Reg. 42522, 42525 (Nov. 5, 1987) (explaining that these provisions “are generally based on the average of the best existing performance by plants of various sizes, ages, and unit processes within the category or subcategory for control of familiar (i.e., conventional) pollutants”); *see also* Chem. Mfrs. Ass’n v. EPA, 870 F.2d 177, 203 (5th Cir. 1989) (citing and applying the definition provided by the rulemaking preamble). POTWs—new and existing—are required to meet a different standard known as “secondary treatment,” expressed in terms of oxygen demand, suspended solids, and pH levels. *Id.* §§ 1311(b)(1)(B), 1314(d)(1). More stringent effluent limitations apply to new point sources because of the lack of sunk costs involved in implementation. *Id.* § 1316. Following 1977 amendments to the CWA, Pub. L. 95-217, 91 Stat. 1582–1586 (Dec. 27, 1977), most existing point sources other than POTWs must meet the standard achieved by the *single-best* performer in the industry, if affordable to most industry participants. *Id.* §§ 1311(b)(1)(A),



Under § 402 of the Act, each point source must seek a permit—known as a National Pollutant Discharge Elimination System (NPDES) permit—from EPA,<sup>104</sup> though states can apply to EPA to administer their own § 402 programs upon demonstration of adequate resources to ensure enforcement;<sup>105</sup> in addition to ensuring compliance, the permit may include requirements for data and information collection and reporting.<sup>106</sup> In a nod to the RHA permitting program, as well as the program envisioned by President Nixon under Executive Order 11574, the final bill also grants authority to the Army Corps of Engineers to administer a separate permitting program for “dredge and fill” under CWA § 404.<sup>107</sup>

While the effluent limitations form the centerpiece of the modern CWA, at the House’s insistence,<sup>108</sup> the final bill also includes a secondary scheme for preventing water pollution, layering state water quality standards on top of the effluent limitations.<sup>109</sup> The states are required to identify waters for which the effluent limitations are insufficient to achieve state water quality standards, set total maximum daily loadings (“TMDLs”),<sup>110</sup> and prescribe an implementation plan for achieving these new limits.<sup>111</sup>

The linchpin enforcing this secondary structure is § 401, which was copied nearly verbatim from § 21(b) of the prior version of the Act.<sup>112</sup> At each step of the

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1314(b). The exception is a carve-out for “conventional pollutants,” i.e., pollutants similar to those produced by POTWs, which must meet a standard similar to secondary treatment. *Id.* §§ 1311(b)(2)(E), 1314(a)(4).

104. 33 U.S.C. § 1342 (general NPDES permitting requirements).

105. States desiring to administer their own permit programs “may submit to the Administrator [of EPA] a full and complete description of the program [they] propose[] to establish and administer under State law or under an interstate compact,” including a statement from a legal official (either the state attorney general or attorney for the state water pollution control agency, or, if administering the program under an interstate compact, from the Chief Legal Officer of the applicable interstate agency) that the state or interstate laws are adequate to ensure compliance with CWA effluent limitations. *Id.* § 1342(b). The Administrator is required to approve each submitted program as long as the state demonstrates it has adequate authority to “apply . . . and insure compliance with” the effluent limitations in the CWA, including by “terminat[ing] or modif[y]ing” the permit in cases of violation or change of conditions, or where the permit was acquired through misrepresentation or inadequate disclosure. *Id.* §§ 1342(b)(1)(A), 1342(b)(1)(C).

106. *Id.* § 1342(a)(2).

107. *Id.* § 1344. EPA was provided the power to veto Corps permits, *id.* § 1344(c), out of concern that they would fail to adequately protect environmental values. *See* Andreen, *supra* note 87, at 272. However, EPA has used this power only thirteen times since the passage of the CWA. *See Clean Water Act: Section 404(c) “Veto Authority,”* EPA, <https://perma.cc/GXT6-2FXN>.

108. *See* Andreen, *supra* note 87, 275–76.

109. 33 U.S.C. § 1313(a)–(c); *see also* Andreen, *supra* note 87, at 276.

110. 33 U.S.C. § 1313(d)(1)(A),(C).

111. *Id.* § 1313(e), (known as the “Continuing [P]lanning [P]rocess”).

112. The limited substantive changes include: (1) requiring that the state authority certify compliance with CWA provisions (specifically §§ 301, 302, 303, 306, and 307) in current §§ 401(a)

process, the states are required to seek EPA approval: of their initial water quality standards,<sup>113</sup> the waters identified as non-compliant,<sup>114</sup> the TMDLs,<sup>115</sup> and the implementation plans.<sup>116</sup> In doing so, these regulations gained “a federal character.”<sup>117</sup> However, the state water quality standards remain fundamentally *state* regulations. As such, under § 401, the act of enforcing the standards with regard to *all* projects applying for federal permits—including § 402 and § 404 permits under the CWA itself—falls to state regulatory agencies.<sup>118</sup> Thus, within the context of the modern CWA, the recycled provision gained significant power, due to both the widened scope of federal permits that required state-level review and to the increased stringency of state standards demanded by the Act.

Since 1972, § 401 has only been amended once, in 1977,<sup>119</sup> though the changes made during this revision were potentially significant to the later functioning of the Act.<sup>120</sup> First, the 1977 Act eliminated a provision exempting federal agency applicants from the certification requirements.<sup>121</sup> Second, while

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(1) and 401(a)(3) (previously §§ 21(b)(1) and 21(b)(3)); (2) the provision grandfathering in projects “lawfully commenced prior to the date of enactment of the Water Quality Improvement Act of 1970” (§ 21(b)(7)) was edited to exclude projects seeking § 402 permits, and a similar grandfather provision pertaining to projects pending after passage of the Water Quality Improvement Act of the 1970 but prior to the passage of the CWA (§ 21(b)(8)) was deleted entirely (for obvious reasons); (3) deletion of a provision addressing the “case of any activity which will affect water quality but for which there are no applicable water quality standards” (§ 21(b)(9)(A)), which was no longer relevant following passage of § 303(a), mandating the establishment of water quality standards; (4) a provision precluding federal agencies from being deemed an applicant (§ 21(b)(6)) was deleted in its entirety; and (5) the current § 401(d) was added in its entirety. *Compare* Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 21(b), 84 Stat. 108–110 (Apr. 3, 1970), *with* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 401, 84 Stat. 877–880 (Oct. 18, 1972). Additionally, several global changes or changes made elsewhere in the Act indirectly modified this provision. First, the CWA assigned authority to the Administrator, rather than the Secretary of the Interior. *See supra* note 72. Second, the 1972 Act added § 511(c) coordinating the CWA with NEPA,, and referenced the new provision in § 401. *See* Pub. L. No. 92-500, §§ 401(a)(1), 511(c), 84 Stat. 877, 893 (codified at 33 U.S.C. § 1371(c)). Third, the modern version of the CWA establishes that Native American tribes shall be treated as states for the purposes of § 401. *See supra* note 44.

113. 33 U.S.C. § 1313(a).

114. *Id.* § 1313(d)(2).

115. *Id.*

116. *Id.* § 1313(e)(2).

117. *Cf.* *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992).

118. 33 U.S.C. §§ 1341(a), (d).

119. Clean Water Act of 1977, Pub. L. No. 95–217, 91 Stat. 1566 (1977).

120. Generally, the basic structure and content of the CWA have remained largely unchanged since it was passed in 1972, though it was amended in 1977, 1981, 1987, and 2014. *See* CLAUDIA COPELAND, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 1 (2016). Most significantly, the 1987 amendments granted additional authority to states to manage nonpoint source pollution under § 319 of the Act. *Id.* at 4.

121. Clean Water Act of 1977, Pub. L. No. 95–217, § 61(b), 91 Stat. 1598 (1977).

the original Act required that states certify compliance with CWA §§ 301, 302, 306, and 307,<sup>122</sup> the 1977 Act required certification of compliance with § 303 as well.<sup>123</sup> As the next section of this Note explains, this latter change was pivotal in the Supreme Court's later application of § 401 to hydropower projects.<sup>124</sup>

### 3. *Precedent: Clarifying the Reach of § 401 to Hydropower*

The recent conflicts surrounding the interpretation of CWA § 401, elaborated upon in Part I.B, primarily relate to certification of hydropower projects. Yet, it is not clear from the plain text of § 401 whether hydropower projects produced sufficient discharge to require certification, and, if so, whether a state or tribe may impose conditions through the certification process that were unrelated to the discharge itself. Subsequent Supreme Court cases answered both questions in the affirmative, thus granting significant power to states and tribes to effectively regulate hydropower.

In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,<sup>125</sup> the Court held that the state regulatory agency could impose a minimum stream-flow requirement on the Elkhorn Hydroelectric Project near Olympic National Park.<sup>126</sup> Specifically, the Court held that § 401(a), which requires applicants seeking federal permits to obtain certification if the activity “may result in any discharge into . . . navigable waters,”<sup>127</sup> functions as a threshold condition to determine whether an applicant must seek review.<sup>128</sup> Once this threshold condition is satisfied, the Court held that § 401(d) allows state and tribal regulatory authorities to impose any conditions on the *applicant* that are necessary to ensure compliance “with any applicable effluent limitations and other limitations,” including state water quality standards.<sup>129</sup>

*PUD No. 1* also affirmed the broad potential reach of state water quality standards as applied to hydroelectric power in two additional ways. First, the Court rejected Petitioners' contention that the state could only set numeric water quality requirements. Rather, it clarified that the state agency was to ensure compliance with state water quality standards promulgated under CWA § 303,<sup>130</sup> which “must ‘consist of the designated uses of the navigable waters

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122. See Clean Water Act of 1972, Pub. L. No. 92-500, § 401(a)(1),(3),(4),(5),(7)(d), 86 Stat. 876–80 (1972).

123. Clean Water Act of 1977, Pub. L. No. 95-217, § 64, 91 Stat. 1599 (1977).

124. See *infra* text accompanying notes 130–131.

125. 511 U.S. 700 (1994).

126. *Id.* at 708, 723.

127. 33 U.S.C. § 1341(a) (emphasis added).

128. *PUD No. 1*, 511 U.S. at 711–12.

129. *Id.* (citing 33 U.S.C. § 1341(d)).

130. Petitioners also argued that § 401(a) specifies that the applicant need comply with §§ 301, 302, 306, 307, but not § 303. The Court easily rejected this challenge, noting that § 301 incorporates § 303 by reference. *Id.* at 712–13.

involved *and* the water quality criteria for such waters based upon such uses.”<sup>131</sup> The Court held that the use of “and” indicated that state water quality standards may consist of *both* numeric criteria as well as qualitative conditions related to the designated uses of the water.<sup>132</sup> Second, the Court affirmed the state agency’s ability to set standards related to water *quantity* as well as *quality* under the CWA, calling this an “artificial distinction,” and noting that decreasing the quantity of water can in turn reduce the water’s quality.<sup>133</sup> In striking down this distinction, the Court affirmed the validity of the minimum stream flow requirement, which was chiefly concerned with water quantity. After *PUD No. 1*, state and tribal agencies frequently imposed minimum stream-flow conditions on hydroelectric projects via the § 401 certification process.<sup>134</sup>

A subsequent Supreme Court case, *S.D. Warren Co. v. Maine Board of Environmental Protection*,<sup>135</sup> confirmed that hydroelectric projects emitted discharge and thus met the threshold condition for certification, § 401(a).<sup>136</sup> Though *PUD No. 1* clarified that this was a necessary first step before the state or tribal agency could apply a minimum stream flow requirement under § 401(d),<sup>137</sup> the Petitioners in *PUD No. 1* “concede[d] that, at a minimum, the project will result in two possible discharges—the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.”<sup>138</sup> By contrast, the Petitioner in *S.D. Warren Co.* argued that hydroelectric dams did not produce “discharge,” since they add nothing to the water.<sup>139</sup> Petitioners relied in part on *South Florida Water Management District v. Miccosukee Tribe*,<sup>140</sup> which held that there was no discharge under CWA § 402 where nothing was added between two connected navigable waters.<sup>141</sup> In rejecting this challenge, the *S.D. Warren Co.* Court distinguished § 401, noting that § 402 referred to “discharge of any pollutant,” whereas § 401 referred only to “discharge,” and was thus “made narrower by its specific definition requiring an ‘addition’ of a pollutant to the water.”<sup>142</sup>

In conclusion, *S.D. Warren Co.* and *PUD No. 1*, taken together, clarified that hydroelectric projects meet the condition for § 401 certification and that

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131. *Id.* at 714 (citing 33 U.S.C. § 1313(c)(2)(A)) (emphasis added).

132. *Id.* at 714–15.

133. *Id.* at 719.

134. Tarlock, *supra* note 25, at 1751–52 (detailing the history of applying section 401 certification to hydropower).

135. 547 U.S. 370 (2006).

136. *Id.* at 380–81.

137. *See supra* note 128.

138. *PUD No. 1 of Jefferson Cnty. v. Washington Dep’t of Ecology*, 511 U.S. 700, 711 (1994).

139. *S.D. Warren Co.*, 546 U.S. at 380.

140. 541 U.S. 95 (2004); *see S.D. Warren Co.*, 546 U.S. at 380 (noting Petitioner’s citation of *Miccosukee Tribe*).

141. *Miccosukee Tribe*, 541 U.S. at 112 (holding that if two bodies of water are not “meaningfully distinct,” a § 402 permit is not needed).

142. *S.D. Warren Co.*, 546 U.S. at 380–81.

the conditions imposed through certification may be qualitative, may pertain to activities other than discharge, and may relate to water quantity as well as quality.

#### 4. *Coda: Current Status of PUD No. 1*

During the Trump Administration, EPA issued the first-ever Final Rule concerning the substantive and procedural requirements for certification under CWA § 401,<sup>143</sup> which, *inter alia*, stated that state and tribal regulatory authorities only had the authority to address through § 401 reviews effects on water quality that specifically emanated from the discharge itself, not from the proposed activity as a whole.<sup>144</sup> While the Rule noted that this interpretation diverged from the Supreme Court’s ruling in *PUD No. 1*, it relied on *National Cable & Telecommunications Association v. Brand X Internet Services*,<sup>145</sup> which held that where a court did not find a particular reading unambiguous, the agency is not precluded from taking a different interpretation via regulation.<sup>146</sup>

In reasoning against the holding in *PUD No. 1*, the Final Rule relied extensively on three points made by Justice Thomas in his dissent. First, it cited his argument that the emphasis on discharge in § 401(a)(1) would be a “wasted effort” if states could “impose conditions unrelated to discharges.”<sup>147</sup> Second, it noted his contention that, because the references in § 401 pertain to other specific discharge-related provisions, the most reasonable statutory construction of the catch-all “other appropriate requirements of state law” is limited to discharge under the canon of *ejusdem generis*.<sup>148</sup> Finally, the Rule asserted that the conclusion rested on “infirm footing” based on Justice Thomas’s contention—again, expressed in the dissent—that *Chevron* deference had been applied improperly, since the Court did not find ambiguity prior to concluding the interpretation was reasonable.<sup>149</sup>

143. Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020).

144. *Id.* at 42,232. The Rule noted that *PUD No. 1* confirmed that state water quality standards may relate to designated uses and thus may consist of non-numeric criteria, *id.* at 42,233, but declined to modify this portion of the holding. *Id.* at 42,234 n.33.

145. 545 U.S. 967 (2005).

146. *Id.* at 982 (“[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, . . . would allow a court’s interpretation to override an agency’s. *Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.”) (referring to *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). See 85 Fed. Reg. at 42234 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005)).

147. 85 Fed. Reg. at 42221 (citing *PUD No. 1* of *Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 726–27 (1994) (Thomas, J., dissenting)).

148. *Id.* at 42221, 42231 (citing *PUD No. 1*, 511 U.S. at 728 (Thomas, J., dissenting)).

149. *Id.* at 42233 (citing *PUD No. 1*, 511 U.S. at 729 (Thomas, J., dissenting)). While possibly a genuine critique as written by Justice Thomas at the time of *PUD No. 1* (given his fidelity to *Chevron* at that time, see, e.g., *Brand X*, 545 U.S. at 982), the rulemaking declined to

While the current Supreme Court has not yet ruled on the Trump § 401 Rule, it suggested possible support for the Rule last spring by keeping the rule in place pending a litigation challenge. The litigation challenge commenced when the Northern District of California vacated the Trump rule in October 2021.<sup>150</sup> The judge justified this ruling in part based on the Biden Administration EPA's signal that it would not adopt a similar rule upon remand,<sup>151</sup> but also concluded that the Trump Rule was contrary to the purpose of the CWA<sup>152</sup> and that the Trump EPA took "an antithetical position to *PUD No. 1* without reasonably explaining the change," instead merely relying on Justice Thomas's dissenting opinion as the correct rationale.<sup>153</sup> After Petitioners appealed,<sup>154</sup> the Supreme Court took the highly unusual step of intervening via an emergency order, suspending vacatur pending disposition of the appeal to the Ninth Circuit.<sup>155</sup> In addition to the practical consequence of keeping the Trump rule in place, this intervention further signalled the current Supreme Court's objection toward any subsequent ruling that may challenge the Trump Administration's Final Rule. Nevertheless, the Biden Administration has in the meantime issued a new Final Rule,<sup>156</sup> which, *inter alia*, affirms the interpretation of water quality requirements' scope in *PUD No. 1*.<sup>157</sup>

While the conflict of interpretation detailed in the next section relates to the timeframe of § 401 certification, the importance of this conflict in turn depends on the status of the Trump rule rejecting *PUD No. 1*. The stipulation that states or tribes may only impose conditions directly related to hydropower projects' discharge would so weaken the certification process that the exact timing of review would have little significance.

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note that other decisions—likely ones with which the Trump Administration EPA would agree—employed similar rhetorical tactics. *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 751, 760 (2015) (holding that EPA unreasonably declined to consider costs when deciding to regulate power plants under CAA § 112(n), without conducting a formal two-step *Chevron* analysis); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (finding the application of cost-benefit analysis to CWA § 316(b) a "reasonable interpretation" of the statute, while declining to go through the step of finding ambiguity).

150. *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021).

151. *Id.* at 1026–27.

152. *Id.* at 1026.

153. *Id.* at 1025.

154. *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022).

155. *Id.* Justices Kagan, Roberts, Breyer, and Sotomayor dissented from the ruling, arguing that the "applicants have given [] no good reason to think that in the remaining time needed to decide the appeal, they will suffer irreparable harm." *Id.* (Kagan, J., dissenting).

156. Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66558 (Sept. 27, 2023) (to be codified at 40 C.F.R. §§ 121, 122, 124).

157. *Id.* at 66,592 ("Having now carefully reconsidered the 2020 Rule's 'discharge-only' interpretation of scope of review, EPA has concluded that the best reading of the statutory text is that the scope of certification is the activity subject to the Federal license or permit, not merely its potential point source discharges.").

*B. Recent Dispute Over § 401(a)(1) Timing*

A number of recent cases concerning the timing of certification under CWA § 401(a)(1) have attempted to address the correct balance between environmental review and infrastructure development. The provision provides that the period of review for the state or tribal agency to certify a federal project under § 401 before the applicable federal agency may commence its licensing or permitting process “shall not exceed one year.”<sup>158</sup> After this one-year period, authority is passed to FERC to license the project.<sup>159</sup> This sequence of duties is a balancing act: while ensuring that all federal projects are initially reviewed for compliance with federal and state water quality standards,<sup>160</sup> the circumscribed period of review is consistent with a “broad federal role [for FERC] in the development and licensing of hydroelectric power”<sup>161</sup> under the Federal Power Act<sup>162</sup> and, according to the congressional record, meant to curb the state agencies’ “dalliance or unreasonable delay.”<sup>163</sup>

In practice, many licenses are held up for much longer than one year by the § 401 certification process. As of October 2019, twenty-seven of the forty-three applications under FERC’s consideration were awaiting state agency certification, four of which had been pending for over a decade.<sup>164</sup> While the plain text of the CWA clearly suggests a one-year review period,<sup>165</sup> many state agencies circumvented this limitation by coordinating with project applicants to withdraw and resubmit their applications, thereby restarting the tolling period.<sup>166</sup>

However, the D.C. Circuit held against this practice in *Hoopa Valley Tribe v. FERC*,<sup>167</sup> reasoning that the state agencies, by directing applicants to withdraw and

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158. 33 U.S.C. § 1341(a)(1).

159. *See supra* note 80.

160. In addition to reviewing for compliance with state water quality standards, § 401(a) directs state and tribal regulatory agencies to review for compliance with CWA §§ 301, 302, 303, 306, and 307, *see supra* note 112, and CWA § 301 incorporates CWA § 303 by reference, *see supra* note 130.

161. *California v. FERC*, 495 U.S. 490, 496 (1990); *see also* *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997) (holding that FERC must incorporate state-imposed certification conditions into licenses, based on the balance implied in the relationship between the FPA and the CWA).

162. *See supra* notes 77–80 and accompanying text (describing FERC’s authority under the Federal Power Act).

163. 115 CONG. REC. 9264 (Apr. 16, 1969) (statement of Rep. Edmondson).

164. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

165. *See, e.g.,* *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972–73 (D.C. Cir. 2011) (“In imposing a one-year time limit on States to ‘act,’ Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request. This is clear from the plain text.”).

166. *See* *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920, 925 (9th Cir. 2022) (explaining that this “practice has developed over the last several decades—in California and in other states”).

167. 913 F.3d 1099 (D.C. Cir. 2019).

resubmit their applications for certification, were effectively “us[ing] § 401 to hold federal licensing hostage,” thereby “delay[ing] federal licensing proceedings and undermin[ing] FERC’s jurisdiction to regulate such matters.”<sup>168</sup> The Supreme Court denied certiorari, leaving the D.C. Circuit’s ruling in place.<sup>169</sup> The Trump § 401 Rule subsequently codified a bright-line rule that certification must take place within one year or less under the plain meaning of the statute, with no restart upon withdrawal and resubmission.<sup>170</sup> It attributed this rule to *Hoopa Valley* and quoted from *Hoopa Valley* at length.<sup>171</sup> Despite “express[ing] misgivings,” FERC initially showed tacit approval by not finding waiver of § 401 certification in a number of cases where parties withdrew and resubmitted their applications.<sup>172</sup> Following *Hoopa Valley*, FERC reversed course, issuing several orders in which it found that state environmental agencies had waived their authority to certify under § 401 where more than a year had passed since the application was initially submitted, even where the applicant withdrew and resubmitted its application.<sup>173</sup>

The D.C. Circuit likely reversed course in *Hoopa Valley* in part because of its highly unusual fact pattern. A hydroelectric project consisting of a series of dams along the California-Oregon border, for which the original license expired in 2006, failed to receive the necessary certifications from the two states.<sup>174</sup> Rather than discontinue the project, however, the operator, PacifiCorp continued to operate the dams under annual interim licenses until 2010, at which point it entered into a formal, written 221-page agreement with the state regulatory agencies of California and Oregon, along with other local stakeholders.<sup>175</sup> The effect of the signed agreement, known as the Klamath Hydroelectric Settlement Agreement (“KHSA”),<sup>176</sup> was to completely circumvent FERC’s role in the licensing process. The KHSA stipulated an arrangement by which PacifiCorp would raise funds in order to compensate them for the decommissioning of the dams through a combination of mandatory surcharges levied on PacifiCorp’s electricity consumers<sup>177</sup> and state bonds.<sup>178</sup> In the meantime, the KHSA required PacifiCorp to develop an implementation plan for complying with a TMDL<sup>179</sup> for the Klamath River, to be approved by the Oregon Department of Environmental Quality and the North

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168. *Id.* at 1104.

169. *Cal. Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650 (2019).

170. Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210, 42223 (July 13, 2020).

171. 85 Fed. Reg. at 42223.

172. *See Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920, 925 (9th Cir. 2022).

173. *See, e.g., id.* at 931 (citing *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185, at P 37 (Sept. 20, 2019), *vacated by* N.C. Dep’t of Env’t Quality v. FERC, 3 F.4th 655 (4th Cir. 2021); *Placer Cnty. Water Agency*, 167 FERC ¶ 61,056, 61,374 (Apr. 18, 2019)).

174. *Hoopa Valley*, 913 F.3d at 1101.

175. *Id.*

176. Klamath Hydroelectric Settlement Agreement, <https://perma.cc/55VG-N875> [hereinafter *KHSA*].

177. *Id.* § 4.1.1.

178. *Id.* § 4.1.2.

179. *See supra* note 110 and accompanying text (explaining the role of TMDLs within the CWA).



Coast Regional Water Quality Control Board.<sup>180</sup> Finally, to maintain the arrangement, the KHSA directed PacifiCorp to request annually that FERC voluntarily “hold [the] Project relicensing proceeding in abeyance”<sup>181</sup> and, if FERC declined to do so, “withdraw and re-file its relicensing applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA during the [period prior to the target date for commencement of decommissioning, January 1, 2020]”<sup>182</sup> in order to evade FERC’s review.

*Hoopa Valley*’s unique procedural posture is also instructive in highlighting the weaknesses of the alternative process pursued through the negotiation of the KHSA. While a large number of stakeholder interests were considered in the negotiations that led to the Agreement—including those of farmers, ranchers, conservation groups, fishermen, and Native American tribal representatives<sup>183</sup>—the Hoopa Valley tribe, whose territory was downstream of the dams, “was not a party to either the KHSA or the Amended KHSA.”<sup>184</sup> Had PacifiCorp sought official § 401 certification, California and Oregon would have been required to consider the water quality standards of downstream states and tribes.<sup>185</sup> The Hoopa Valley tribe thus petitioned FERC for a declaratory order stating that California and Oregon had waived their § 401 certification, and, as a result, PacifiCorp had not diligently prosecuted its licensing application.<sup>186</sup> Upon FERC’s refusal to grant the initial order,<sup>187</sup> and subsequent denial of a request for rehearing, the tribe appealed to the D.C. Circuit.<sup>188</sup>

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180. *KHSA* § 6.3.

181. *Id.* § 6.5.1. While couched in other language, this amounts to an acknowledgment that FERC *could* find waiver at the completion of the one-year review period, allowing it to resume relicensing proceedings, and a request that FERC decline to do so.

182. *Id.* § 6.5.3. The language from this provision uses the definition “Interim Period,” which is defined as the substituted language explains through a series of interconnected definitions in the agreement. “Interim Period” itself “refers to the period between the Effective Date and Decommissioning,” *id.* § 1.4, where the former is the date the agreement will take effect, *id.* §§ 1.4, 8.2, and the latter “means PacifiCorp’s physical removal from a facility of any equipment and personal property that PacifiCorp determines has salvage value, and physical disconnection of the facility from PacifiCorp’s transmission grid,” *id.* § 1.4. The agreement further provides that target date for the *commencement* of the Decommissioning is January 1, 2020, and that the process should be completed by December 31, 2020. *See id.* at §§ 7.3.1, E2-5 (exhibit translating the language in § 7.3.1); *see also id.* § 7.3.3 (providing further context regarding the relationship between the dates provided in § 7.3.1). While there is some ambiguity in the definition of the Interim Period as to whether “Decommissioning” means the commencement or the completion of Decommissioning, the above substitution employs the most conservative reading.

183. *Hoopa Valley*, 913 F.3d at 1101.

184. *Id.* at 1102.

185. *See supra* note 44.

186. *Hoopa Valley*, 913 F.3d at 1102.

187. *See supra* text accompanying note 173 (describing FERC’s initial tacit approval of withdrawal and resubmission prior to *Hoopa Valley*). Additionally, the fact that *Hoopa Valley* unusually involved a *decommissioning*, rather than a licensing, of a dam may also partially explain FERC’s clear abdication of responsibility in this fact pattern.

188. *Hoopa Valley*, 913 F.3d at 1102.

The flagrancy with which the parties to the KHSA sought to evade the normal review process has complicated subsequent attempts to apply the holding in facially similar cases. Following *Hoopa Valley*, FERC and State regulatory agencies generally agree that an *applicant* may withdraw and resubmit an application to restart the tolling period; however, for the *state* to do so constitutes an unlawful extension of the review period in violation of the plain text of the CWA, thereby constituting a waiver of certification.<sup>189</sup> However, two questions remain open after *Hoopa Valley*: (1) the degree of coordination between state agency and applicant that would constitute waiver if an applicant withdrew and resubmitted its application, and (2) the degree to which the resubmitted application must differ from the original.<sup>190</sup>

*North Carolina Department of Environmental Quality v. FERC*,<sup>191</sup> a subsequent Fourth Circuit case involving a license to operate a hydroelectric project in North Carolina, illustrates the divergent interpretations of the language in *Hoopa Valley* regarding these questions. Both the state regulatory agency in *North Carolina* (“NCDEQ”) and FERC framed their respective arguments in reference to *Hoopa Valley*, despite its lack of binding authority as an opinion from another circuit.<sup>192</sup>

First, while the court in *Hoopa Valley* referred to coordination generally throughout its opinion, NCDEQ framed the question presented more narrowly as “whether a state waives its Section 401 authority when, *pursuant to an agreement between the state and applicant*, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year.”<sup>193</sup> Based on this framing, NCDEQ argued that since it did not have a formal agreement with the applicant, there was insufficient coordination to constitute waiver.<sup>194</sup> However, based on the dicta on coordination from other parts of *Hoopa Valley*, FERC disagreed that a formal agreement was necessary for

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189. See Reply Brief of Petitioner at 14, *N.C. Dept of Env’t Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021) (Nos. 20-1655 (L), 20-1671)), 2021 WL 238654 [hereinafter *NCDEQ Reply Brief*] (“Congress enacted a bright line with Section 401: a waiver occurs when a state fails or refuses to act on a certification request within one year. 33 U.S.C. § 1341(a). If the applicant chooses to withdraw and resubmit its request, there is no failure or refusal to act on the part of the state and thus no waiver under the statute.”).

190. *Id.* at 3–4 (articulating FERC’s test for waiver); see also *Cal. State Water Res. Control Bd.*, 43 F.4th at 931–32 (same).

191. 3 F.4th 655 (4th Cir. 2021).

192. *Id.* at 667, 663.

193. *NCDEQ Reply Brief* at 20 (citing *Hoopa Valley*, 913 F.3d at 1103) (emphasis in original).

194. *NCDEQ Reply Brief* at 21–22 (finding [FERC’s] “waiver decision . . . not supported by substantial evidence in the record” and that this constitutes “a separate and independent basis for vacatur of [FERC’s] decision” even if FERC’s coordination test were adopted). In fact, the state argued that email communications were not coordination at all, but rather “diligent processing of the application.” *Id.* at 5.

coordination.<sup>195</sup> While the Fourth Circuit sided with the state agency, concluding that “it must take more than routine informational emails to show coordination,” it declined to affirmatively state what *would* be required.<sup>196</sup>

Second, the court in *Hoopa Valley* “decline[d] to resolve” the question of whether it would similarly find fault with the withdrawal of one agreement only to substitute a different one in its place; since the KHSA directed PacificCorp to withdraw-and-resubmit an *identical* version of the agreement each year, the court found that it “need not determine how different a request must be to constitute a ‘new request.’”<sup>197</sup> The parties in *North Carolina* each read this language as support for their respective positions. FERC argued that the similarity between the applications withdrawn and resubmitted supported its finding of waiver,<sup>198</sup> while NCDEQ argued that this conclusion would lead to gamesmanship in which applicants pointlessly added new material to otherwise identical applications during resubmission to avoid a finding of waiver.<sup>199</sup> The Fourth Circuit declined to address this disagreement, concluding that the “supposed coordination” was the dispositive one for FERC, and the “‘new application’ issue” was secondary.<sup>200</sup>

Together, the rulings in *Hoopa Valley* and *North Carolina* have created great uncertainty around the types or frequency of coordination that may trigger waiver upon the applicant’s withdrawal and resubmission, as well as whether a new application must be substantially different than that previously submitted to avoid waiver.<sup>201</sup> The Biden Administration conceded as much by declining to take a position in its recently published Final Rule,<sup>202</sup> citing both *Hoopa Valley* and *North Carolina* and noting that “drawing a bright regulatory line on this issue is challenging, and the law in this area is dynamic.”<sup>203</sup> Instead, the Biden

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195. Brief for Respondent Fed. Energy Regul. Comm’n at 39–40, *N.C. Dept of Env’t Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021) (Nos. 20-1655 (L), 20-1671), 2020 WL 7907033 [hereinafter *FERC Brief*] (citing *Hoopa Valley*, 913 F.3d at 1104–05).

196. *N.C. Dep’t of Env’t Quality*, 3 F.4th at 675. The court also reasoned—less convincingly, given the enormous loophole that would be created by such an interpretation—that the statute required the state regulatory agency “to act” within one year rather than specifically to certify or deny compliance with state water quality standards within that timeframe, and, thus, given the lack of specificity in this wording choice, the North Carolina Department of Environmental Quality did not necessarily breach its obligations. *Id.* at 670.

197. *Hoopa Valley*, 913 F.3d at 1104.

198. *FERC Brief* at 34–35 (citing *Hoopa Valley*, 913 F.3d 1099 at 1104).

199. *NCDEQ Reply Brief* at 5–7.

200. *N.C. Dep’t of Env’t Quality*, 3 F.4th at 675–76.

201. *See generally, e.g.*, *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920 (9th Cir. 2022) (disagreement between FERC and the California State Water Resources Control Board around whether there was sufficient coordination to constitute waiver of § 401).

202. Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66558 (Sept. 27, 2023) (to be codified at 40 C.F.R. pts. 121, 122, 124).

203. *Id.* at 66584.

Administration Rule suggests that states and tribal authorities either promulgate their own regulations on the issue or make case-specific decisions.<sup>204</sup>

Where, as in the case of *North Carolina*, the required documents for environmental review are not completed within the one-year timeframe,<sup>205</sup> there is additional disagreement on acceptable alternatives to withdrawal-and-resubmission. In particular, a Second Circuit case pre-dating *Hoopa Valley*<sup>206</sup> proposed instead that in this scenario, the state agency could deny certification without prejudice.<sup>207</sup> Without taking a firm position on whether this alternative would be permissible, the *Hoopa Valley* court referenced this dicta,<sup>208</sup> as did FERC in its briefing for *North Carolina*.<sup>209</sup> The D.C. Circuit upheld such a denial without prejudice as within the scope of “act[ion]” required by § 401(a)(1) in *Turlock Irrigation District v. FERC*,<sup>210</sup> a recent case on the provision.<sup>211</sup>

The alternative of denial without prejudice suffers from a similar line-drawing problem as withdrawal-and-resubmission. The court in *Turlock* dismissed the Petitioners’ contention that “State agencies could extend the time for decision indefinitely by denying one certification request after another without prejudice,” implying that such a “slippery slope” argument was based on implausible predictions.<sup>212</sup> In light of the similar tactic used in *Hoopa Valley* to similar effect, however, the claim of implausibility rings hollow.

Both the positions of the state agencies and of FERC have merit in this debate. The plain meaning of § 401, as well as the legislative history,<sup>213</sup> both clearly suggest that Congress intended to provide a limited and delineated timeframe for environmental review. On the other hand, while NEPA reform may reduce the delay federally,<sup>214</sup> the state review processes can be almost as onerous and may make the one-year timeframe infeasible.<sup>215</sup> Moreover, it is legitimately difficult to draw a bright line rule on the appropriate amount of coordination: even if the parties to a dispute were to agree something more than “routine

204. *Id.*

205. In *North Carolina*, one reason for the delayed submission was FERC’s delay in submitting the requisite Environmental Assessment under NEPA. *N.C. Dept of Env’t Quality*, 3 F.4th at 662; *see also Cal. State Water Res. Control Bd.*, 43 F.4th at 924–25 (explaining the onerous requirements surrounding the California Environmental Quality Act (analogous to NEPA) and that they may take more than one year to complete, thus delaying the § 401 certification process significantly).

206. *New York State Dep’t of Env’t Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018).

207. *Id.* at 455–56.

208. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019).

209. *FERC Brief* at 31–32.

210. 36 F.4th 1179 (D.C. Cir. 2022), *cert denied*, 143 S. Ct. 1746 (2023).

211. *Id.* at 1183. The reference to whether this constitutes “action” under the statute rings of the reasoning employed in *N.C. Dep’t of Env’t Quality*. *See supra* note 196.

212. *Id.* at 1184.

213. *See supra* notes 160–163 and accompanying text.

214. *See supra* text accompanying notes 31–41.

215. *See supra* note 205.

informational emails” is needed, there is great uncertainty around the tone, frequency, and information that may be provided without crossing the line.<sup>216</sup>

C. *Administrative Deference in Adjudicating the Conflict Over § 401(a)(1)*

Stepping back from the specifics of the dispute over the timing of § 401 review, the means of resolving this conflict are fundamentally lopsided, since EPA alone may issue binding regulations clarifying the § 401 certification process. EPA has taken advantage of this opportunity under both the Trump and Biden Administrations.<sup>217</sup> However, as courts adjudicating conflicts over § 401 have repeatedly emphasized, FERC may not interpret the CWA, since it does not administer the statute.<sup>218</sup> This inequity turns on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>219</sup> which held that where a statute is silent or ambiguous on a question of law, the agency administering the statute alone should be entitled to deference in interpreting the statute.<sup>220</sup> In *City of Arlington v. F.C.C.*,<sup>221</sup> the Supreme Court further held that an agency is entitled to *Chevron* deference for reasonable interpretations pertaining to the scope of its authority under its organic statute:<sup>222</sup> it is this specific authority that EPA draws on in its recent regulations interpreting the bounds for the timing of § 401 review.

However, deferring to EPA’s interpretation of § 401 under *Chevron* simply because it administers the CWA wrongly prioritizes environmental review over infrastructure development rather than balancing these two interests against one another. This is not to suggest that FERC’s interpretation should necessarily prevail: for example, rather than embracing FERC’s strict definition of coordination, in which any communication between the applicant and the state

216. *See supra* text accompanying note 196.

217. The Trump Administration EPA attempted to draw a bright-line rule of one-year review, *see supra* text accompanying note 171, while the Biden administration’s Proposed Rule acknowledges that subtleties of individual cases may warrant different outcomes, *see supra* text accompanying notes 203–204.

218. *See, e.g.*, N.C. Dep’t of Env’t Quality v. FERC, 3 F.4th 655, 666–67 (4th Cir. 2021) (“Because FERC does not administer the Clean Water Act, we owe no deference to its interpretation of § 401.”); Hoopa Valley Tribe v. FERC, 913 F.3d 1099, 1102 (D.C. Cir. 2019) (“In conducting the review in this case, because FERC is not the agency charged with administering the CWA, the Court owes no deference to its interpretation of Section 401 or its conclusion regarding the states’ waiver.”); Alcoa Power Generating Inc. v. FERC, 643 F.3d 963, 972 (D.C. Cir. 2011) (“[T]he Commission concedes that its interpretation of Section 401 is entitled to no deference by the court because the Environmental Protection Agency, and not the Commission, is charged with administering the Clean Water Act.”); Ala. Rivers All. v. FERC, 325 F.3d 290, 296–97 (D.C. Cir. 2003) (“The Commission’s interpretation of the CWA is not entitled to the usual judicial deference, however, because the Environmental Protection Agency (EPA)—and not FERC—is charged with administering the statute.”).

219. 467 U.S. 837 (1984).

220. *Id.* at 842–43.

221. 569 U.S. 290 (2013).

222. *Id.* at 296–97.

or tribal environmental agency may amount to impermissible coordination and bar withdrawal-and-resubmission by the applicant, it may make sense to permit some reasons for delaying beyond the one-year allocated time period (e.g., FERC's owned delayed issuance of required environmental documents) but not others (e.g., the state regulatory agency's failure to communicate in a timely manner). Whatever balance the courts strike, they should consider EPA's interpretation of its authority only to the extent it is persuasive, and not merely reasonable. In other words, as Part II argues, EPA's interpretation should warrant *Skidmore* rather than *Chevron* deference.

Before turning to that argument, however, it is first necessary to address several lines of critique that, taking for granted the need to strike an equitable balance between environmental review and infrastructure development, would still find application of current administrative law principles to the § 401 conflict unproblematic. The first two such objections would not reach *Chevron* step 2, the step at which EPA is currently given deference; the final objection would find such deference to EPA unlikely to significantly bolster the agency's position vis-à-vis FERC.<sup>223</sup>

First, one objection is that the unambiguous plain meaning of the statutory text should enable courts to resolve a dispute over the timing of § 401 review at *Chevron* step 1,<sup>224</sup> which would in turn imply no deference should be given to *either* agency; rather, one year after the application, waiver should be automatically granted.<sup>225</sup> However, while the disagreement between the Trump and Biden EPAs does not, on its own, preclude the resolution of the issue on plain

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223. A fourth objection, difficult to respond to at the time of writing, is that the entire analysis of which agency should be afforded *Chevron* deference is irrelevant because, in the view of some observers, the Supreme Court is poised to overturn the *Chevron* doctrine in a case to be decided this term, *Loper-Bright Enterprises v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S.Ct. 2429 (March 27, 2023). In petitioning for a writ of certiorari, the Petitioners presented two questions: (1) whether the case involved proper application of *Chevron* and (2) “[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.” Petition for Writ of Certiorari at i–ii, *Loper-Bright Enterprises v. Raimondo* (2022) (No. 22-451). The Court granted cert only for the second question, 143 S.Ct. 2429, signifying its interest in potentially overturning or, at a minimum, reconsidering the scope of *Chevron*. It is too early to tell, however, whether the Supreme Court will overturn *Chevron*, or, if it does, whether it will replace it with something like the *Skidmore* framework this piece advocates should be applied in the context of shared regulatory space, or with a different framework entirely. Such speculation is beyond the scope of this piece, but of course relevant to the ultimate administration of statutes such as the CWA.

224. *See supra* note 165 and accompanying text (articulating the perspective that the § 401 timing dispute can be resolved on plain meaning).

225. *City of Arlington*, 569 U.S. at 296. (“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.”).

meaning,<sup>226</sup> it at least suggests that the issue may be less clear cut than it appears at first glance. Moreover, as the *North Carolina* court pointed out, there is textual ambiguity within the meaning of the words “to act” in the statute, which are used in place of more precise language requiring the state or tribal agency to specifically certify or deny an application within one year.<sup>227</sup> Additionally, the controversy surrounding whether denial without prejudice is allowed within the confines of statutory text points to further statutory ambiguity.<sup>228</sup> Taken together, these ambiguities suggest the issue of whether withdrawal-and-resubmission is a valid tactic for restarting the one-year certification clock is more appropriately analyzed under *Chevron* step 2 than step 1.

Second, even if the issue cannot be resolved on plain meaning, another objection is that EPA should not be granted deference for its interpretation under the “major questions doctrine” announced in *West Virginia v. EPA*,<sup>229</sup> which requires agencies to “point to ‘clear congressional authorization’” when assuming authority over issues of “economic and political significance.”<sup>230</sup> As recent scholarship has observed, analyzing this conflict under the post-*West Virginia* major question doctrine would “flip[] the entire analysis,” such that neither *Chevron* step 1 or step 2 is reached.<sup>231</sup>

Under the strongest version of the major questions doctrine, the fact that Congress did not explicitly permit withdrawal-and-resubmission under the CWA categorically precludes EPA from taking this interpretation. While this

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226. See, e.g., *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 334–35 (1994) (resolving based on plain meaning a circuit conflict over the interpretation of a provision in the Resource Conservation and Recovery Act).

227. See *supra* note 196.

228. See *supra* text accompanying notes 205–211.

229. 142 S. Ct. 2587 (2022).

230. *Id.* at 2595. While this piece focuses on *West Virginia*, the Supreme Court's jurisprudence on the major questions doctrine is ever evolving. Most recently, the Court invoked the doctrine in *Biden v. Nebraska*, 143 S.Ct. 2355 (2023). In that opinion, Justice Barrett notably filed a separate concurrence in which she envisioned the doctrine to be merely “an interpretive tool” for determining whether Congress delegated authority, rather than “a normative rule . . . discourag[ing] Congress from empowering agencies.” *Id.* 2378, 2381 (Barrett, J., concurring) (emphasis in original). However, the majority opinion in *Nebraska*—also written by Chief Justice Roberts, as in *West Virginia*—frequently cited *West Virginia* and largely echoed its reasoning, including by demanding a clear statement where an agency interpreted a provision deemed to be “of deep ‘economic and political significance.’” *Id.* at 2375 (Roberts, C.J., writing for the majority) (citation omitted).

231. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1036 (2023), <https://perma.cc/B6MH-BKQ8>; see also generally Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263–64 (2022), <https://perma.cc/9SBW-FYL2> (arguing that four recent major questions cases—*Ala. Ass'n of Realtors v. Dept. of Health and Hum. Servs.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, *Biden v. Missouri*, and *West Virginia v. EPA*—“unhitch[] the major questions exception from *Chevron*, which has been silently ousted from its position as the starting point for evaluating whether an agency can exert regulatory authority.”)

interpretation of the major questions doctrine best describes the concurrence rather than the majority opinion in *West Virginia*,<sup>232</sup> perhaps the strongest argument for applying the majority's version of the "major questions doctrine" to a § 401 conflict is the one already made throughout this section: by allowing withdrawal-and-resubmission without limitation, EPA could amass undue power.<sup>233</sup> Taken to the extreme, endless repeats of the scenario in *Hoopa Valley* would make infrastructure development untenable. Cast in this light, EPA's interpretation of § 401 may be one of "economic and political significance" of the type Congress did not intend to delegate.<sup>234</sup>

While it is still too early to predict decisively how the "major questions doctrine" will be applied in future cases, several of the factors that the Court pointed to in *West Virginia* as disqualifying EPA's interpretation of the Clean Air Act § 111(d) do not apply to this conflict. First, there is no evidence of Congress considering and rejecting language allowing for withdrawal-and-resubmission, as it did with cap-and-trade and other economic solutions similar to generation shifting.<sup>235</sup> Additionally, determining the length of time for an environmental review falls squarely within EPA's expertise, counter to the Court's interpretation of EPA's expertise regarding electricity regulation.<sup>236</sup>

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232. *West Virginia*, 142 S. Ct. at 2619–20 (Gorsuch, J., concurring) (analogizing the major questions doctrine to the non-delegation doctrine).

233. Importantly, this would be a somewhat novel application of the major questions doctrine. The cases invoking the doctrine standardly allege that the challenged agency overinterpreted its authority under a statute it administers. *See, e.g.,* Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2487 (2021) ("Originally passed in 1944, this provision has rarely been invoked—and never before to justify an eviction moratorium."); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."); *West Virginia*, 142 S. Ct. at 2613 ("Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d)."); Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023) ("The Secretary has never previously claimed powers of this magnitude under the HEROES Act."). However, the previous cases in this line have centered around agencies allegedly arrogating power at the expense of *individuals*; in fact, Justice Gorsuch has asserted this to be a primary motivation for invoking the doctrine. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring) ("If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress."). By contrast, a major questions challenge to EPA in this context would involve an allegation that EPA had overinterpreted its authority at the expense of *another agency*, namely, FERC (or another agency requiring timely § 401 certification to fulfill its duties, such as the Corps).

234. *West Virginia*, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

235. *Id.* at 2614.

236. *Id.* at 2612–13.



A third and final objection to the claim that principles of administrative deference wrongly tilt resolution of this conflict in favor of EPA rests not on the inapplicability of *Chevron*, but on the weakness of EPA's own position. The logic of this objection turns on whether states should be afforded something akin to *Auer* deference, i.e., the level of deference granted to an agency's interpretations of its own rules,<sup>237</sup> when interpreting federal law. Since in most circumstances authority is delegated to the states under § 401,<sup>238</sup> most conflicts with FERC over § 401 arise between FERC and the states. Assuming that state interpretations of EPA regulations are not entitled to deference because the states, like FERC, do not administer the CWA, conflicts between state agencies and FERC over the timing of § 401 review would be interpreted *de novo*. Under this logic, there is no need to find a different structure for deference that rights the balance between EPA and FERC, since EPA's ability to issue regulations is of little consequence. But, in fact, "[w]hether a state agency is entitled to deference when administering federal law is not well settled,"<sup>239</sup> and both theory and lower court precedent across several circuits supports affording deference to a state agency when such authority is explicitly delegated to that agency to administer a particular federal statute.

First, theoretically, there are several reasons why, under a cooperative federalism framework, the state agency interpretation should be regarded as an "authoritative" or "official position," as is required for *Auer* deference.<sup>240</sup> First, EPA has a coordinating role in the § 401 process.<sup>241</sup> Second, it exercises extensive oversight over state water quality standards,<sup>242</sup> which, by the Court's own admission, provide the state water quality standards with a "federal character."<sup>243</sup>

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237. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "plainly erroneous or inconsistent with the regulation.") (citations omitted).

238. Under limited circumstances, EPA may assume responsibility for the program where the state agency has failed, as provided under § 21(b)(1) of the Water Quality Improvement Act of 1970, *see supra* text accompanying notes 81–82, copied over to the current CWA as § 401(a). (*See supra* note 112 for a summary of changes between the 1970 version and current version of the provision.) In most cases, however, states and tribal agencies administer the program.

239. *Grand Canyon Tr. v. Energy Fuels Res. (U.S.A.) Inc.*, 269 F. Supp. 3d 1173, 1194 (D. Utah 2017).

240. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (citation omitted).

241. Section § 401(a)(2) provides that "[u]pon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator [of EPA] of such application and certification." 33 U.S.C. § 1341(a)(2). Additionally, it requires the Administrator to determine the impact on the water quality of "any other state," to notify that state of the potential violation; that state may then request the federal licensing or permitting agency to host a public hearing, at which the Administrator must submit an evaluation and recommendations to be incorporated into the final license. *Id.*

242. *See supra* notes 113–116 and accompanying text.

243. *See supra* note 117 and accompanying text.

Finally, the Supreme Court recently held in *Kisor v. Wilkie*<sup>244</sup> that *Auer* deference is only afforded where “the agency’s interpretation [of its own regulations] . . . implicate[s] its substantive expertise” because “[a]dministrative knowledge and experience largely ‘account [for] the presumption that Congress delegates interpretive lawmaking power to the agency.’”<sup>245</sup> Since the cooperative federalist model is premised upon leveraging state expertise,<sup>246</sup> it is consistent with the theoretical basis for *Auer* deference—as stated in *Kisor*<sup>247</sup>—to afford at least some deference to the state agency interpreting a federal statute it was explicitly delegated authority to administer.

In addition to these theoretical justifications, several lower courts have found that state environmental agencies were entitled to some deference in interpreting environmental regulations within a cooperative federalist framework. In *Grand Canyon Trust v. Energy Fuel Resources (U.S.A.), Inc.*,<sup>248</sup> the U.S. District Court of Utah held that Utah’s Department of Air Quality was entitled to “some deference” in interpreting the radon emission regulations promulgated pursuant to the CAA “because it [was] applying federal regulations pursuant to Congress’s express authorization in a manner that is not inconsistent with federal law and is reasonable.”<sup>249</sup> The District Court relied on the fact that under the CAA—like the CWA—the “EPA serves a ‘limited but vital role in enforcing [CAA standards],’” putting the “primary responsibilit[y]” to interpret the statute on the states.<sup>250</sup> The Ninth Circuit and First Circuit reached similar results in two cases<sup>251</sup> interpreting state regulatory authority under the Comprehensive

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244. 139 S. Ct. 2400 (2019).

245. *Id.* at 2417 (citing *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 153 (1991)).

246. See Memorandum from Michael S. Regan, Administrator of EPA, to Assistant, Regional, Deputy Assistant, and Deputy Regional Administrators, Principles and Best Practices for Oversight of State Implementation and Enforcement of Federal Environmental Laws, EPA (Feb. 17, 2023), <https://perma.cc/3GT5-EVPX> (“The [EPA] recognizes the importance of early, meaningful, and substantial involvement by the agency’s state partners in the development, implementation, and enforcement of the nation’s environmental programs. *Each state has a unique understanding of longstanding and emerging environmental and public health challenges within its jurisdiction; relationships with communities, regulated businesses, local government, and the wide range of interested stakeholders; and firsthand knowledge of how to design programs to address those challenges.*”) (emphasis added).

247. See *supra* note 245.

248. 269 F. Supp. 3d 1173 (D. Utah 2017).

249. *Id.* at 1196.

250. *Id.* (citing *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 491 (2004)) (substitution in original). As these quotes indicate, the Court found EPA’s supervising role important, but particularly emphasized the role of the states, noting that under “the unique circumstances of cooperative federalism embodied in the Clean Air Act, . . . a separate and distinct sovereign [i.e., the state] has accepted the responsibility of implementing the law of another sovereign [i.e., the federal government].” *Id.* at 1194 n.10.

251. *Arizona v. City of Tucson*, 761 F.3d 1005, 1014–15 (9th Cir. 2014); *City of Bangor v. Citizens Commc’ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008). The district court in *Grand Canyon Tr.* cited

Environmental Response Compensation and Liability Act (“CERCLA”),<sup>252</sup> a statute directed at the cleanup of hazardous waste sites, which, like the CAA and CWA, explicitly contemplates a specific role for states under a cooperative federalism framework.<sup>253</sup> Echoing the third theoretical justification provided above, each of these circuits found the state agency should be afforded some deference in recognition of its expertise.<sup>254</sup>

While these theoretical arguments and lower court precedent do not conclusively prove that state environmental agencies warrant *Auer* deference—as noted above, this question remains unsettled—at a minimum, they should counsel against complacency regarding a rethinking of the principles of administrative law that should apply to this conflict. To reiterate the finding of the *Grand Canyon Trust* court, the state agency deserved deference precisely “because it [was] applying federal regulations pursuant to Congress’s express authorization”:<sup>255</sup> that is, EPA’s regulations may directly influence state processes—in the case of § 401, the certification process—while FERC lacks the authority to guide the process in the same manner.

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In conclusion, current doctrines of administrative law suggest the § 401 conflict is most appropriately analyzed under *Chevron* step 2, which in turn would grant deference to EPA, as the administrator of the statute, to interpret the scope of its authority. Under *Chevron*, this applies as long as EPA’s interpretation is reasonable, whether or not it is persuasive or desirable from a policy perspective.

## II. NEW MODEL FOR ADMINISTRATIVE DEFERENCE ALLOCATION

This Part argues that where two or more agencies share regulatory space in coordinating the development of a specific project, each agency should be entitled to *Skidmore* deference for its interpretation of the statute it administers but should not be granted *Chevron* deference. Shared regulatory space—in which multiple agencies jointly administer a single statute or area of the law—is

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both of these decisions as persuasive authority. *Grand Canyon Tr.*, 269 F. Supp. 3d at 1195.

252. 42 U.S.C. §§ 9601–9675.

253. CERCLA § 104, which authorizes the President to undertake removal or remedial actions to clean up hazardous waste sites, expressly requires him to sign a coordination agreement with the state officials where the cleanup will take place, dictating state responsibility for various actions. 42 U.S.C. § 9604(c)(3); *see also City of Bangor*, 532 F.3d at 89–90. Additionally, at issue in both *Arizona* and *City of Bangor*, the statute explicitly allows either the federal government or a state to settle with a liable party, thereby protecting that liable party from further claims requesting financial contribution toward the clean-up of a hazardous waste site. *Id.* § 9613(f)(2)–(3).

254. *Arizona*, 761 F.3d at 1014–15 (citing *City of Bangor*, 532 F.3d at 94).

255. *See supra* note 249 (emphasis added).

prevalent across the government,<sup>256</sup> and a convoluted body of case law addresses the assignment of deference where multiple agencies administer a single statute.<sup>257</sup> This Note looks to the new NEPA § 107(a), as proposed by the FRA (herein “§ 107(a)”)<sup>258</sup> as a model for an extra-statutory structure that, if allowed to supersede the statute in terms of assigning deference, would provide a flexible, project-level approach to shared regulatory space.

Many of the permitting reform provisions of the FRA originally appeared as part of a package introduced by Senator Joe Manchin with the support of Democratic party leaders,<sup>259</sup> first on the Senate Committee on Energy & Natural Resources website in September 2022,<sup>260</sup> and subsequently in December 2022, as a proposed amendment to an annual defense spending authorization.<sup>261</sup> Though Senator Manchin failed to secure the requisite sixty votes to pass the filibuster in December, he reintroduced permitting legislation in May 2023,<sup>262</sup> restarting the negotiations that led to permitting reform’s inclusion in the FRA. This Note is not intended as an endorsement of all NEPA-related FRA revisions or of permitting reform as a whole, which has faced fierce criticism,<sup>263</sup>

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256. *See infra* Part II.A.

257. *See infra* Part II.B.

258. *FRA* at 137 Stat. 40–41 (codified as 42 U.S.C. § 4336a(a)).

259. *See* Jeremy Dillon et al., *Democrats open to Manchin’s push for permitting reform*, E&E NEWS (July 29, 2022), <https://perma.cc/P8WY-BW6H>.

260. Energy Independence and Security Act of 2022, <https://perma.cc/Q6BY-9GAL>. Originally, Senate Leader Chuck Schumer, House Speaker Nancy Pelosi, and President Biden agreed to include the permitting reform package as part of a bill to extend government funding before the end of the fiscal year. *Manchin Releases Comprehensive Permitting Reform Text to Be Included in Continuing Resolution*, SENATE COMM. ON ENERGY AND NAT. RES. (Sept. 21, 2022), <https://perma.cc/UQP4-SCPY>. However, when the combined package bill did not appear to have sufficient votes to pass, Senator Manchin pulled the permitting package to ensure the government could secure the funds necessary to run through the end of the year. Jeremy Dillon, *Manchin backs off permitting reform in spending bill*, E&E NEWS (Sept. 27, 2022), <https://perma.cc/QG25-N9M8>.

261. S.A. 6512 & S.A. 6513, 117th Cong. (2022) [herein *Manchin Bill*]. The majority of the bill was introduced as SA 6513 on Senator Manchin’s behalf by Senator Chuck Schumer, as part of Schumer’s commitment to support Manchin’s proposal, *see supra* note 259. However, due to the controversy surrounding the Mountain Valley Pipeline section of this proposal, *see infra* note 263, Senator Manchin introduced the package as a separate amendment, S.A. 6512.

262. Jeremy Dillon, *Manchin tries again on permitting overhaul*, E&E NEWS (May 2, 2023), <https://perma.cc/B4ZE-68K3>.

263. In particular, liberal members of Congress have voiced concerns in response to Manchin’s earlier proposals that expediting review for high-priority projects would further exclude long-marginalized communities from the decision-making process. *See* Letter from Members of Congress to Speaker Pelosi and Leader Hoyer (Sept. 12, 2022), <https://perma.cc/HU9H-QHNX>. They have also bristled at a provision included in each iteration of the permitting reform bills which would streamline approval and prohibit judicial review of the Mountain Valley Pipeline, a long-delayed and controversial pipeline in Senator Manchin’s home state of West Virginia. *See, e.g.*, Bernard Sanders, *Oppose the Big Oil Side Deal*, U.S.

but instead focuses narrowly on the extra-statutory structure proposed in new NEPA § 107(a) as created by the FRA.<sup>264</sup> New § 107(a) would allow FERC and EPA to, in addition to administering their own respective statutes, act as joint lead agencies under an extra-statutory wrapper, which, under the relevant case law pertaining to multi-agency administration would suggest that EPA would be entitled to *Skidmore* deference for its interpretation of CWA § 401.

### A. Current Instances of Shared Regulatory Space

The prevalence of shared regulatory space—both in environmental law and otherwise—suggests that the current model of determining deference based on the agency administering the statute is ripe for reconsideration.

Environmental law is replete with examples of single statutes creating shared regulatory space. As previously discussed, the CWA itself splits

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SENATE (Sept. 23, 2022), <https://perma.cc/YF24-G8LP>. Various NEPA-related litigation challenges have prevented the operation of the pipeline since the Forest Service initially approved it in December 2017. *Mountain Valley Pipeline and the Jefferson National Forest*, U.S. DEP'T OF AGRIC., FOREST SERV., <https://perma.cc/3US2-QG77>. However, the FRA required FERC as well as the Secretaries of the Interior, Agriculture, and Army to “to continue to maintain such authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline,” and commanded the Secretary of Army to “issue all [additional] permits or verifications necessary” for the pipeline’s construction, operation, and maintenance within twenty-one days of the Act’s enactment. *FRA* § 324(c)(2), (d), 137 Stat. 47. The FRA also prohibited further judicial review of actions “necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline.” *Id.* § 324(e). Environmental and community groups, arguing that this provision violated separation of powers, sued in the Fourth Circuit to stay issuance of the necessary permits and construction of the pipeline, which the court granted. *Wilderness Society v. U.S. Forest Service*, No. 23-1592 (4th Cir. filed July 10, 2023); *The Wilderness Society v. U.S. Forest Service*, No. 23-1594 (4th Cir. filed July 10, 2023); *Appalachian Voices v. U.S. Dep’t of the Interior*, No. 23-1384 (4th Cir. filed July 11, 2023); *see also* Coral Davenport, *Mountain Valley Pipeline Halted as Legal Wrangling Heats Up*, N.Y. TIMES (July 12, 2023), <https://perma.cc/XU3J-YGL4>. Mountain Valley Pipeline LLC asked the Supreme Court to vacate the stay via the emergency docket, arguing that the stay “defied Congress’s clear commands in Section 324 of the Fiscal Responsibility Act of 2023.” Emergency Application to Vacate the Stays of the U.S. Court of Appeals for the Fourth Circuit (Nos. 23-1592, 23-1594, & 23-1384) at 1, Mountain Valley Pipeline, LLC v. The Wilderness Society (No. 23A35), <https://perma.cc/L7T3-XZPA>. The Supreme Court vacated the stay on July 27, 2023. *See Mountain Valley Pipeline, LLC v. The Wilderness Society*, SCOTUSBLOG, <https://perma.cc/UE5B-8USX>. On remand the Fourth Circuit agreed it lacked jurisdiction under FRA § 324(e). *Appalachian Voices v. United States Dep’t of the Interior*, No. 23-1384, at \*8–9 (4th Cir. Aug. 11, 2023). As with Manchin’s original permit reform package, much of the resistance to the FRA has focused on the pipeline-related provisions. *See, e.g.*, Jarod Facundo, *Manchin’s Pipeline Payoff Strangles Future Permitting Reform Negotiations*, AMERICAN PROSPECT (June 2, 2023), <https://perma.cc/8UYE-YCZ9>.

264. *FRA* at 137 Stat. 40–41 (codified as 42 U.S.C. § 4336a(a)).

permitting authority between EPA and the Corps.<sup>265</sup> The National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”) jointly administer the ESA and split authority for listing and protecting endangered or threatened species at the species level: NMFS administers the ESA with respect to most marine and anadromous species, while FWS does so with respect to primarily terrestrial and freshwater species.<sup>266</sup> The ESA also established the Endangered Species Committee, which “function[s] as an administrative court of last resort,”<sup>267</sup> and is composed of secretaries from five different federal agencies,<sup>268</sup> the Chairman of the Council of Economic Advisors,<sup>269</sup> and one member from each affected state.<sup>270</sup> The Clean Air Act requires EPA to consult the Department of Transportation in setting transportation control measures<sup>271</sup> and the Department of the Interior on various issues related to land use.<sup>272</sup> The Resource Conservation and Recovery Act provides to the Department of the Interior “exclusive responsibility for carrying out any requirement of subtitle C of [the] Act with respect to coal mining wastes or overburden” for which it has issued a permit under the Surface Mining Control and Reclamation Act.<sup>273</sup> The Federal Onshore Oil and Gas Leasing Reform Act provides that the Forest Service (a division of the Department of Agriculture) and the Bureau of Land Management (a division of the Department of the Interior) shall share regulation of oil and gas leases on National Forest System Lands.<sup>274</sup>

Split delegation under a single statute is not unique to environmental law. Congress has delegated authority to multiple agencies under a single statute in

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265. See *supra* text accompanying notes 105–107.

266. *Laws & Policies: Endangered Species Act*, NOAA FISHERIES, <https://perma.cc/A45K-XAEB>.

267. S. REP. NO. 97–418, at 17 (1982); see also *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1541 (9th Cir. 1993) (explaining the purpose of the Committee and summarizing the history of its establishment).

268. 16 U.S.C. §§ 1536(e)(3)(A)–(B), 1536(e)(3)(D)–(F). The government entities from which the secretaries are drawn include the Department of Agriculture, the Army, EPA, the Department of the Interior, and the National Oceanic and Atmospheric Administration. *Id.*

269. *Id.* § 1536(e)(3)(C). The Council of Economic Advisors is a three-person committee within the Executive Office of the President. *Council of Economic Advisors*, THE WHITE HOUSE, <https://perma.cc/98LS-5T8Q>.

270. 16 U.S.C. § 1536(e)(3)(G).

271. 42 U.S.C. §§ 7408(e), 7408(f)(1)(a).

272. *Id.* §§ 7408(f)(1)(a)(xv) (construction of pathways for pedestrian or non-motorized use), 7491 (review of federal lands to determine whether “visibility is an important value of the area”), 7627 (establishment of air pollution requirements for offshore activities).

273. *Id.* § 6905(c)(2).

274. 30 U.S.C. § 226.

the fields of, *inter alia*, banking,<sup>275</sup> drug enforcement,<sup>276</sup> and workplace safety.<sup>277</sup> Additionally, international treaties also delegate power between multiple federal and state agencies,<sup>278</sup> and the D.C. Circuit has applied doctrines of deference to conflicts involving such treaties on several occasions.<sup>279</sup>

There are further examples of shared regulatory space extending across multiple statutes. For example, different aspects of food safety are regulated by the Food and Drug Administration, U.S. Department of Agriculture, Department of Homeland Security, and EPA.<sup>280</sup> In many cases, the “shared” space contains more overlap. The Department of Justice and Federal Trade Commission both have authority to bring antitrust cases against the same types of activities under the Sherman Act and Federal Trade Commission Act, respectively, and both agencies also jointly administer the Clayton Act, which addresses anticompetitive activities not covered by the Sherman Act.<sup>281</sup> Similar duplications exist

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275. Outside of environmental law, multi-agency delegation is most prevalent in banking and financial regulation. *See, e.g.*, *Rapaport v. U.S. Dep’t of Treasury*, 59 F.3d 212, 215 (D.C. Cir. 1995) (concerning the Financial Institutions Reform, Recovery and Enforcement Act of 1989 § 401(h), which allocates overlapping authority to the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, and the Resolution Trust Corporation); *Lawson v. FMR LLC*, 571 U.S. 429, 436–37 (2014) (concerning Sarbanes–Oxley Act of 2002 which assigns rulemaking power to the Securities and Exchange Commission but whistleblower protection to the Department of Labor which in turn delegates power to two different administrative bodies); *Dodd-Frank*, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (establishing the interagency Financial Stability Oversight Council, 12 U.S.C. § 5321, to monitor system-wide risk).

276. The Controlled Substances Act of 1970 (“CSA”) is administered by the Attorney General, *see, e.g.*, 21 U.S.C. § 811, which has delegated authority to the Drug Enforcement Agency (“DEA”), 28 C.F.R. § 0.100. However, prior to rulemaking around the scheduling of a drug under the Act, the DEA must in turn seek scientific and medical evaluation of a substance from the Department of Health and Human Services, 21 U.S.C. § 811(b), which in turn has delegated this responsibility to the Food and Drug Administration, 84 Fed. Reg. 27943, 27944 (June 17, 2019). *See also* *Gonzales v. Oregon*, 546 U.S. 243, 252, 254 (2006) (concerning a conflict over the CSA between the Attorney General and the state of Oregon).

277. *See* *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 147 (1991) (concerning the Occupational Safety and Health Act of 1970, which provides rulemaking and enforcement authority to the Secretary of Labor but adjudicative authority to the Occupational Safety & Health Review Commission).

278. *See* *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d 1246, 1251 (D.C. Cir. 2003) (concerning the 1972 International Regulations for Preventing Collisions at Sea (“COLREGS”), which assigns enforcement authority alternately to the Coast Guard, Navy, and the states, depending on the vessel, and in each case grants authority to the National Transportation Safety Board power to review the judgment before appeal to the judiciary).

279. *Id.* (citing prior cases applying the *Chevron* framework or otherwise deferring to executive interpretation of international treaties as justification for the same).

280. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1147 (2012).

281. *The Antitrust Laws*, FED. TRADE COMM’N, <https://perma.cc/SWG7-E6VM> (explaining the overlapping authority of the Department of Justice and the Federal Trade Commission with regard to the Sherman Act and Federal Trade Commission Act and explaining the substance

between other statutes, including environmental statutes.<sup>282</sup> While such duplication may lead to inefficiencies,<sup>283</sup> the agencies may resolve these duplications through formal<sup>284</sup> and informal<sup>285</sup> interagency agreements, joint rulemaking,<sup>286</sup> or by one agency abdicating authority.<sup>287</sup>

*B. Administrative Deference in the Context of Multi-Agency Administration*

Where multiple agencies administer a single statute, courts still begin by reviewing for ambiguity, as under step 1 of the *Chevron* framework.<sup>288</sup> In *Lawson*

of the Clayton Act); 15 U.S.C. § 18a (noting many ways in which two agencies share administrative authority under the notification and waiting requirements imposed by the Clayton Act).

282. Two examples include (1) regulation of air pollution emissions from nuclear power plants, assigned to both the Nuclear Regulatory Commission and EPA, *see* Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 183 (2011), and (2) delegation to investigate pollution in waterways to both the National Marine Fisheries Service within NOAA and to the Department of Fish and Wildlife within the Department of Interior, *see id.* at 197.

283. Professors Jody Freeman and Jim Rossi identify inefficiencies resulting from conflict between the duplicated agencies (the agencies acting counter to one another, increased transaction costs involved with managing jurisdictional disputes), as well as those resulting regardless of the duplicated agencies' relationship (foregone economies of scale, waste of limited resources, increased compliance costs for regulated parties, increased monitoring costs for both politicians and the public). Freeman & Rossi, *supra* note 280, at 1150. *But see* Jacob Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law* 10–11 (University of Chicago Public Law & Legal Theory Working Paper No. 161, 2007) (positing that overlapping statutory regimes may be an attempt to solve the agency problem resulting from divergent preferences of Congress and the agency to which Congress delegates).

284. Agencies may use memorandums of understanding to formalize division of responsibilities in a way that binds the agencies involved, despite generally being unenforceable by courts. Freeman & Rossi, *supra* note 280, at 1161.

285. For example, the Department of Justice and the Federal Trade Commission have navigated the overlap in antitrust responsibilities by consulting one another prior to investigating and (informally) developing expertise in different areas, with the Federal Trade Commission primarily claiming authority in industries characterized by high consumer spending. *The Enforcers*, FED. TRADE COMM'N, <https://perma.cc/3HUQ-BFRG>.

286. *See generally* Freeman & Rossi, *supra* note 280, at 1166–73. Agencies working cooperatively may also operate according to jointly published standards and guidelines. For example, the Bureau of Land Management and Forest Service operate according to joint operating standards and guidelines for oil and gas development, known informally as “The Gold Book.” *Federal Oil and Gas Resource Management*, U.S. DEP'T OF AGRIC., FOREST SERV., <https://perma.cc/K5G5-RL49>.

287. The duplicated delegation over emissions from nuclear power plants, *see supra* note 282, was resolved in this manner through an interagency agreement upheld by the Supreme Court. *See* Marisam, *supra* note 282, at 183 (citing *Train v. Colo. Pub. Int. Rsch. Grp., Inc.*, 426 U.S. 1 (1976)). Agencies may also abandon duplicative plans before they go into effect if made aware of the duplication through statutorily mandated consultation with other agencies, *id.* at 199–200, or through comments submitted by regulated entities during notice-and-comment, *id.* at 200–01.

288. *See supra* text accompanying note 220.



*v. FMR LLC*,<sup>289</sup> the Supreme Court resolved a dispute between the First Circuit and the Department of Labor over whether a provision of the Sarbanes-Oxley Act of 2002 protecting whistleblowers at public companies also extended to employees at privately held contractors and subcontractors of those companies.<sup>290</sup> Though the Act, which “aims to ‘prevent and punish corporate and criminal fraud’” in the financial sector,<sup>291</sup> is generally administered by the Securities and Exchange Commission (SEC),<sup>292</sup> it delegates whistleblower protection to the Department of Labor.<sup>293</sup> However, the Court in *Lawson* sidestepped completely the complex question of which agency administered the statutory provision at issue, instead reasoning that the provision should apply to privately held contractors and subcontractors based on the text and legislative history of the whistleblower provision.<sup>294</sup> The dissent in *Lawson* framed the majority’s error in terms of the *Chevron* framework, arguing that while the “majority correctly start[ed] its analysis with the statutory text, it fail[ed] to recognize that [the whistleblower provision] is deeply ambiguous,” and thus wrongly stopped the analysis after *Chevron* step 1.<sup>295</sup>

After finding ambiguity, courts look to the statutory structure to determine whether any of the agencies administering the statute have a superior claim of authority to administer the particular provision at issue in the case. In an early case of conflicting interpretations between multiple agencies administering a single statute, the D.C. Circuit held in *Rapaport v. Treasury*<sup>296</sup> that the court should interpret the provision *de novo* rather than granting deference to any of the administering agencies in order to avoid conflicting interpretations of the same text, or to prevent one interpretation from prevailing merely because a particular administering agency was first to the courthouse.<sup>297</sup> However, without overruling *Rapaport* directly, a subsequent case, *Collins v. National Transportation Safety Board*,<sup>298</sup> synthesized earlier case law in order to clarify that two

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289. 571 U.S. 429 (2014).

290. *Id.* at 433.

291. *Id.* at 434–35 (citing S. REP. NO. 107-146, p. 2 (2002)).

292. *Id.* at 474–75 (Sotomayor, J., dissenting) (citing *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 485 (2010)) (explaining the role of the SEC in regulating attorneys and of the PCAOB, an agency within the SEC, in regulating accountants); *id.* at 477 (Sotomayor, J., dissenting) (describing the SEC’s rulemaking power).

293. *Id.* at 436.

294. *Id.* In particular, the Court relied on the fact that the statutory language was borrowed from another statute, which has previously been read to extend to employees of contractors and subcontractors, *id.* at 434, as well as the fact that the Sarbanes-Oxley Act emerged in response to the Enron scandal, in which both Enron and its privately held accounting firm, Arthur Anderson, suppressed whistleblowers’ attempts to report fraud with threats of retaliation, *id.* at 435.

295. *Id.* at 462 (Sotomayor, J., dissenting).

296. 59 F.3d 212 (D.C. Cir. 1995).

297. *Id.* at 216–17.

298. 351 F.3d 1246 (D.C. Cir. 2003).

assumptions underlying the court's reasoning in *Rapaport* were not true in all circumstances.

First, whereas *Rapaport* presumed that the existence of multiple agencies administering a *statute* implied overlap in their authority to interpret a particular *provision*,<sup>299</sup> *Collins* noted that some statutes may contain a “horizontal split,” i.e., division of authority into mutually exclusive spheres of influence.<sup>300</sup> In such cases, *Collins* held that *Chevron* deference may appropriately be granted to the interpretation of the lone agency with authority to administer a particular provision or part of the statute.<sup>301</sup> However, *Collins* conceded that such an interpretation may instead warrant *Skidmore* rather than *Chevron* deference if the relevant provisions interact with others administered by different agencies under the statute, thus necessitating “interpretive uniformity.”<sup>302</sup> While *Collins* declined to “assess the exact weight” of *Skidmore* deference,<sup>303</sup> instead assuming that one agency's interpretation would naturally be more persuasive than the others,<sup>304</sup>

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299. The majority in *Rapaport* makes this assumption clear through only addressing the shared administration of the *statute*, rather than the specific provision at issue. 59 F.3d at 216–17. The concurrence criticizes this assumption, arguing that it is “too facile to conclude that deference is inappropriate simply because more than one agency is involved in administering a statute,” and should instead turn on “the nature of the statute and how Congress has decided it shall be administered.” *Id.* at 221 (Rogers, J., concurring in part).

300. *Collins*, 351 F.3d at 1252–53.

301. *Id.* at 1253 (noting that in the case of “mutually exclusive authority over separate sets of regulated persons,” the “danger that any one regulated party will be faced with multiple and perhaps conflicting interpretations of the same requirement” is not present and thus “[doesn't] work against application of *Chevron* deference”).

302. *Id.*

303. *Id.* at 1254. The court instead only went so far as to establish guideposts, noting that *Skidmore* deference was “obviously less than *Chevron*,” *id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 236–39 (2001)), “but more than acknowledgement that the agency's position is more convincing than its adversaries’, as would be true any time it submitted the more convincing brief,” *id.* The citation of *Mead* is instructive here because, from one angle, *Collins* may be viewed as updating *Rapaport* in light of *Mead*, a Supreme Court case that was decided nearly a decade after *Rapaport*. *Mead* held that, prior to granting *Chevron* deference, a court should first determine whether Congress had meant for the agency's interpretation to carry “the force of law.” *Mead*, 533 U.S. at 226–27. *Mead* is not a perfect analogue: for example, while *Mead* is generally regarded as “*Chevron* step 0,” *see, e.g.*, Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 873 (2001); Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006), that the Court in *Lawson* reviewed for ambiguity without first delving into the statutory structure suggests that in the context of multi-agency administration, the question of whether (and which) agency has authority to administer the statute may be more accurately considered “*Chevron* step 1.5.” Nevertheless, as in *Mead*, the courts in such cases looked to the statutory structure to determine the weight to assign to each administrative agency with respect to the interpretation of a particular statutory provision.

304. *Collins*, 351 F.3d at 1254. (“If the three enforcement agencies were found to have conflicting (though individually very reasonable) interpretations, the varied positions’ ‘power to persuade’ would sharply fall.”)

*Skidmore* itself held that “the weight of [an agency’s] judgment” should turn on “all those factors which give it power to persuade, if lacking power to control,” including “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.”<sup>305</sup>

Second, *Collins* rejected the *Rapaport* court’s presumption that, where there was overlap between agencies’ authority under the statute, there was no way to prioritize one agency’s interpretation over another’s.<sup>306</sup> Instead, *Collins* held that in cases of a “vertical split” in the statute, i.e., an implicit hierarchy, one agency’s interpretation should alone warrant *Chevron* deference.<sup>307</sup> While *Collins* pioneered this terminology, it relied on the example of *Martin v. Occupational Safety & Health Revenue Commission*<sup>308</sup> in which the Supreme Court reasoned from the “well established” principle “that an agency’s construction of its own regulations is entitled to substantial deference”<sup>309</sup> to find such a hierarchy where one agency was assigned enforcement and rulemaking authority and the other only adjudicative authority.<sup>310</sup>

The *Martin* Court found that “the power to render authoritative interpretations of [statutory] regulations is a ‘necessary adjunct’ of [an agency’s] powers to promulgate and to enforce [those] standards.”<sup>311</sup> By contrast, the Court found the authority of the agency with only adjudicative powers was analogous to that of a court and thus limited to “review . . . for consistency with the regulatory language and for reasonableness”: essentially, the Supreme Court found that under this statutory structure, the adjudicative agency owed the rulemaking agency

305. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

306. *Rapaport* did cite for comparison a previous case in which the Supreme Court refused to defer to a rulemaking pursuant to a section of the Rehabilitation Act that prohibits discrimination against handicapped people because many agencies had made similar rules, and there was thus “not the same basis for deference predicated on expertise” as in *Chevron*.<sup>306</sup> *Rapaport*, 59 F.3d at 217 (citation omitted). However, *Rapaport* cursorily stated that the Office of Thrift Supervision “suggested no reason to believe” that there was a similar hierarchy in the statute it co-administered with other agencies, without providing further elaboration. *Id.*

307. *Collins*, 351 F.3d at 1251. As a note, the court in *Collins* found the presence of both types of splits in a single treaty (which it treated as a statute), demonstrating that the existence of one type of split need not imply the exclusion of the other. *Id.* at 1252–53.

308. 499 U.S. 144 (1991).

309. *Id.* at 150–51 (citing *Lyng v. Payne*, 476 U. S. 926, 939 (1986); *Udall v. Tallman*, 380 U. S. 1, 16–17 (1965); *Ehlert v. United States*, 402 U.S. 99, 105 (1971); *N. Indiana Pub. Serv. Co. v. Porter Cnty. Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975); *Ford Motor Credit Co. v. Milhollin*, 444 U. S. 555, 566, 568 (1980)). While *Martin* predated *Auer* by six years, the cases cited here sound in what came to be known as *Auer* deference after a similar principle was espoused in *Auer v. Robbins*, 519 U.S. 452 (1997). See *supra* note 237 and accompanying text.

310. *Martin*, 499 U.S. at 147 (describing the unique structure of the Occupational Safety and Health Act of 1970, which provides rulemaking and enforcement authority to the Secretary of Labor but adjudicative authority to the Occupational Safety & Health Review Commission).

311. *Id.* at 152.

*Auer* deference.<sup>312</sup> The court in *Collins* applied *Martin*, finding a similar vertical split where only one authority had authority under the statute to promulgate rules,<sup>313</sup> as did the dissent in *Lawson* after finding the relevant provision in the Sarbanes-Oxley Act to be ambiguous.<sup>314</sup>

However, given *Martin*'s reliance on *Auer* deference, it may be interpreted to incorporate by reference the caveats the Supreme Court has subsequently applied to *Auer* itself. The Supreme Court held in *Gonzales v. Oregon*<sup>315</sup> that an agency's interpretation of its own rules was not entitled to deference where the rule "merely . . . paraphrase[d] the statutory language."<sup>316</sup> In *Kisor v. Wilkie*,<sup>317</sup> the Court further caveated that, for *Auer* deference to apply, an agency's interpretation "must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise."<sup>318</sup> *Gonzales* provides an example of how a limited interpretation of *Auer* may also change the application of *Martin*: the Court declined to find a vertical split implying deference to the Attorney General even though he alone had rulemaking power under the statute.<sup>319</sup> The Court reasoned that the Attorney General must rely on the Department of Health and Human Services for its expertise regarding "quintessentially medical judgments,"<sup>320</sup> meaning it did not qualify for deference because, according to *Martin*, deference to the rulemaking authority stems "in the first instance" from the presumption that that agency has "historical familiarity and policy-making expertise."<sup>321</sup> The *Gonzales* Court thus clarified that *Martin*'s holding extended only as far as the principles underlying *Auer* deference on which the *Martin* Court based its conclusions. At the same time, the *Gonzales* Court seemed to imply that expertise itself could be the basis for finding a "vertical

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312. *Id.* at 154–55.

313. *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1252 (D.C. Cir. 2003).

314. *Lawson v. FMR LLC*, 571 U.S. 429, 477 (2014) (Sotomayor, J., dissenting) ("[E]ven if the Secretary has the power to investigate and adjudicate § 1514A claims, Congress did not delegate authority to the Secretary to 'make rules carrying the force of law,' . . . [s]o if any agency has the authority to resolve ambiguities in § 1514A with the force of law, it is the SEC, not the Department of Labor.").

315. 546 U.S. 243 (2006).

316. *Id.* at 257.

317. 139 S. Ct. 2400 (2019).

318. *Id.* at 2,424–25 (Roberts, C.J., concurring) (summarizing the caveats to *Auer* imposed by the plurality).

319. *Gonzales*, 546 U.S. at 266.

320. *Id.* at 266–67. For additional information on the structure of the CSA, and in particular the sharing of authority between the Attorney General and Department of Health and Human Services, see *supra* note 276.

321. *Id.*

split” in a scenario involving a conflict between two agencies that differed on this basis.<sup>322</sup>

To summarize, in the case of a conflict of interpretation between multiple agencies administering a statute, the Court follows a two-pronged inquiry, first evaluating the statute for ambiguity and then, if ambiguous, considering whether the structure of the statute suggests one agency has more authority than the other(s) to interpret the disputed statutory provision. Under the second prong, the court may draw one of four possible conclusions: (1) none of the administering agencies has a superior claim of authority, in which case the court should review the conflict *de novo*; (2) one party is the sole agency responsible for administering a particular part of the statute that *does not* interact with other parts administered by other agencies, and is thus entitled to *Chevron* deference; (3) one party is the sole agency responsible for administering a particular part of the statute that *does* interact with other parts administered by other agencies, and is thus entitled *Skidmore* deference; or (4) one party is solely entitled to *Chevron* deference due to an implicit hierarchy contained in the statutory structure, if, e.g., that agency alone has rulemaking authority or has superior expertise to interpret the disputed provision.

### C. *The Fiscal Responsibility Act's Lead Agency Structure*

The above case law currently only applies to multi-agency administration of a *single* statute. However, new NEPA § 107(a), as proposed under the FRA, could provide a way to extend this treatment to multi-agency administration of *multiple* statutes, where the statutes and the agencies administering them were explicitly grouped together.

New § 107(a) requires that a lead agency—or joint lead agencies<sup>323</sup>—be appointed to coordinate the environmental review process for all projects subject to NEPA.<sup>324</sup> Under the Proposed Phase 2 NEPA Regulations,<sup>325</sup> most projects triggering conflict over § 401 review, such as hydroelectric dams, would still require an EIS, given their effects on environmental and economic resources,<sup>326</sup>

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322. This is distinct from the scenario in *Gonzales*, where the conflict was between a federal agency determined not to have sufficient expertise for its interpretation of the CSA to be authoritative, and a state agency, which did not administer the CSA at all. *Id.* at 252.

323. Joint lead agencies are explicitly permitted, subject to limitations. *See infra* note 332 and accompanying text.

324. FRA § 321(b), 137 Stat. 39 (constructing the permitting reform structure as an add-on to NEPA itself).

325. *See supra* note 38.

326. In particular, hydroelectric dams are likely to be close to wild and scenic rivers, 88 Fed. Reg. 49969 (to be codified at 40 C.F.R. § 1501.3(d)(2)(iii)), and may affect endangered species, *id.* § 1501.3(d)(2)(viii). *See, e.g.,* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (hydroelectric facility enjoined under the Endangered Species Act of 1973).

and would not be subject to the new limitations imposed by the FRA precluding application of NEPA in specific circumstances.<sup>327</sup>

The proximate goal of new § 107(a) is to enable more streamlined and efficient review. The result of applying new § 107(a) is that the lead agenc(ies) must “super-  
vise the preparation of a[] [single] environmental document” where multiple federal agencies are involved.<sup>328</sup> The lead agenc(ies) are required to “request the participation of each cooperating agency at the earliest practicable time,” “give consideration to any analysis or proposal created by a cooperating agency,” and “meet with a cooperating agency [upon request].”<sup>329</sup> Assigning responsibility to a particular agency to coordinate the process also provides accountability. Furthermore, the lead agenc(ies) must develop a schedule for meeting the required documentation deadlines and instruct the cooperating agencies to take rectifying measures if, in the lead agenc(ies)’ estimation, the schedule is unlikely to be met.<sup>330</sup> This coordination ensures all participating agencies not only comply with the deadlines required under their respective statutes, but also complete their respective reviews or authorizations with sufficient time to inform the actions of other agencies. This authority would be particularly useful in preventing § 401 conflicts where state agencies claim that withdrawal-and-resubmission was necessary because other review processes delayed the start of their review, making the one-year timeline unachievable.<sup>331</sup>

#### D. Multi-Agency Administration as Applied to § 401

While designed to expedite the agency review process, the lead agenc(ies) structure provided under the structure created by the FRA also acts as a “wrapper” around other existing statutes that require review or other action by state and federal agencies. This makes it a natural fit for a superseding structure to replace statutes as the means by which to assign deference, where doing so may impede coordination. The FRA explicitly allows for a federal agency to act as a

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327. The FRA provides that projects only require environmental reporting under NEPA if they meet four “threshold determinations,” including that the proposed agency action (1) constitutes “final agency action,” (2) not be excluded from review under NEPA by categorical exclusions or other legal provisions, (3) not require preparation of environmental documentation that would conflict with other legal provisions, and (4) be a discretionary action of the relevant agency. *FRA* at 137 Stat. 39 (42 U.S.C. § 4336). The decision of whether to issue permits for the construction a hydropower project is clearly “final agency action” because it would “mark the consummation of the agency’s decisionmaking process” and is a determination “from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal citation omitted) (interpreting 5 U.S.C. § 704). Additionally, there are not currently any categorical exclusions or other laws prohibiting environmental review or environmental documentation of hydropower projects, and there is agency discretion to approve or deny the permits.

328. *FRA* at 137 Stat. 40 (codified as 42 U.S.C. 4336a(a)(2)(A)).

329. *Id.* (codified as 42 U.S.C. 4336a(a)(2)(B),(C),(F)).

330. *Id.* (codified as 42 U.S.C. 4336a(a)(2)(D)–(E)).

331. *See supra* note 205 and accompanying text.

joint lead agency in conjunction with “State, Tribal, or local” agencies.<sup>332</sup> Under this structure, if both FERC and the relevant state environmental agency certifying the project under § 401 were appointed joint lead agencies for a particular project, this would allow those agencies—along with EPA, which must play a coordinating role under the text of the CWA<sup>333</sup>—to share regulatory space, acting effectively as multiple agencies administering a single “statute.”

A key advantage of this approach is assignment of a lead agency at the project level allows for flexibility: for political or other reasons, one agency or the other may be given the lead role for particular infrastructure projects. The FRA does not address directly who would be in charge of assigning the lead agenc(ies) at the project level—beyond specifying procedures if the various agencies cannot agree on the lead agency<sup>334</sup>—but neither does it preclude follow-on legislation dictating such assignments for various specific types of infrastructure.<sup>335</sup> For example, for pipelines or other infrastructure projects contributing to climate change, EPA alone could act as the lead agency, with FERC merely participating. This would mean EPA’s regulations surrounding the scope and timing of § 401 review would warrant *Chevron* deference, as they currently do under the CWA. Conversely, for renewable energy projects, a joint appointment between the relevant state environmental agency and FERC would require courts to look to the precedent detailed in Part II.B on the allocation of deference in the context of shared regulatory space. While the categorical nature of this approach would create some rigidity, it would allow for more flexibility than the current statutory structure can provide; additionally, compared to a true

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332. *FRA* at 137 Stat. 40 (codified as 42 U.S.C. § 4336a(a)(1)(B)). This prohibition on two *federal* agencies acting as joint lead agencies is in notable contrast to previous iterations of permitting reform. *Compare id.* (imposing this restriction) *with Manchin Bill*. § 12112(c)(1) (“Nothing in this section precludes an agency from serving as a joint lead agency for a project, in accordance with NEPA.”). While the “wrapper” structure described in this section would more naturally give rise to the application of case law regarding multiple-agency administration if two federal agencies—i.e., FERC and EPA—directly shared responsibility as lead agencies, due to EPA’s coordinating role under the CWA, *see infra* note 333, a similar result arises where FERC shares authority with the state environmental agency charged with certification under § 401.

333. *See supra* notes 113–117, 241 and accompanying text.

334. Specifically, the FRA provides that “[a]ny Federal, State, Tribal, or local agency or person that is substantially affected by the lack of a designation of a lead agency” may submit a request to another participating federal agency, to be transmitted to *all* participating federal agencies and the CEQ. *FRA* at 137 Stat. 41 (codified as 42 U.S.C. § 4336(a)(4)). If, after forty-five days following this submission the relevant agencies still have not reached resolution, the affected “Federal, State, Tribal, or local agency or person” may request CEQ to resolve the dispute, which it must do within twenty additional days. *Id.* (codified as 42 U.S.C. § 4336a(a)(5)).

335. Moreover, since the purpose of this section is to present a model of an extra-statutory “wrapper” rather than detail the exact mechanisms of Senator Manchin’s bill, the more pertinent inquiry is how *ideally* to determine the lead agenc(ies).

project-by-project approach, it is less administratively complex, more predictable, and less susceptible to manipulation.

Where FERC and a state environmental agency jointly act as lead agencies within an extra-statutory structure, requiring them to coordinate environmental review and licensing, the precedent detailed above provides guidance for allocating deference.

The first step is review for ambiguity: if the text of the statutory provision is unambiguous—as the Court decided in *Lawson*<sup>336</sup>—the court need not decide which agency’s interpretation warrants deference. However, as explained above, this is not the case with respect to § 401.<sup>337</sup>

The next step is to look to the structure of the statute—in this case, the “wrapper” structure—to determine which agency interpretation warrants deference. Since the “wrapper” is effectively an umbrella encompassing two independently administered statutes, the share of authority is most logically described as a mutually exclusive spheres of influence, or what *Collins* described as a “horizontal split”.<sup>338</sup> The relevant state agency is exclusively responsible for ensuring that § 401 review is completed within the allocated one-year period, subject to EPA guidelines, after which it must pass on exclusive authority to FERC to license the project.<sup>339</sup> Additionally, the state agency, together with EPA, on the one hand, and FERC on the other hand each have exclusive authority over a particular domain of the project. Since the nature of the split is sequential, the provisions administered by EPA and state regulatory authorities under the CWA necessarily interact with the provision administered by FERC under the Federal Power Act;<sup>340</sup> therefore, per *Collins*, there must be “interpretive uniformity” between the respective agencies’ interpretations of the timeframe for review under § 401(a)(1).<sup>341</sup> As held in *Collins*, in instances of shared regulatory authority where there is a horizontal split and a need for interpretive uniformity, each authority’s interpretation of the provisions within its “sphere” is entitled to *Skidmore* deference.<sup>342</sup> Thus, under *Collins*, in a conflict over § 401, the court should provide *Skidmore* deference to EPA’s construction, rather than *Chevron* deference;<sup>343</sup> it should be evaluated for its persuasiveness rather than held to be controlling.<sup>344</sup>

In effect, providing *Skidmore* deference to EPA’s interpretation of § 401 means that it must clear a higher bar, leaving more room for the court to balance against FERC’s interpretation. Under both types of deference, EPA is allowed

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336. See *supra* note 294 and accompanying text.

337. See *supra* text accompanying notes 227–228.

338. See *supra* notes 300–301 and accompanying text.

339. See *supra* notes 46–48 and accompanying text.

340. See *supra* notes 161–162 and accompanying text (explaining FERC’s role under the Federal Power Act).

341. See *supra* note 302 and accompanying text.

342. See *supra* note 302 and accompanying text.

343. See *supra* note 303 and accompanying text.

344. See *supra* text accompanying note 305.



to interpret the scope of its authority in the first instance. However, *Chevron* deference requires the court to defer to the agency's interpretation as long as it is reasonable, even if they do not agree.<sup>345</sup> By contrast, *Skidmore* deference requires that the court is also persuaded by EPA's construction and enables the court to adopt FERC's interpretation (or another interpretation altogether) if more thoroughly considered, valid in its reasoning, or consistent with case law.<sup>346</sup>

## CONCLUSION

In conclusion, in order to facilitate the construction of renewable energy infrastructure at the scale needed—and anticipated under the IJJA and IRA—there must be additional shared regulatory space between federal permitting authorities and environmental agencies charged with assuring compliance with state or federal standards. This would in turn allow the judiciary to mediate conflicts between EPA and pro-development agencies like FERC without automatically affording *Chevron* deference to EPA.

Such shared regulatory space—already common both within and outside of environmental law—could conveniently and flexibly be created at the project level using an extra-statutory structure like that proposed in Section 12112 of Senator Manchin's December permitting reform package, which involves appointing a lead agency or joint lead agencies to administer a larger process for a specific project, including coordinating the environmental reviews and licensing. Such a structure would be imposed *on top of* the statutes that the lead agencies administer separately.

If such an agreement were to become the bases for adjudicating a conflict between FERC and EPA with respect to CWA § 401, and the two agencies were appointed joint lead agencies under the agreement, the court could resolve the conflict by affording *Skidmore* deference to EPA's interpretation. Rather than deferring wholesale to EPA's interpretation as long as it is reasonable—as would be required if *Chevron* deference were owed to EPA as the agency charged with administering the CWA—*Skidmore* deference would require that EPA's interpretation of the scope of its own authority in a particular conflict is persuasive.

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345. See, e.g., *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) ("*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative . . . Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."); see also *Arkansas v. Oklahoma*, 503 U.S. 91, 104–05 (1992) (declining to resolve whether EPA *must* take into account downstream water quality standards in issuing a permit under CWA § 402, but finding the position taken by EPA through regulation that § 401(a)(2) requires such consideration to "constitute a reasonable exercise of the Agency's statutory authority").

346. See *supra* text accompanying note 305.

