

NOTES

COORDINATING COORDINATION REQUIREMENTS IN ENVIRONMENTAL EMERGENCY ACTION PROVISIONS

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Certain provisions within environmental statutes, known as emergency action provisions, provide EPA administrators with the authority to take legal action when certain forms of pollution threaten public health. Of the six most prevalent environmental statutes with emergency action provisions, five have unique requirements for coordination with state and local authorities. These coordination requirements fit within a broader spectrum in environmental law of cooperative federalism, the concept of dividing responsibilities between central and regional authorities.

Drawing from case law, legislative history, canons of interpretation, and academic commentary, this Note highlights the inconsistent coordination requirements of the emergency action provisions—leading to confusion and delay for enforcement authorities—and shows there is scant normative justification for those differences. This Note also assesses what levels of coordination between federal and regional authorities are practically beneficial for agency attorneys and public health outcomes. Ultimately, this Note recommends standardization of the emergency action provisions, through legislative, judicial, and/or executive action, to capitalize on the benefits and mitigate the challenges of cooperative federalism.

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INTRODUCTION

On April 25, 2014, the City of Flint, Michigan, switched its drinking water supply from Detroit’s water system to the Flint River to save utility costs.¹ By February 2015, U.S. Environmental Protection Agency (EPA) was aware of growing levels of lead in the Flint tap water and knew that residents were facing harmful exposure.² Despite copious complaints from residents that their water was dark brown in color and foul-tasting and -smelling, the City of Flint did not declare a state of emergency until December 2015, after local officials had attested for

¹ Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NAT. RES. DEF. COUNCIL (Oct. 8, 2024), <https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know> [<https://perma.cc/5ZT9-C2GG>] (providing an overview of the Flint water crisis).

² See Eric Moorman, “A Greater Sense of Urgency”: EPA’s Emergency Authority Under the SDWA and Lessons from Flint, Michigan, 47 ENV’T L. REP. 10786, 10795 (2017) (citing U.S. EPA, OFFICE OF INSPECTOR GENERAL, MANAGEMENT ALERT: DRINKING WATER CONTAMINATION IN FLINT, MICHIGAN, DEMONSTRATES A NEED TO CLARIFY EPA AUTHORITY TO ISSUE EMERGENCY ORDERS TO PROTECT THE PUBLIC 4–5 (2016) (17-P-0004) [hereinafter EPA MANAGEMENT ALERT]).

months to the water's safety.³ The State of Michigan declared a state of emergency in the county shortly after, and EPA subsequently issued an emergency order under section 1431 of the Safe Drinking Water Act (SDWA) directing the city to abate the contamination.⁴ This provision allows EPA to take emergency legal action, including orders to protect public health and civil action for relief, in the face of "imminent and substantial endangerment to the health of persons."⁵

In a later report, EPA's Office of Inspector General criticized EPA for not acting quickly enough to avert the crisis, noting that although EPA's regional office "had sufficient information to issue an emergency order to Flint as early as June 2015," it failed to do so.⁶ The report noted one of the primary reasons that EPA failed to invoke its emergency powers in a timely manner was because EPA "mistakenly concluded that it did not have authority [under SDWA section 1431] to act where Michigan and Flint were taking steps—however minimal and inadequate—to address the issue."⁷

The language of SDWA section 1431 at issue requires EPA to determine that state and local authorities "have not acted" to protect public health before taking emergency legal action.⁸ This clause, along with a requirement in the statute that EPA "consult with" state and local authorities to validate information,⁹ implicates notions of cooperative

³ *Id.* (describing a July 2015 press conference where the Flint mayor assured residents that the water was safe to drink).

⁴ *Id.* at 10786.

⁵ 42 U.S.C. § 300i(a).

⁶ EPA MANAGEMENT ALERT, *supra* note 2, at 8; *see also* Moorman, *supra* note 2, at 10796 (citing the report to demonstrate EPA's "acknowledge[ment] that the Agency's late invocation of emergency authority in Flint caused serious harm").

⁷ Moorman, *supra* note 2, at 10796; EPA MANAGEMENT ALERT, *supra* note 2, at 8 ("The former EPA Region 5 Regional Administrator believed that the state of Michigan's actions to address the Flint situation barred formal federal action."). For its inadequate activities, the City of Flint had issued boil water advisories, boosted chlorine levels, and eventually issued a lead advisory and reconnected to Detroit's water system, all of which were unsuccessful to remediate the lead contamination. *See* Perri Zeitz Ruckart, Adrienne S. Ettinger, Mona Hanna-Attisha, Nicole Jones, Stephanie I. Davis & Patrick N. Breyse, *The Flint Water Crisis: A Coordinated Public Health Emergency Response and Recovery Initiative*, Jan.–Feb. 2019, J. PUB. HEALTH MGMT. & PRAC. 84, 85. While governmental confusion played a key role, EPA's delay in Flint likely had multiple causes, including that Flint is a predominantly low-income community of color with limited political clout. Kristen Clarke, *The Environmental Racism Flowing in Flint*, OPEN SOC'Y FOUNDS. (Jan. 27, 2016), <https://www.opensocietyfoundations.org/voices/environmental-racism-flowing-flint> [<https://perma.cc/M4ZB-2BXE>] (noting "the significantly diminished political power of African Americans in Flint" as a key reason for government inaction).

⁸ 42 U.S.C. § 300i(a). As discussed in later sections, courts have interpreted this language not to require complete inaction, but rather insufficient action to protect public health. *See infra* Section II.A.1.

⁹ *See* 42 U.S.C. § 1431.

federalism—the concept that federal, state, local, and tribal authorities share overlapping duties to advance the public interest and must coordinate to navigate their coextensive authority.¹⁰ In order to take action under this provision, EPA—the federal authority—must grapple with the actions of subnational authorities, determine whether those actions are sufficient, and measure to what extent to cooperate with those authorities.¹¹

SDWA section 1431 is one of several environmental statutory provisions that grant EPA the ability to prevent imminent and substantial endangerment to public welfare.¹² The other provisions, which appear in different environmental statutes, such as the Clean Air Act (CAA) and Clean Water Act (CWA), contain very similar language to section 1431, including requirements to notify and coordinate with state and local authorities.¹³ However, each statutory provision has its own nuanced language and particular requirements, creating unique standards of application for each statute.¹⁴

Despite their potential importance in protecting public health, SDWA section 1431 and the other emergency action provisions in federal environmental laws have received little academic attention and remain poorly understood. The coordination requirements among the statutes are not consistently articulated or standardized, leading

¹⁰ See Mary H. Morris, *Cooperative Federalism*, CTR. FOR THE STUDY OF FEDERALISM (2006), https://encyclopedia.federalism.org/index.php/Cooperative_Federalism [https://perma.cc/3JFL-XB6K] (“In general, cooperative federalism asserts that governmental power is not concentrated at any governmental level or in any agency. Instead, the national and state governments share power.”).

¹¹ For the purposes of this Note, I occasionally refer to state, local, and tribal authorities as regional authorities, which refers to subnational powers in the system of federalism. Similarly, EPA has considered the language “[s]tate and local authorities” within SDWA section 1431 to include “tribes, territories, and the District of Columbia.” U.S. EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, UPDATED GUIDANCE ON EMERGENCY AUTHORITY UNDER SECTION 1431 OF THE SAFE DRINKING WATER ACT 3 n.1 (2018) [hereinafter EPA SDWA GUIDANCE], <https://www.epa.gov/sites/default/files/2018-09/documents/updatedguidanceonemergencyauthorityundersection1431sdwa.pdf> [https://perma.cc/NZN9-TEWW]. Specific issues related to tribal authorities under Federal Indian Law are outside of the scope of this Note as they are uniquely situated, but in the context of coordination are treated equivalently as state and local authorities.

¹² For additional examples of emergency action provisions, see *infra* note 74 and accompanying text (introducing other prominent environmental emergency action provisions).

¹³ Clean Air Act § 303, 42 U.S.C. § 7603 (“Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based.”); Clean Water Act § 504, 33 U.S.C. § 1364 (“[T]he Administrator upon receipt of evidence . . . [of] an imminent and substantial endangerment to the health of persons or to the welfare of persons . . . , may bring suit on behalf of the United States . . . or to take such other action as may be necessary.”).

¹⁴ See *infra* Section II.D.

to confusion surrounding EPA's authority under each provision. Still, there are generally mutual benefits to cooperation between federal and regional authorities,¹⁵ demonstrating the importance of some statutory requirement to coordinate. This Note seeks to highlight the notable coordination differences between the emergency provisions in various environmental statutes, categorize them along several dimensions, and emphasize that there is no clear rationale for the differences in the emergency provisions.

Since the main federal environmental laws were enacted in the 1970s, there has been extensive debate, in the realm of cooperative federalism, about whether and when the federal government should address environmental problems, or leave them to localities, states, and Tribes.¹⁶ This literature about when the federal government should act tends to focus on when the federal government should set standards to regulate environmental problems, such as air and water pollution, or leave regulatory responsibility to the states. Fewer scholars have explored the concept of cooperative federalism as it applies to agency lawyering and affirmative authority under environmental statutes.¹⁷

¹⁵ See *infra* Section I.A.2 (describing the benefits of cooperation, including cost-savings, exchange of information, and more effective and targeted outcomes).

¹⁶ See, e.g., Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977) ("The success of federal programs has been gravely compromised by . . . dependence upon state and local governments, whose generally poor record in controlling environmental deterioration triggered the initial resort to federal legislation, and whose subsequent performance in the context of federal programs has in many instances remained inadequate."); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996) ("While the character of some environmental concerns warrants a preference for local control, a sweeping push for decentralized regulation cannot be justified."); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001) (challenging "the influential claim that primary responsibility for environmental regulation should be assigned to the federal government because public choice pathologies cause systematic underrepresentation of environmental interests at the state level"); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006) (analyzing legal developments of environmental cooperative federalism over the past century, concluding that the resulting "federal system . . . hinders the capacity of both levels of government to pursue environmental protection initiatives, thereby constraining the force of environmental law by pushing both levels toward the lowest common denominator").

¹⁷ See, e.g., Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179 (2006) ("The broad conception of cooperative federalism includes all programs with incentives for state, tribal, and local jurisdictions to help advance federal law. . . . Few scholars of cooperative federalism have considered the broad conception."); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599 (2012) ("In the immediate aftermath of the *Printz v. United States* decision, a few legal scholars posited separation-of-powers-based limits on cooperative-federalism programs. Most legal scholarship, however,

This Note seeks to expand an even narrower domain of scholarship: how emergency action provisions of environmental statutes incorporate concepts of cooperative federalism.

To better public health outcomes under the auspices of the emergency action provisions, this Note offers solutions to clearly articulate the division between federal and subnational emergency authority and enhance opportunities for collaboration between those powers. Enforcement authorities would benefit from a more standardized set of statutes, notwithstanding potential tradeoffs with a particularized system.¹⁸

This Note proceeds with Part I, which provides a brief overview of the concept of cooperative federalism, including policy analysis of the benefits and challenges of enforcement coordination between federal and subnational authorities, and a history of the emergency action provisions. Next, Part II provides a legal analysis of the emergency action provisions. These provisions typically condition EPA's ability to act on coordinating with states and local governments and tribes in some way, but the type of required coordination with the subnational level of government varies significantly depending on the statute. This Note categorizes the coordination requirements into three types, from most to least demanding for EPA as: a state inaction requirement under which EPA must determine that the state has not acted, a consultation requirement mandating that EPA consult with the affected state or locality, and a notice requirement mandating that EPA notify the state prior to acting. In Part III, this Note explores whether there is a justifiable basis for the different types of coordination requirements across the statutes, considering explanations in legislative history and the practical differences in forms of pollution before concluding that there is no justification for the variations, and that EPA's emergency authorities to act should be subject to a standard set of conditions. Part IV recommends ways that emergency action provisions could be standardized. It begins by recommending legislative changes to harmonize the emergency action provisions. Recognizing the difficulty of obtaining legislative changes, this Part also considers ways in which judicial interpretations and executive action could incrementally promote harmonization in the standards that EPA must satisfy to

has focused on the normative and public-policy implications of such arrangements, rather than on their constitutionality.”).

¹⁸ For an example of a tradeoff, as discussed in Section III.B, a particularized system that provides for different coordination requirements across different statutes could better account for practical differences in forms of pollution—like a more stringent requirement for federal-state coordination where the type of pollution is predominantly local. See *infra* Section III.B.

intervene and address emergencies. This Note then briefly concludes and addresses the prospects of reform to standardize the statutes and reduce confusion.

I BACKGROUND

Before analyzing the language of the coordination conditions within the emergency action provisions in Part III, this Note provides an overview of the concept of cooperative federalism, detailing its history and practical benefits and drawbacks, followed by an introduction to the relevant statutes and aspects of their requirements that reflect the ideals of cooperative federalism.

A. Cooperative Federalism

1. Overview and Contemporary Role

Federalism is the distribution of power between a central authority and subnational sub-authorities—relevantly characterized in the American context by the central national government, regional states, and Indian tribes.¹⁹ The U.S. Constitution allocates enumerated powers to the national government, reserving unenumerated powers to the states without specifying the relationship between those powers.²⁰ In the environmental context, federalism has been interpreted as a continuum of environmental protection and management activities placed between poles of traditional state power and traditional national power.²¹ Traditional state powers focus on rights associated with land in their domain (e.g., land use regulation, torts, and property rights), while traditional national powers focus on issues not tied to a specific geography (e.g., managing defense-generated nuclear waste).²²

¹⁹ See Fischman, *supra* note 17, at 183 (referring to “the actual power structure,” not the political favoring of state power).

²⁰ See *id.* (“While the Constitution allocates enumerated powers to the national government, it does little to specify the relationship between those powers and the reserved powers of the states.”). The Supremacy Clause and the Tenth Amendment are the two provisions of the Constitution that most directly implicate federalism. Seth P. Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 U. KAN. L. REV. 141, 142 (2002) (“[T]hese provisions describe a straightforward principle: where Congress and the President act within the powers expressly afforded them by the Constitution, their laws and acts prevail; in all other respects, power and authority reside with the States . . .”).

²¹ See Fischman, *supra* note 17, at 183–84 (“Federalism can be mapped on a continuum defined by the poles of exclusive state power and exclusive national power.”).

²² See *id.* at 183 (finding that “states generally maintain near-exclusive control over land use regulation, substantive tort law, allocation of property (such as water rights) among

Historically, local and state governments acted to protect the environment before the federal government, with significant federalization of environmental law occurring only in the 1970s.²³ Following the publication and popularity of the book *Silent Spring*, high-profile national environmental disasters, and a groundswell of activism in response, Congress enacted a series of sweeping statutes to regulate environmental quality at the federal level.²⁴ These statutes included: the National Environmental Policy Act (NEPA), the Clean Air Act (CAA), the Clean Water Act (CWA), and the Safe Drinking Water Act (SDWA), among others.²⁵ Following the format of New Deal congressional actions,²⁶ these statutes, instead of prescribing broad federal enforcement, tended to establish national environmental standards and encourage—but not coerce—state and local implementation of those standards.²⁷

This system of “congressional or administrative efforts to induce . . . states to participate in a coordinated federal program” represents what is traditionally understood as cooperative federalism.²⁸ Over the last fifty years, the vast majority of scholarship in this area has tended to focus on the merits of whether the federal or state governments should establish regulatory standards to reduce environmental problems such as pollution.²⁹ In this context, policy arguments generally offer

private interests, and game hunting on private land.”). Local governments carry similar responsibilities as states, and function to deliver services for communities, but are generally subject to the full legal authority of states. Robert Agranoff, *Local Government*, CTR. STUDY FEDERALISM (2006), <https://federalism.org/encyclopedia/intergovernmental-relations/local-government> [<https://perma.cc/2965-FLPU>] (providing an overview of the functioning of local governments).

²³ See Sophie Yeo, *How the Largest Environmental Movement in History Was Born*, BBC (Apr. 22, 2024), <https://www.bbc.com/future/article/20200420-earth-day-2020-how-an-environmental-movement-was-born> [<https://perma.cc/UP7W-VN5F>] (discussing a campaign by environmental organizers in late summer of 1970 to motivate Congress to legislate).

²⁴ See Scott Josephson, *This Dog Has Teeth . . . Cooperative Federalism and Environmental Law*, 16 VILL. ENV'T L.J. 109, 111 (2005) (“Beginning in the early 1960s, with the publication of the book, *Silent Spring*, environmental issues began to take more precedence on the national level. This book, coupled with a number of highly visible environmental disasters, led to an explosion of federal environmental regulations beginning in the early 1970s.”) (citing ALAN BRINKLEY, *THE UNFINISHED NATION: A CONCISE HISTORY OF THE AMERICAN PEOPLE* 909 (1993)).

²⁵ See, e.g., 42 U.S.C. § 4321 (NEPA); 42 U.S.C. § 7401 (CAA); 33 U.S.C. § 1251 (CWA); 42 U.S.C. § 300 (SDWA).

²⁶ See Fischman, *supra* note 17, at 187 (discussing the New Deal history of cooperative federalism).

²⁷ See Jonathan H. Adler, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 576 (1998) (“[M]ost major federal environmental statutes establish environmental standards at the national level but encourage a significant degree of enforcement and implementation at the state or local level.”).

²⁸ Fischman, *supra* note 17, at 184.

²⁹ See *supra* notes 16–17 and accompanying text.

three reasons for a system founded in cooperative federalism instead of federal preemption: cost savings, local expertise, and local politics.³⁰

Still, since the 1990s, many state and local authorities have called for more autonomy to implement environmental programs, complaining that “the federal government is too rigid and means-oriented” in its environmental regulation, “hampering the ability of states to enact sensible environmental policies.”³¹ On the other hand, some scholars critique that the current system of environmental cooperative federalism grants too much discretion to the states, incentivizing “race-to-the-bottom” dynamics.³² These disagreements illustrate that there are longstanding debates about how to divide the power to regulate the environment. As discussed in Section I.B, these arguments are also relevant to direct federal enforcement through emergency action provisions of environmental statutes that allow for such action.

In recent years, the federal government and states alike have recognized a need to reform aspects of domestic environmental regulation and encourage more effective cooperation. In 2016, the Assistant Attorney General for the Environment & Natural Resources Division (ENRD) of the Department of Justice (DOJ) published a blog post highlighting then-recent wins in joint state-federal environmental enforcement.³³ As the first Trump administration entered office in

³⁰ See Josephson, *supra* note 24, at 112–13 (citing Adler, *supra* note 27, at 578) (analyzing the cost, expertise, and local politics issues of cooperative federalism).

³¹ Adler, *supra* note 27, at 582.

³² In the environmental policy context, the race-to-the-bottom rationale theorizes that states will seek to attract mobile industry to locate in their jurisdictions by continuously offering “suboptimally lax environmental standards” in competition with other states. Compare Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 538 (1997) (responding to critics of Revesz’s challenge of the race-to-the-bottom rationale for allocating to the federal government responsibility over ornamental regulation and the manner in which the federal environmental statutes have dealt with the problem of interstate externalities), and Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67, 68 (1996) (responding to Revesz’s pro-race-to-the-bottom arguments, arguing “significant failures would likely occur in competition among the states if the federal government were to repeal its minimum environmental standards.”), with Scott R. Saleska & Kirsten H. Engel, “*Facts Are Stubborn Things*”: *An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL’Y 55, 61 (1998) (responding to the race-to-the-bottom debate by proposing “an empirically-based risk-benefit approach to environmental law and policy that takes account of the inevitable uncertainties faced by policymakers”), and Joshua D. Sarnoff, *A Reply to Professor Revesz’s Response in “The Race to the Bottom and Federal Environmental Legislation,”* 8 DUKE ENV’T L. & POL’Y F. 295 (1998) (defending Sarnoff’s previous article from Revesz’s criticisms).

³³ John Cruden, *Cooperative Federalism: A Central Concept of Environmental Law*, U.S. DEPT OF JUST. (July 27, 2016), <https://www.justice.gov/archives/opa/blog/cooperative-federalism-central-concept-environmental-law> [<https://perma.cc/EJ8M-CY8E>] (“The Environment and

2017, then-EPA Administrator, Scott Pruitt—likely with an agenda to shift authority over environmental issues to the states³⁴—participated in a “State Action Tour,” with the goals of “[e]nhanc[ing] shared accountability between EPA and state, tribal and federal partners through joint governance and compliance assistance” and “[i]ncreas[ing] transparency and collaboration by listening and working with impacted stakeholders and providing effective platforms for public participation and meaningful engagement.”³⁵

In response to uncertainty about the role the federal government would play in environmental regulation, the Environmental Council of the States (ECOS),³⁶ called in 2017 for a recalibration of state and federal roles in domestic environmental policy—a movement they referred to as “Cooperative Federalism 2.0.”³⁷ The key outcomes of this movement would be to grant state environmental agencies more responsibility in environmental programs, including involvement in decisions for minimum standards to protect public health and deference to state and local enforcement.³⁸ The following year, the Environmental Law Institute released a report capturing a series of dialogues between federal, state, and local representatives that assessed the vision of Cooperative Federalism 2.0.³⁹ Contextualizing the states’ call for greater discretion in making environmental decisions, the report refers back to the Flint Water Crisis as an example that “illustrates the impracticability of EPA completely withdrawing even in situations where a state has primacy over an inherently local problem.”⁴⁰ The report notes the

Natural Resources Division (ENRD) actively promotes joint state-federal environmental enforcement, which underlies the whole nature of cooperative federalism, a concept central to the structure of our environmental laws.”).

³⁴ See U.S. EPA, *Cooperative Federalism at EPA* (June 22, 2020), https://19january2021snapshot.epa.gov/home/cooperative-federalism-epa_.html [<https://perma.cc/CSH2-PTNC>] (“EPA is embracing cooperative federalism and working collaboratively with states, local government, and tribes to implement laws that protect human health and the environment, rather than dictating one-size-fits-all mandates from Washington.”).

³⁵ *Id.*

³⁶ The ECOS is an association of state and territorial environmental agency leaders. See *About ECOS*, ENV’T COUNCIL OF THE STATES, <https://www.ecos.org/about-ecos> [<https://perma.cc/9BRY-LD99>].

³⁷ ENV’T COUNCIL OF THE STATES, *COOPERATIVE FEDERALISM 2.0: ACHIEVING AND MAINTAINING A CLEAN ENVIRONMENT AND PROTECTING PUBLIC HEALTH* (2017), <https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf> [<https://perma.cc/7SPY-3G9H>].

³⁸ See *id.* at 3.

³⁹ ENV’T L. INST., *THE MACBETH REPORT: COOPERATIVE FEDERALISM IN THE MODERN ERA* (2018), <https://www.eli.org/sites/default/files/eli-pubs/macbeth-report.pdf> [<https://perma.cc/6Y5M-R96C>].

⁴⁰ *Id.* at 29.

difficulty of building a regulatory architecture that balances the needs for appropriate deference to states and a necessarily protective federal enforcement mechanism.⁴¹

In 2023, the Biden EPA released a series of memoranda that highlighted the importance of cooperative federalism in the enforcement of environmental statutes, noting that EPA and the states serve “as co-regulators [with] a shared commitment to work together to protect human health and the environment, taking advantage of the strengths and capabilities of both federal and state authorities.”⁴² The first of these documents also highlights the responsibility of EPA to enforce civil rights compliance with states to advance equity and environmental justice.⁴³

Discussions around the proper allocation of power between state and federal authorities in environmental cooperative federalism are ongoing. As the second Trump EPA takes shape, state agencies may renew calls for increased deference and responsibility in environmental regulation. Early actions by the second Trump EPA suggest that cooperative federalism will be a priority,⁴⁴ albeit as pretext

⁴¹ See *id.* at 21–22.

⁴² MICHAEL S. REGAN, ADM’R, U.S. EPA, PRINCIPLES AND BEST PRACTICES FOR OVERSIGHT OF STATE IMPLEMENTATION AND ENFORCEMENT OF FEDERAL ENVIRONMENTAL LAWS 2 (Feb. 17, 2023) [hereinafter REGAN MEMO], <https://www.epa.gov/system/files/documents/2023-03/principles-and-best-practices-oversight-federal-environmental-programs-2023.pdf> [<https://perma.cc/UH3P-7Q6P>]. See also LAWRENCE E. STARFIELD, ACTING ASSISTANT ADM’R, U.S. EPA, EFFECTIVE PARTNERSHIPS BETWEEN EPA AND THE STATES IN CIVIL ENFORCEMENT AND COMPLIANCE ASSURANCE (June 21, 2023) [hereinafter 2023 EPA MEMO], <https://www.epa.gov/system/files/documents/2023-06/effectivepartnershipsbetweenepaandthestatesincivilenforcementandcomplianceassurance062123.pdf> [<https://perma.cc/3U9Y-QPZ5>] (providing recommendations for modes of engagement with state authorities in environmental enforcement).

⁴³ See REGAN MEMO, *supra* note 42, at 5 (“An open relationship and effective communication between EPA and states is important to this effort and includes technical assistance to states to strengthen state nondiscrimination programs and promote compliance.”). Many of the communities most impacted by environmental emergencies are environmental justice communities—marginalized. For example, both Flint, Michigan, and Jackson, Mississippi, two cities to suffer recent major drinking water crises, are both majority-Black cities. U.S. Census Bureau, *Quick Facts: Flint City, Michigan*, <https://www.census.gov/quickfacts/fact/table/flintcitymichigan/PST045224> [<https://perma.cc/J23L-SDXX>] (estimating a population that is 56.7% Black, as of July 2024); U.S. Census Bureau, *Quick Facts: Jackson City, Mississippi*, <https://www.census.gov/quickfacts/fact/table/jacksoncitymississippi/BZA115222> [<https://perma.cc/NC48-692Y>] (estimating a population that is 81.8% Black, as of July 2024). For general background on the environmental justice movement, see Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NATURAL RESOURCES DEFENSE COUNCIL (Aug. 22, 2023), <https://www.nrdc.org/stories/environmental-justice-movement> [<https://perma.cc/K9XD-NAF9>].

⁴⁴ See U.S. EPA, *Administrator Zeldin Takes Action to Prioritize Cooperative Federalism, Improve Air Quality Faster* (Mar. 12, 2025), <https://www.epa.gov/newsreleases/administrator-zeldin-takes-action-prioritize-cooperative-federalism-improve-air> [<https://perma.cc/V8DA-5528>] (“With more than 140 million Americans living in nonattainment areas around the

for broad withdrawal of EPA's responsibility to protect and regulate the environment.⁴⁵

2. *Benefits of Cooperative Federalism*

Three key policy benefits motivate the use of cooperative federalism in environmental regulations.⁴⁶ First, it would be cost-prohibitive and inefficient for the federal government to completely control environmental protection; second, environmental issues vary by state and many require inherently local expertise; third, effective implementation of environmental programs requires local political support.⁴⁷ These motivations similarly apply in the specific context of enforcement of environmental standards.

Federal, state, local, and tribal authorities benefit from cost savings when cooperating with one another in enforcement activities. Environmental issues affect citizens who are subject to—and pay taxes to—both regional and central governments. While they have their own litigating agencies, these authorities have largely the same interest in protecting the public health of their jurisdiction. Collaboration between federal and local governments in enforcement actions thus allows attorneys to plan their time more efficiently and avoid duplication of effort through parallel work.⁴⁸ Combined public resources can help counteract the frequent resource advantage that private parties have in litigating their individual interests.⁴⁹

By sharing information across central and regional authorities, the federal government can utilize local expertise to produce more effective outcomes. The United States is geographically, ecologically, economically, politically, and demographically diverse. Notwithstanding

country, cooperative federalism and clearing out the State Implementation Plan backlog will make significant strides to improving the air we breathe.”).

⁴⁵ See Lisa Friedman & Hiroko Tabuchi, *E.P.A. Targets Dozens of Environmental Rules as It Reframes Its Purpose*, N.Y. TIMES (Mar. 12, 2025), <https://www.nytimes.com/2025/03/12/climate/epa-zeldin-rollbacks-pollution.html> [<https://perma.cc/74DE-N4R4>] (noting a video posted to X in which Lee Zeldin, EPA Administrator, claims EPA's mission is to “lower the cost of buying a car, heating a home and running a business”).

⁴⁶ Josephson, *supra* note 24, at 112 (“There are generally three reasons given for using cooperative federalism.” (citing Adler, *supra* note 27, at 578)). See also *supra* notes 30–34 and accompanying text.

⁴⁷ See Josephson, *supra* note 24, at 112–13.

⁴⁸ See *Interjurisdictional Collaboration*, NAT'L ASS'N OF ATT'YS GEN. [hereinafter NAAG ARTICLE], <https://www.naag.org/issues/consumer-protection/interjurisdictional-collaboration> [<https://perma.cc/426Y-H6R3>] (providing an overview of the ideal circumstances for attorneys general to collaborate with each other—and the federal government—on consumer protection matters).

⁴⁹ See *id.* (“The parties will be advantaged by acting collectively, will be able to draw upon their collective resources to address the breadth or magnitude of the problem”).

certain interstate effects, each state has its unique issues with specific types of pollution, and how that pollution affects its population, flora, and fauna.⁵⁰ In a given enforcement action, local and state authorities may have more insight into local actors and environs than a federal regulator.⁵¹ Exchange of information between different levels of government allows federal enforcers to craft more holistic litigation strategies that anticipate polluter behavior and pursue injunctive relief that is more beneficial to the local population and environment.

Successful implementation of federal environmental regulations relies on local political support.⁵² Local politics similarly influence environmental enforcement. Proper or not, subnational authorities may be influenced by local interests to pursue different enforcement actions than the federal government would pursue.⁵³ Similarly, federal enforcement action that does not gain local support might be subject to criticism that the government is acting outside of its authority and needlessly interfering.⁵⁴ By engaging state and local authorities, the federal government can avoid the perception of imperiousness and pursue more effective enforcement that factors in local politics.

Beyond these three considerations, additional factors motivate cooperation between central and regional authorities. For one, cooperation between federal and regional governments encourages application of consistent standards of environmental enforcement, creating more predictable incentives for potential polluters across jurisdictions.⁵⁵ Additionally, as highlighted in a DOJ memo providing guidelines on joint state/federal environmental enforcement, collaboration between state, local, and federal litigators can “lead

⁵⁰ For example, certain states suffer primarily from harmful pollution of their water ways and water systems while others struggle primarily with air quality. See Charlie Lai, *The Worst States for Climate Change in the US*, EARTH.ORG (June 25, 2023), <https://earth.org/worst-states-for-climate-change> [<https://perma.cc/VV5H-J3F2>] (comparing the states facing the direst levels of different forms of pollution).

⁵¹ See Josephson, *supra* note 24, at 113 (“Each state’s environment is different, so environmental policies are necessarily going to be different in Los Angeles than they are in Bismarck.”).

⁵² *Id.* (“Without local political support, implementing environmental policy can be extremely difficult, if not impossible.”).

⁵³ For example, farming groups carry great influence on local governments in the United States and could influence policy decisions that prioritize beneficial farming practices at the expense of the environment. See *The Importance of Local Businesses to Local Government*, CIVICPULSE (Mar. 14, 2024), <https://www.civicpulse.org/post/evaluating-interest-group-influence-in-local-government> [<https://perma.cc/6TH8-S724>] (noting how local officials ranked farmer groups as more influential on local government than environmental groups).

⁵⁴ This reflects the concerns noted below by Rep. Murphy during the SDWA amendments. See *infra* notes 102–04 and accompanying text.

⁵⁵ See NAAG ARTICLE, *supra* note 48 (“The parties will . . . ensure consistent enforcement or standards across jurisdictional lines.”).

to more persuasive briefs, strengthened by diversity of perspective and combined knowledge across a broad spectrum of issues.”⁵⁶ These benefits extend in both directions, as state and local litigators “bring knowledge of local perspectives and sensitivities while ENRD trial attorneys will bring knowledge of national developments, as well as experiences from other states.”⁵⁷

3. *Challenges of Cooperative Federalism*

Notwithstanding the apparent benefits of collaboration between levels of government in the enforcement context, certain challenges must be addressed. These challenges include industry capture and inherent administrative difficulties. Like the benefits, these issues should receive consideration in any potential reform of the current model of domestic environmental enforcement.

While consideration of local politics—which can lead to more effective enforcement—is a benefit of cooperation, local authorities may impede progress if they overly prioritize industry interests over public health. For industries that pollute at local levels, local and state governments may inherently be more subject to capture by corporate interests.⁵⁸ Even if they are not captured, state and local governments may be more hesitant to upset—or lack the resources to challenge—powerful industries that provide tax revenue and jobs to their jurisdictions. In some cases, this influence could lead regional authorities not to take enforcement action against industry polluters. For example, a state that depends heavily on its chocolate factory for tax revenue, despite it producing carcinogenic air pollution to its citizens, may work against any environmental protection efforts that would impair the business. There, the requirement to cooperate with an adversely interested local

⁵⁶ NAT’L ASS’N ATT’YS GEN. & U.S. DEP’T OF JUST., GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION 2 (2017) [hereinafter NAAG/DOJ MEMO].

⁵⁷ *Id.*

⁵⁸ See Ryan T. Moore & Christopher T. Giovinazzo, *The Distortion Gap: Policymaking Under Federalism and Interest Group Capture*, 42 PUBLIUS 189 (2011) (suggesting that smaller government units are easier for small, concentrated industries to capture than large ones). Federal government is similarly subject to forms of regulatory capture. See Maximilian Laufer, *Democracy and Industry Capture of the Executive*, GEO. L.: DENNY CTR. FOR DEMOCRATIC CAPITALISM, GEO. L. BLOG (Sept. 21, 2023), <https://www.law.georgetown.edu/denny-center/blog/industry-capture-of-the-executive> [<https://perma.cc/BF9C-23NV>]. However, it is likely more immune from influence by smaller industries concentrated in certain parts of the country than regional governments. That is—with certain exceptions—industries whose interests are to deregulate environmental protections at the local level likely devote more effort to influencing the bodies that are primarily responsible for those regulations: state governments. See also Moore & Giovinazzo, *supra*, at 189 (finding that “national policymaking provides more aggregate welfare [than state policymaking] when voters widely disagree with moderately prevalent strong interest groups”).

government would impede federal enforcement efforts. Alternatively, states may want to reasonably address their environmental issues in the way they see fit, and federal intervention could disrupt those efforts. For example, a state that is approaching a productive, amicable settlement with a polluter could find their efforts undone by an aggressive federal enforcement action.

Additionally, there are many inherent administrative difficulties associated with collaboration of regional and federal authorities. Environmental enforcement cases that rise to the level of concern for federal intervention are often resource intensive. Federal litigators may have different expectations from their state and local counterparts “regarding the time frames for resolution of the case as well as how the case should be resolved.”⁵⁹ These different expectations may lead to disagreement and require more time and effort from the parties to resolve conflict and make decisions on significant issues. Decision-making inherently takes longer when more players are involved. Many state and local authorities have also cited challenges to coordination with federal agencies, such as “difficulty identifying intergovernmental affairs contacts, limited federal agency knowledge of state and local government, and inconsistent consultation on proposed regulations.”⁶⁰ Similarly, while many federal statutes and regulations that allow environmental enforcement action have state cognates (or allow for state enforcement), there may be nuances that lead central and regional authorities to pursue different forms of action, adding to the difficulty of joint enforcement.⁶¹

B. Emergency Action Provisions

To ensure federal government officials could take appropriate action to avert threats to the environment and public health, Congress broadly drafted emergency action provisions within the most prominent environmental statutes.⁶² The first relevant emergency

⁵⁹ NAAG/DOJ MEMO, *supra* note 56, at 3.

⁶⁰ U.S. GAO, *Federalism: Opportunities Exist to Improve Coordination and Consultation with State and Local Governments* (Aug. 7, 2020), <https://www.gao.gov/products/gao-20-560> [<https://perma.cc/Z6KU-DFAZ>] (citing findings from interviews with state and local associations).

⁶¹ For example, in light of recent Supreme Court rollbacks to wetlands protection, states that maintained stronger rules for protecting water can no longer rely on federal support for enforcement. Alex Brown, *After Clean Water Act Ruling, States that Want to Protect Affected Wetlands Need Millions*, STATELINE (Dec. 5, 2023), <https://stateline.org/2023/12/05/after-clean-water-act-ruling-states-that-want-to-protect-affected-wetlands-need-millions> [<https://perma.cc/R582-D5HC>].

⁶² See *infra* note 74; see also U.S. EPA, OFF. OF ENF'T & COMPLIANCE ASSURANCE, OECA COOKBOOK ON IMMINENT AND SUBSTANTIAL ENDANGERMENT AUTHORITIES 1

action legislation drafted was through the Air Quality Act of 1967, where section 108(k) provided a limited emergency authority for the Attorney General to bring suit for an injunction against any air pollution source endangering public health, not as a substitute for regular enforcement action.⁶³ Since the passage of that act, similar provisions have appeared in the CAA, CWA, Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and Toxic Substances Control Act (TSCA).

These provisions generally require the occurrence (or anticipation of an occurrence) of an imminent and substantial endangerment to public health, the environment, or both.⁶⁴ This standard has been interpreted largely consistently across the statutes, with flexible definitions of “imminent,” “substantial,” and “endangerment.”⁶⁵ These statutes permit varying levels of relief, from civil actions to administrative orders requiring abatement or prohibiting polluting conduct.⁶⁶

In addition to the above requirements, most of these provisions contain some requirement of coordination with state and local authorities.⁶⁷ At one end of the spectrum, as mentioned in the Introduction, SDWA section 1431 contains a requirement that state and local authorities must not have acted to protect public health for the federal government to act.⁶⁸ On the other end of the spectrum, many of these statutes merely require EPA to provide some form of

(1997) [hereinafter OECA Cookbook], <https://nepis.epa.gov/Exe/ZyPDF.cgi/910220FQ.PDF?Dockey=910220FQ.PDF> [https://perma.cc/YHD4-PCRD] (noting how Congress intended “to give appropriate government officials the right to seek judicial relief, or take other appropriate action to avert threats to the environment or public health”). For a summary of the emergency action provisions as they stand today, see *infra* Table 1.

⁶³ Air Quality Act of 1967, Pub. L. No. 90-148, § 108(k), 81 Stat. 485, 497 (1967); see also Logan Senack, *Forty Years Later, Revisiting the Idea of a Single Emergency Authority Provision*, 8 GEO. WASH. J. ENERGY & ENV'T L. 213, 215 (2018) (“The first instance of relevant emergency power legislation can be found in the Air Quality Act of 1967 . . .”). Similar language exists in the Federal Water Pollution Control Act of 1948, which granted similar authority to the Secretary of Health, Education, and Welfare to request that the Attorney General bring suit to secure abatement of water pollution where it endangers the health of persons in a different state. Pub. L. No. 80-845, 62 Stat. 1155 (1948).

⁶⁴ See OECA Cookbook, *supra* note 62, at 3-4, 9-10, 15-16, 18 (explaining the legal requirements to show “imminent and substantial endangerment” of RCRA section 7003, CERCLA section 106, SDWA section 1431, and CAA section 303).

⁶⁵ *Id.* at 4.

⁶⁶ *Id.* at 1.

⁶⁷ Reference to state and local authorities is included within CAA section 303 and SDWA section 1431. 42 U.S.C. § 7603(a); 42 U.S.C. § 300i(a). CERCLA § 106 and RCRA § 7003 reference state authorities only. 42 U.S.C. § 9606(a); 42 U.S.C. § 6973.

⁶⁸ See *infra* Section II.A (discussing the inaction requirements of SDWA section 1431).

notice to state and local authorities before pursuing action.⁶⁹ In the middle of this range, certain of these statutes call for “consultation” with the appropriate regional authorities as a prerequisite to federal action.⁷⁰ With relatively scant explanation from legislative history, as discussed in Part III, each statute contains some unique combination of these coordination requirements, with one statute containing no coordination requirement at all.⁷¹ Given the lack of a normative reason for these unique requirements, in Part IV this Note recommends reform to standardize these requirements across the statutes.⁷²

The statutory coordination requirements appear to draw on some of the benefits of cooperative federalism specific to the enforcement context. The requirement for state and local inaction imposes a form of deference to regional authorities who have primary authority over emergency enforcement and may have an interest in avoiding parallel enforcement actions. The requirement to consult with state and local authorities facilitates valuable exchange of information, particularly knowledge from local investigations and local expertise (about geography, ecosystem, regional politics, etc.). While the requirement to provide notice does little to involve regional authorities, it does recognize that those authorities, who are traditionally responsible for mitigating pollution within their jurisdiction, should be aware of enforcement action.

The above overview shows how cooperative federalism in environmental law is evolving with modern capabilities and domestic realpolitik. Emergency action provisions represent a key area of coordination between federal and regional authorities that is ripe for reform to reallocate responsibilities in a more standardized way. Before attempting to rationalize the differences between the statutes in Part IV, the next Part analyzes the language of each of the provisions—reviewing relevant case law and legislative history—with a particular focus on the coordination requirements that inform the relationship between federal and regional authorities.

⁶⁹ See *infra* Section II.C (discussing the notice requirements of RCRA section 7003 and CERCLA section 106).

⁷⁰ See *infra* Section II.B (discussing the consultation requirements of SDWA section 1431 and CAA section 303).

⁷¹ CWA section 504, 33 U.S.C. § 1364 (containing no requirement for coordination with state and local authorities).

⁷² See *infra* Part IV.

II

LEGAL ANALYSIS OF EMERGENCY ACTION PROVISIONS

The emergency action provisions of environmental statutes have been recognized as a discrete group by the EPA, courts, and legal academics alike, although each may place different statutes within this category.⁷³ For the purposes of this Note, the most significant statutes included in this group are: Safe Drinking Water Act section 1431, Clean Air Act section 303, Resource Conservation and Recovery Act section 7003, and Comprehensive Environmental Response, Compensation, and Liability Act section 106.⁷⁴

This Part analyzes each of these statutes by looking to the common coordination requirements that tend to appear in emergency action provisions. First, Section II.A reviews the “have not acted” requirement of SDWA section 1431, as well as the removal of such a requirement from CAA section 303. Then, Section II.B assesses the consultation requirements of SDWA section 1431 and CAA section 303. Section II.C continues by comparing the notice requirements of RCRA section 7003 and CERCLA section 106. Ultimately, Section II.D reviews the limited legislative history that sheds light on the varying requirements among the statutes and concludes that there is no normative reason that they should be different.

A. *Inaction*

In response to likely or actual contamination of a public drinking water system, SDWA section 1431(a) permits EPA to take necessary action to protect the health of persons from imminent and substantial endangerment if the “appropriate State and local authorities have not acted to protect the health of such persons.”⁷⁵ This Section reviews the legal interpretations of this provision from

⁷³ Compare OECA COOKBOOK, *supra* note 62, at 1 n.1 (listing SDWA section 1431, CWA section 311(c), (e), CAA section 303, RCRA section 7003, TSCA section 8, and CERCLA section 106 as statutes with emergency provisions), with Senack, *supra* note 63, at 213 n.1 (referring to CWA section 504, SDWA section 1431, RCRA section 7003, CAA section 303, and CERCLA section 106(a) as statutes with emergency provisions).

⁷⁴ SDWA § 1431, 42 U.S.C. § 300i(a); CAA § 303, 42 U.S.C. § 7603; RCRA § 7003, 42 U.S.C. § 6973; CERCLA § 106, 42 U.S.C. § 9606(a). In Section II.D, for comparison purposes, this Note draws on additional emergency action provisions within TSCA section 208, 15 U.S.C. § 2648; CAA section 112(r)(9)(A), 42 U.S.C. § 7412(r); and CWA section 504, 33 U.S.C. § 1364(a). The provisions within CAA section 112(r)(9)(A) and CWA section 504 do not warrant the same meaningful discussion, as they are less frequently utilized and contain minimal coordination requirements. The TSCA section 208 provision has substantively different requirements and functions—a detailed analysis would shed little light on the other requirements.

⁷⁵ 42 U.S.C. § 300i(a).

SDWA section 1431, discusses the removal of a similar provision from CAA section 303, and highlights the potential risk for an alternative, textualist interpretation.

1. *Safe Drinking Water Act § 1431*

The sum of authorities interpreting the inaction requirement of the Safe Drinking Water Act section 1431 show strong deference to EPA's determination that state and local action is inadequate to protect public health—and thus not prohibitive of federal action.

Following several high-profile instances of public drinking water contamination, Congress passed the SDWA in 1974 to “assure that water supply systems serving the public meet minimum national standards for protection of public health.”⁷⁶ The original House committee report showed that Congress intended for EPA to have extensive authority to take action to protect public health.⁷⁷ Referring directly to the inaction requirement, Congress “intend[ed] to direct [EPA] to refrain from precipitous preemption of effective State or local emergency abatement efforts. However, if State or local efforts are not forthcoming in timely fashion or are not effective to prevent or treat the hazardous condition, this provision should not bar prompt enforcement by [EPA].”⁷⁸

The case most directly on point for the inaction requirement is *Trinity Am. Corp. v. EPA*, a 1998 Fourth Circuit Court of Appeals case concerning an EPA order under SDWA section 1431 that required a polyurethane foam plant to sample groundwater and provide bottled water to local residents after sewage and toxic waste from the site had entered local aquifers.⁷⁹ Holding that the order did not displace state authority under the statute, despite state monitoring requirements, the court stated that “EPA retains authority to act when it has a rational basis for concluding that a state’s efforts at abating a potentially hazardous situation are ‘not effective.’”⁸⁰ The requisite action by state and local

⁷⁶ H.R. REP. NO. 93-1185, at 1 (1974). *See also* H.R. REP. NO. 95-338, at 2 (1977) (explaining that the SDWA was enacted in the wake of several disease outbreaks caused by waterborne contaminants, which “heightened awareness of the inadequacy of the existing regulatory procedures to assure safe drinking water”).

⁷⁷ H.R. REP. NO. 93-1185 (1974), *as reprinted in* 1974 U.S.C.A.N. 6454, 6487 (“The authority conferred hereby is intended to be broad enough to permit the Administration to issue orders to owners or operators of public water systems, to State or local governmental units, to State or local officials, . . . and to any other person whose action or inaction requires prompt regulation to protect the public health.”).

⁷⁸ *Id.*

⁷⁹ 150 F.3d 389, 392 (4th Cir. 1998).

⁸⁰ *Id.* at 398.

authorities, then, must be done “in a way adequate to protect the public health; and EPA . . . determines if the state efforts were adequate.”⁸¹

Recent cases that interpreted EPA’s authority under section 1431 concerned residents of Flint, Michigan, pursuing action against EPA for negligence in failing to act following the water crisis.⁸² Two cases, *In re Flint Water Cases* and *Burgess v. United States*, found that EPA had discretion not to act under section 1431, but the courts used the language of coordination with state and local authorities to read into the statute broad discretion for EPA that may support the interpretation from *Trinity*.⁸³ These cases are examples of courts expanding and affirming EPA’s discretion *not* to act under this provision, but in doing so, they also appear to support broad discretion for EPA to determine *how* to act. When interpreting other requirements of section 1431, courts have similarly supported EPA’s “broad authority . . . to provide [itself] with substantial flexibility needed to prevent imminent hazards.”⁸⁴

In response to the Flint Water Crisis and criticism that EPA Region 5 had improperly interpreted their authority under section 1431, EPA released a guidance document in 2018 affirming their authority to act even when state and local authorities have taken minimal action. In their guidance, EPA noted “Section 1431 should not be used to deal with problems that are being handled effectively by state . . . or local governments in a timely fashion” but that “Section 1431 does not require any finding that a State or local authority has ‘failed’ to act.”⁸⁵ Clarifying the requirement for EPA Regions’ determination that local authorities have not acted, EPA recommended that the Regions consult with state authorities because “the State should be able to identify

⁸¹ *Id.* (explaining that the standard is “whether EPA could reasonably conclude that [State and local] efforts . . . [are] not sufficiently effective to protect the public health”).

⁸² See *In re Flint Water Cases*, 482 F. Supp. 3d 601 (E.D. Mich. 2020); *Burgess v. United States*, 375 F. Supp. 3d 796 (E.D. Mich. 2019).

⁸³ *In re Flint*, 482 F. Supp. 3d at 627 (noting the “facially apparent discretion given to the EPA in Section 1431” to act if state action is “insufficient”); *Burgess*, 375 F. Supp. 3d at 813 (“Assessing what State and local authorities have done, whether those actions will protect public health, and whether those actions are sufficient certainly involve [sic] an element of choice and judgment.”).

⁸⁴ *United States v. Hooker Chems. & Plastics Corp.* 749 F.2d 968, 988–89 (2d Cir. 1984) (internal quotation omitted) (supporting EPA’s “broad authority” in the context of determining imminent and substantial endangerment, because “[t]he proper exercise of this authority requires that the Administrator’s discretion under this provision be left relatively untrammelled”). See also *United States v. Price*, 523 F. Supp. 1055, 1074 (D.N.J. 1981), *aff’d*, 688 F.2d 204 (3d Cir. 1982) (affirming the “broad reach” of authority given to EPA under SDWA section 1431); Moorman, *supra* note 2, at 10788 (“In enacting § 1431, Congress sought to vest EPA with broad preventative authority to protect public health.”).

⁸⁵ EPA SDWA GUIDANCE, *supra* note 11, at 12 (arguing that EPA retains authority when local government has acted ineffectively).

the appropriate local authorities and may be aware of whether these authorities have taken any actions.”⁸⁶ The guidance document shares additional examples of state and local actions:

“[F]or instance where *E. coli* was detected at a child care facility, an example of a timely State action was the development of an action plan, approved by the Region, that included: discontinued use of the contaminated well; installation of a new, deeper well; provision of interim bottled water to employees; and delay of school start date until a new, safe well was online.”⁸⁷

In one case, following a drinking water crisis in Jackson, Mississippi, EPA noted in an order that affirmative “informal enforcement” actions by the state agency, including issuance of a compliance plan to the polluter, were insufficient to protect public health in light of a remaining imminent and substantial endangerment.⁸⁸

Notwithstanding these interpretations of generally broad authority, the bounds of the inaction requirement are unclear since only a few cases have discussed it. No case has found that EPA could not act under this statute because a state or local authority had already taken sufficient action to abate the harm. Still, despite the supportive case law and legislative history, a firmly literalist court might conclude that a strict meaning of “have not acted” should apply and prohibit EPA from acting wherever state and local authorities have done *anything* to abate the issue.⁸⁹ Regardless of this risk, and despite the near universal flexibility currently applied to the inaction requirement, the text of this provision has led EPA to wrongfully conclude that it should not take protective action in the face of minimal state and local abatement efforts.⁹⁰

⁸⁶ *Id.* at 13.

⁸⁷ *Id.* at 12.

⁸⁸ U.S. EPA Region 4, Emergency Administrative Order at 5, Jackson, Public Water Sys., SDWA-04-2020-2300 (Mar. 27, 2020) [hereinafter EPA Jackson Order], https://msdh.ms.gov/msdhsite/files/JacksonWater/EPA-MSDH-Correspondence/EPA_City_of_Jackson_Emergency_Administrative_Order_1431_03272020.pdf [<https://perma.cc/2XBE-7B8L>] (ordering the City of Jackson to treat its drinking water after failing turbidity measurements, which if consumed could lead to “severe and sometimes fatal” gastrointestinal illness).

⁸⁹ Textualist approaches to statutory interpretation have become more prominent. *See, e.g.*, Tara Leigh Grove, Comment, *Which Textualism*, 134 HARV. L. REV. 265, 266–67 (2020) (discussing *Bostock v. Clayton County* and “formalist textualism”); Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59, 59–60 (2024) (“Over the last several decades, the U.S. Supreme Court’s approach to statutory interpretation has shifted in a textualist direction.”).

⁹⁰ *See, e.g., supra* note 7 and accompanying text (discussing EPA’s inaction in light of the Flint Water Crisis).

2. *Clean Air Act § 303*

Clean Air Act section 303 provides EPA with the authority to unilaterally issue orders to—or sue—air polluters substantially endangering the public health, welfare, or the environment.⁹¹ In early versions of the CAA, section 303 included language requiring “that appropriate State or local authorities have not acted to abate such sources [of pollution]” before EPA could bring suit.⁹² This requirement was removed through the 1990 amendments to the CAA in order to make the statute more closely resemble other emergency action provisions, which, aside from SDWA section 1431, do not contain inaction provisions.⁹³

Congress began attempting to regulate air pollution at the federal level decades before the modern environmental statutes of the 1970s.⁹⁴ In 1963, prior to the EPA, Congress delegated authority to the Secretary of Health, Education, and Welfare to seek injunctive relief through the courts “to secure abatement of the pollution.”⁹⁵ Subsequently, following the Air Quality Act of 1967, the Clean Air Act of 1970 assigned this authority to the newly established EPA.⁹⁶ Both the 1967 and 1970 statutes required that “appropriate State or local authorities [had] not acted to abate such sources,”⁹⁷ which also survived the 1977 amendments to the CAA.⁹⁸

⁹¹ 42 U.S.C. § 7603.

⁹² Pub. L. No. 101-549, 104 Stat. 2399, 2681–82 (1990) (codified as 42 U.S.C. § 7603). The original language was made effective in Pub. L. No. 95-95, 91 Stat. 685, 770–71 (1977) (codified as 42 U.S.C. § 7603) (amended 1990).

⁹³ Pub. L. No. 101-549, 104 Stat. 2399, 2681–82 (1990) (codified at 42 U.S.C. § 7603). For a summary of other provisions’ requirements, see *infra* Table 1.

⁹⁴ U.S. EPA, *Evolution of the Clean Air Act* (Nov. 12, 2024), <https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act> [<https://perma.cc/4WPP-4P8F>] (discussing the Air Pollution Control Act of 1955 and the Clean Air Act of 1963). For additional history of federal regulatory efforts to control air pollution, see William L. Andreen, *Of Fables and Federalism: A Re-Examination of the Historical Rationale for Federal Environmental Regulation*, 42 ENV’T L. 627 (2012).

⁹⁵ Pub. L. No. 88-206, 77 Stat. 392, 397–98 (1963). Before remedial action could be taken, the relevant provision of the 1963 Clean Air Act required an intensive process of establishing a hearing board of representatives of the affected states to determine whether such pollution and/or abatement was already occurring. *Id.* at 397–99.

⁹⁶ Johanna Adashek, *Clean Air Act § 303 Coming into the Limelight*, GEO. WASH. L.: THE GW POINT SOURCE (Dec. 28, 2023), <https://blogs.gwu.edu/law-gwpointsource/2023/12/28/clean-air-act-%C2%A7-303-coming-into-the-limelight> [<https://perma.cc/6NMG-BKYU>] (describing how the Air Quality Act of 1967 section 108(k) provided similar authority as the 1963 statute and contained nearly the same language as the subsequent Clean Air Act of 1970).

⁹⁷ Air Quality Act of 1967, Pub. L. No. 90-148, § 108(k), 81 Stat. 485, 497; Clean Air Act of 1970, Pub. L. No. 91-604, § 303, 84 Stat. 1676, 1705–06 (originally codified as 42 U.S.C. § 1857i (Supp. IV 1970)) (amended 1977).

⁹⁸ See Pub. L. No. 95-95, 91 Stat. 685, 770–71 (1977) (codified at 42 U.S.C. § 7603) (amended 1990).

In the 1990 amendments to the CAA, the most recent update which placed the statute in its current form, Congress broadened EPA's authority and flexibility by reducing the coordination requirements, including by removing the requirement for state and local inaction before federal government intervention.⁹⁹ In the Senate committee report for these amendments, Congress noted the changes "conform the Administrator's emergency authority under the Act to emergency authorities under other environmental laws."¹⁰⁰

The reasoning that Congress applied to the 1990 amendments could provide an argument that the "have not acted" language in SDWA section 1431 should be read narrowly to provide EPA with the deference and flexibility they carry in all other emergency action provisions. Alternatively, Congress' intentional removal of this provision from section 303 but not SDWA section 1431 could indicate that the requirement within section 1431 should be more strictly applied.

B. Consultation

Beyond the inaction requirement of SDWA section 1431 and CAA section 303, both contain requirements that EPA "shall consult with appropriate State and local authorities" before taking abatement action to prevent imminent and substantial endangerment. This Section first reviews the consultation language of SDWA section 1431 and then reviews the consultation language of CAA section 303.

1. Safe Drinking Water Act § 1431

The Safe Drinking Water Act contains the following language within its emergency action provision:

To the extent [EPA] determines it to be practicable in light of such imminent endangerment, [they] shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking.¹⁰¹

Compared to the inaction requirement, authoritative discussion surrounding this language is even more limited. Those authorities

⁹⁹ Pub. L. No. 101-549, 104 Stat. 2399, 2681-82 (1990) (codified at 42 U.S.C. § 7603).

¹⁰⁰ S. REP. NO. 101-228, at 370 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3753. The report states that, "[t]hese changes are necessary to enable the Administrator to address air pollution emergencies in an adequate manner." Congress noted that, similarly, the removal of the inaction requirement brings the Act in line with other environmental laws. *Id.*

¹⁰¹ 42 U.S.C. § 300i(a).

confirm this is a meaningful requirement for EPA, albeit one that is not stringently enforced due to the “practicability” language.

The consultation requirement was introduced to the provision through an amendment of SDWA offered during a House debate on November 19, 1974.¹⁰² Representative Morgan F. Murphy of Illinois stated that the amendment required EPA to “consult with State and local authorities as to the emergency, what information it is based on, and what action [EPA] proposes to take, so that [EPA] can work hand in glove with the local and State authorities.”¹⁰³ Representative Murphy’s overall tenor when introducing the amendment placed the primary authority on the states to resolve safe drinking water issues and spoke to “the detrimental effect [of] unnecessary interference.”¹⁰⁴

In its 2018 guidance document, EPA drew from statements within the legislative history for this amendment and the original statute to indicate that “Congress inserted this language in Section 1431 . . . simply to avoid duplication between the federal and state enforcement and to preserve the primary responsibility for protecting the public at the state and local levels.”¹⁰⁵ While speaking of its value in the congressional scheme, EPA noted consultation is not mandatory and highlighted the language requiring consultation only “to the extent . . . practicable.”¹⁰⁶ EPA gave additional guidance on satisfying this requirement or making a finding of impracticability: “Nevertheless, the Regions should be aware that EPA will need a basis in the record for the finding. This written basis could be simply a log of a telephone conversation or correspondence between EPA and the State and local authorities.”¹⁰⁷ EPA also noted that a mere notice of violation—even though not an independent requirement under section 1431—would not constitute a consultation with state and local authorities.¹⁰⁸

While no cases directly interpret this consultation requirement, *Burgess* affirms EPA’s discretion on the practicability of consultation with state and local authorities.¹⁰⁹ In response to a challenge by plaintiffs that EPA was mandated to act to prevent the Flint Water Crisis, the Eastern District of Michigan held that section 1431 did not obligate EPA to act, finding support in the provision’s broad discretionary scheme. Referring

¹⁰² 120 CONG. REC. 36400 (1974).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ EPA SDWA GUIDANCE, *supra* note 11, at 13 n.37 (citing H.R. REP. NO. 93-1185, at 22-35; S. REP. NO. 93-231, at 9-10 (1973); 120 CONG. REC. 36372, 36374-75, 37591-92 (1973)).

¹⁰⁶ *Id.* at 13.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Burgess v. United States*, 375 F. Supp. 3d 796, 813 (E.D. Mich. 2019).

to the consultation requirement, the court noted “[t]his provision grants the EPA further discretion by stating that . . . it may determine whether it would ‘be practicable in light of such imminent endangerment[]’ to ‘consult with State and local authorities’”¹¹⁰

Moreover, some commentators have relied on the practicability language of this provision to support EPA’s broad authority under section 1431.¹¹¹ In an article from 2008, one commentator offered thoughts on how agency attorneys should satisfy consultation requirements like those in section 1431, suggesting “[c]onsultation may be accomplished with a simple telephone call, although more extensive discussion may be appropriate. . . . EPA should normally consult with state and local agencies regarding a pending imminent hazard action regardless [of] whether it is required by law. Such consultation can often have beneficial consequences.”¹¹²

While there are only a few analyses of SDWA section 1431’s consultation requirement, the above authorities show it could be satisfied with documentation of relevant conversation or not met at all—with justification for the impracticability.

2. *Clean Air Act § 303*

Compared to SDWA section 1431, Clean Air Act section 303 contains a less forgiving requirement for consultation: “Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based.”¹¹³ In this provision, unlike section 1431, the language allowing EPA not to undertake consultation if impracticable is not present and the content of consultation is distinct. Both provisions require consultation on the correctness of information at the heart of the case, yet only section 1431 additionally requires consultation on the actions state and local authorities plan to take. There is very limited discussion of this requirement, but similar authorities to those relied on for SDWA section 1431 indicate that it is a flexible requirement not intended to limit EPA’s discretion to abate harmful pollution.¹¹⁴

¹¹⁰ *Id.*

¹¹¹ See, e.g., Moorman, *supra* note 2, at 10791 (“Finally, § 1431 does not strictly require that EPA consult with state or local entities before invoking its emergency authority. Such consultation, while desirable, is completely discretionary.”).

¹¹² Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 STAN. ENV’T L.J. 43, 184 (2008).

¹¹³ 42 U.S.C. § 7603.

¹¹⁴ See, e.g., *supra* notes 109–12 and accompanying text.

The language on consultation within section 303 was not part of the original CAA statute or equivalent emergency provisions of earlier air pollution statutes. Instead, the consultation requirement was added through the 1977 amendment to the CAA.¹¹⁵ In adding this requirement, the relevant House committee report noted this language was intended to mitigate parallel enforcement, but not discourage necessary federal action.¹¹⁶ In 1983, prior to the 1990 amendment to the CAA, EPA released a guidance document on section 303 actions.¹¹⁷ Citing the above House report, EPA advised that “[t]he requirement of consultation should not be viewed as an obstacle to effective action by EPA. . . . The consultation requirement is therefore not a concurrence requirement, but rather one of notification and corroboration prior to taking action.”¹¹⁸

The language included in the 1977 amendment differed slightly from the modern form:

Prior to taking any action under this section, the Administrator shall consult with the State and local authorities *in order to* confirm the *correctness* of the information on which the action proposed to be taken is based *and to ascertain the action which such authorities are, or will be, taking*.¹¹⁹

As shown, the 1990 amendment to the CAA relaxed the consultation requirements of this provision.¹²⁰ In addition to removing the inaction requirement, this amendment removed language requiring consultation to require what action state and local authorities are taking and amended the language from “in order to confirm the correctness” to “attempt to confirm the accuracy of the information.”¹²¹ Though this is a subtle alteration, it grants EPA more latitude in its consultation

¹¹⁵ Pub. L. No. 95-95, 91 Stat. 685, 770–71 (1977) (codified at 42 U.S.C. § 7603) (amended 1990).

¹¹⁶ See H.R. REP. NO. 95-294, at 328 (1977) (“The consultation requirement is in furtherance of the committee’s intent that [EPA] not supplant effective State or local emergency abatement action. However, . . . if State and local efforts are not forthcoming in timely fashion . . . to prevent . . . the hazardous condition, this provision would permit prompt action by [EPA].”).

¹¹⁷ EDWARD E. REICH & MICHAEL S. ALUSHIN, U.S. EPA, GUIDANCE ON USE OF SECTION 303 OF THE CLEAN AIR ACT (1983) [hereinafter EPA CAA GUIDANCE], <https://19january2017snapshot.epa.gov/sites/production/files/documents/guide-sec303-rpt.pdf> [<https://perma.cc/38Q4-FAWB>].

¹¹⁸ *Id.* at 6–7 (citing H.R. REP. NO. 95-294, at 328 (1977)).

¹¹⁹ Pub. L. No. 95-95, 91 Stat. 685, 770–71 (1977) (emphasis added).

¹²⁰ See *supra* notes 99–100 and accompanying text.

¹²¹ Pub. L. No. 95-95, 91 Stat. 685, 770–71 (1977); Pub. L. No. 101-549, 104 Stat. 2399, 2682 (1990).

actions.¹²² These adjustments reflect the goal of changes to section 303 within the 1990 amendment, which, as discussed above, sought to “conform [EPA’s] emergency authority under the Act to emergency authorities under other environmental laws.”¹²³

While, at the time of writing, no courts have directly interpreted the consultation requirement under CAA section 303, the methods and merits of consultation within SDWA section 1431 would likely apply here. However, academics have distinguished the two consultation provisions primarily on the grounds that CAA section 303 does not allow for EPA to avoid consultation due to impracticability—a more stringent standard.¹²⁴ Despite this difference in language, the legislative history and long-standing interpretation by EPA indicate that this requirement is not meant to bar proper emergency action, but rather to mitigate unnecessary parallel enforcement actions by EPA.¹²⁵

As with SDWA section 1431, the consultation provision of CAA section 303 encourages the beneficial effects of coordination between authorities without hindering EPA’s emergency enforcement efforts.

C. Notice

Many of the emergency action provisions contain some requirement for EPA to notify state and local authorities before taking certain actions. Resource Conservation and Recovery Act section 7003(a) requires that EPA “provide notice to the affected State” of any lawsuit, and that EPA give “notice to the affected State” prior to taking “other action.”¹²⁶ Comprehensive Environmental Response, Compensation, and Liability Act section 106(a) requires EPA to give “notice to the affected State” prior to taking “other action,” but notice of a lawsuit is not mandatory.¹²⁷ Though there is not much substantively to interpret, these requirements show a respect by Congress for the inherent authority that state and local authorities have over their environments while allowing EPA flexibility to proceed with emergency actions.

¹²² See Adashek, *supra* note 96 (“Now, the EPA need merely to attempt to confirm the correctness of the information. The change, while subtle, removes barriers to action allowing the EPA more freedom to act to protect the public and environment.”).

¹²³ S. REP. NO. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3753 (citing other emergency actions); *see also supra* note 100 and accompanying text.

¹²⁴ See, e.g., Moorman, *supra* note 2, at 10791 n.47.

¹²⁵ See *supra* note 116 and accompanying text.

¹²⁶ 42 U.S.C. § 6973(a).

¹²⁷ 42 U.S.C. § 9606(a).

1. *Resource Conservation and Recovery Act § 7003*

RCRA is the primary law governing solid and hazardous waste disposal in the United States.¹²⁸ RCRA was signed into law in 1976, as an amendment to the Solid Waste Disposal Act of 1965, and it gives EPA the authority to control hazardous waste from generation to disposal.¹²⁹ RCRA section 7003 was first enacted within the original 1976 statute and subsequently amended a series of times to its current form by 1984, allowing for suit where solid waste presents an “imminent and substantial endangerment to health or the environment.”¹³⁰ The text of the statute notes that EPA must provide notice to an affected state of any suit or other action under the provision.

Courts have recognized that the legislative history of RCRA section 7003 is limited, with the discussion available in the amendments not addressing the notification requirements.¹³¹ The only apparent commentary on this requirement comes from EPA via a 1997 guidance document on RCRA section 7003 actions.¹³² This document offers that an EPA region should provide “written notification to the director of the state agency having jurisdiction over hazardous waste matters at least one week before the Agency issues an administrative order.”¹³³ EPA also advises that, when initiating an enforcement suit, “the Region should consult with DOJ regarding an appropriate process for providing notice to the affected state.”¹³⁴ Unlike the consultation requirements, which require some back and forth with the relevant authorities, the requirement to provide notice seems to require only a single communication from EPA to the state.

¹²⁸ *History of the Resource Conservation and Recovery Act (RCRA)*, U.S. EPA (Feb. 11, 2025), <https://www.epa.gov/rcra/history-resource-conservation-and-recovery-act-rcra> [https://perma.cc/6LWY-FJ5F].

¹²⁹ *Id.*; *Resource Conservation and Recovery Act (RCRA) Overview*, U.S. EPA (Sept. 11, 2024), <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview> [https://perma.cc/A4XT-4K4E].

¹³⁰ 42 U.S.C. § 6973(a). The authority to issue emergency orders and requirement to provide notification before doing so was added through the 1980 amendment to RCRA. Pub. L. No. 96-482, 94 Stat. 2334, 2348 (1980).

¹³¹ *See, e.g., United States v. Waste Industries, Inc.*, 734 F.2d 159, 165 (4th Cir. 1984) (acknowledging the near-total lack of legislative history as an obstacle to interpretation).

¹³² U.S. EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, GUIDANCE ON THE USE OF SECTION 7003 OF RCRA (1997) [hereinafter EPA RCRA GUIDANCE], <https://www.epa.gov/sites/default/files/2013-10/documents/use-sec7003-mem.pdf> [https://perma.cc/LU9Q-H38Q].

¹³³ *Id.* at 33 (noting that notification by telephone may be appropriate when conditions dictate a shorter time frame).

¹³⁴ *Id.*

2. *Comprehensive Environmental Response, Compensation, and Liability Act § 106*

Where RCRA generally prioritizes regulations governing the management and disposal of hazardous waste, CERCLA establishes requirements governing “closed and abandoned hazardous waste sites.”¹³⁵ CERCLA was enacted by Congress in 1980, and it provides EPA with authority to pursue short-term actions to address threatened releases and long-term response actions to reduce dangers associated with existing releases.¹³⁶ CERCLA section 106(a) was similarly included as part of the original 1980 enactment of the statute and was amended in 1986, allowing for suit where hazardous substances from a facility present imminent and substantial endangerment to public health, welfare, or the environment.¹³⁷ The text requires only notice to an affected state for other protective action brought by EPA. Practically, CERCLA section 106 can be utilized in ways very similar to RCRA section 7003.¹³⁸

Commentators have parsed the extensive and complex legislative history surrounding CERCLA—“a hastily assembled bill” with “a fragmented legislative history.”¹³⁹ Understandably, the notice requirement of CERCLA section 106(a) has received minimal attention from courts and academics through the years, as it did in the original congressional discussion.¹⁴⁰ In interpreting its authority under section 106(a), EPA provided relevant guidance in 1983 for the notice requirement.¹⁴¹ They advised that, although written notification to the state is desirable at least one week before federal action, a shorter notice period or telephone call to the head of the relevant state

¹³⁵ *Superfund: CERCLA Overview*, U.S. EPA (Oct. 8, 2024), <https://www.epa.gov/superfund/superfund-cercla-overview> [https://perma.cc/EUS5-K9LV].

¹³⁶ *Id.*

¹³⁷ 42 U.S.C. § 9606(a).

¹³⁸ U.S. EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, GUIDANCE MEMORANDUM ON USE AND ISSUANCE OF ADMINISTRATIVE ORDERS UNDER SECTION 106(A) OF CERCLA 4 (1983) [hereinafter EPA 1983 CERCLA GUIDANCE], <https://www.epa.gov/sites/default/files/2013-09/documents/useiss-sec106-mem.pdf> [https://perma.cc/US6E-CE9Z] (“A comparison of § 106(a) and § 7003 of the Resource Conservation and Recovery Act (RCRA) reveals similarities in the two sections, and therefore many of the criteria for issuance of a § 7003 order also apply to § 106 Orders.”).

¹³⁹ Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENV’T L. 1, 2 (1982).

¹⁴⁰ While there is little to substantively interpret from it, the requirement was a product of House amendments to the bill that most informed the final law. See H.R. 7020, 96th Cong. (1980).

¹⁴¹ EPA 1983 CERCLA GUIDANCE, *supra* note 138, at 9.

agency is acceptable where rapid response is necessary.¹⁴² Similarly, in 1990, EPA provided updated—but largely similar—guidance on issuing orders under section 106.¹⁴³ While, unlike RCRA section 7003, CERCLA section 106 does not require notice to regional authorities before judicial action, EPA generally recommends the issuance of an administrative order—which does require notice—before bringing a civil judicial case.¹⁴⁴

The notice requirement of certain emergency action provisions is largely administrative and appears straightforward for EPA to satisfy.¹⁴⁵ That the requirement exists, however, indicates that Congress recognized that the authority granted to EPA in such provisions was one traditionally within the realm of state and local authorities.

¹⁴² See *id.* (“[W]ritten notification to the state should precede federal action [In] [c]ircumstances . . . where rapid response . . . is necessary, issuance of . . . an Order may follow an abbreviated notice period or even a telephone call made by EPA to the . . . affected state.”). But see *id.* (“Written confirmation must follow such telephone notice.”).

¹⁴³ See U.S. EPA, GUIDANCE ON CERCLA SECTION 106(A) UNILATERAL ADMINISTRATIVE ORDERS FOR REMEDIAL DESIGNS AND REMEDIAL ACTIONS 11 n.27 (1990) [hereinafter EPA 1990 CERCLA GUIDANCE], <https://www.epa.gov/sites/default/files/documents/cerc106-uao-rpt.pdf> [<https://perma.cc/NXK5-FNQT>] (adding that “[i]t is EPA policy to give Indian tribes equivalent notification”).

¹⁴⁴ See U.S. EPA, GUIDANCE ON CERCLA SECTION 106 JUDICIAL ACTIONS 7 (1989), <https://www.epa.gov/sites/default/files/2013-10/documents/cercla-106ja-rpt.pdf> [<https://perma.cc/9GN6-TRNP>] (“The Region should generally issue a Section 106 administrative order before referring a Section 106 civil judicial case.”).

¹⁴⁵ For additional insight, academic Charles de Saillan provides non-authoritative recommendations—based on his experience as an Assistant Attorney General for the State of New Mexico—for satisfying the notice requirement. He advises that notice should be written and sent to the governor of the relevant state, with an additional “courtesy copy” sent to the head of the relevant state environmental agency. de Saillan, *supra* note 112, at 185. An additional courtesy copy should be sent to the state attorney general (or relevant head of an environmental division of the office) if a lawsuit is planned. *Id.*; see also *id.* (“Although the agency can only take action after providing notice, no minimum time period between providing notice and taking action is prescribed . . .”).

D. Summary of Coordination Requirements

TABLE 1. EMERGENCY ACTION PROVISION COORDINATION REQUIREMENTS

Statute	Inaction Requirement	Consultation Requirement	Notice Requirement
Safe Drinking Water Act (SDWA) Section 1431	State and local authorities “have not acted”	To the extent practicable, EPA shall consult with State and local authorities	None
Clean Air Act (CAA) Section 303	None	EPA shall consult with State and local authorities	None
Resource Conservation and Recovery Act (RCRA) Section 7003	None	None	EPA shall notify State of suit or any other action
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 106	None	None	EPA shall notify State of any other action
Toxic Substances Control Act (TSCA) Section 208	Local educational agency “is not taking sufficient action”	None	State shall notify EPA before taking emergency action
Clean Air Act (CAA) Section 112(r)(9)(A)	None	None	EPA shall notify State of any other action
Clean Water Act Section 504	None	None	None

For ease of comparison, Table 1 details the different coordination requirements of emergency action provisions.¹⁴⁶ This chart includes

¹⁴⁶ As noted above, the preceding analysis left out discussion on a few emergency action provisions that largely reflect similar requirements and histories to certain provisions discussed. For example, in response to imminent and substantial endangerment to human

the emergency action provisions discussed above, as well as those that did not warrant additional analysis for the purposes of this Note. Each statute described contains a unique set of coordination requirements with state and/or local authorities.

The environmental emergency action provisions require varying levels of coordination between federal, state, and local authorities. These range from requirements of state and local inaction before federal action or consultation between authorities, to provision of notice to authorities. In the next Part, this Note considers these differences in the context of their legislative histories, addresses potential reasons why they differ, and resolves in favor of standardization of the provisions.

III

NORMATIVE EXPLANATION AND CONGRESSIONAL INTENT

Having reviewed the various coordination requirements of otherwise similar emergency action provisions, this Part seeks to explain the differences between these requirements. In its first Section, this Part reviews the disorganized nature of most of the provisions' associated legislative histories. Then, it offers potential explanations for the differences, suggesting primarily that the differences across the statutes correspond to different forms of pollution or the ability of political subdivisions to address those forms. After showing why these explanations are unconvincing, this Part concludes that standardization of the coordination requirements across the emergency action provisions is the best approach considering the—albeit limited—evidence of congressional intent.

health or the environment posed by asbestos in a school building, TSCA section 208 contains a similar inaction requirement as SDWA section 1431 before allowing EPA to act. *See* 15 U.S.C. § 2648(a)(1)(B) (authorizing the administrator or governor of a state to act to protect human health or the environment if the local educational agency is not taking sufficient action to respond to the presence of asbestos or asbestos-containing material in school buildings governed by the agency). CAA section 112(r)(9)(A), which allows emergency enforcement against owners and operators of stationary sources for accidental releases of extremely hazardous substances, contains only a notice requirement. *Compare* 42 U.S.C. § 7412(r)(7)(h)(vi) (establishing the notice requirement), *with* 42 U.S.C. § 7412(r)(9)(A). Additionally, another emergency action provision not discussed, CWA section 504, allows EPA to bring suit to stop the discharge of pollutants that present imminent and substantial endangerment to the health or welfare of persons without any coordination with regional authorities. 33 U.S.C. § 1364(a); *see also supra*, note 74 and accompanying text for an explanation of the excluded provisions.

A. Legislative History

For most of the environmental emergency action statutes, the legislative history is not sufficiently clear to explain the differences between the provisions. Many of the environmental statutes of the 1970s were passed quickly in response to high-profile disasters,¹⁴⁷ and the differences between the similar provisions of the statutes may be accidental due to the rush of the legislative process or urgency to respond to environmental disasters. For example, the legislative histories of the RCRA, CERCLA, and SDWA each include limited discussion of the coordination requirements.¹⁴⁸ And there are circumstantial reasons to believe the requirements in these statutes received insufficient attention. Conversely, the legislative history of CAA section 303 includes the most direct discussion of the coordination requirements, thus providing stronger evidence of congressional intent.

The legislative history of RCRA as originally enacted contains no discussion about the notice requirement of section 7003 and limited discussion about the section at all.¹⁴⁹ In general, RCRA was hastily formed in Congress through a non-traditional process motivated by election year deadlines.¹⁵⁰ Similarly, CERCLA's legislative history contains no discussion of its notice requirement. Closer examination of the law's original passage involved a rushed "take it or leave it" exchange between bodies of Congress that led to interpretive differences.¹⁵¹ From

¹⁴⁷ See, e.g., *Introduction to the Clean Water Act*, WATERSHED ACADEMY WEB, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2571 [https://perma.cc/UGR7-DYZ5] (noting how the 1969 Cuyahoga River Fire motivated the 1972 amendments to the Clean Water Act); *Superfund's 40th Anniversary - A Look-Back at the Decades*, EPA, <https://www.epa.gov/superfund/superfunds-40th-anniversary-look-back-decades> [https://perma.cc/E2XL-TYM4] (noting how, in the late 1970s, "public perception about the dangers at Love Canal served as a catalyst for elected officials" to enact CERCLA in 1980).

¹⁴⁸ See, e.g., *infra* note 151 (discussing how congressional discussion of CERCLA focused on other provisions of the statute during a tight timeline for passage); Richard Weinmeyer, Annalise Norling, Margaret Kawarski & Estelle Higgins, *The Safe Drinking Water Act of 1974 and Its Role in Providing Access to Safe Drinking Water in the United States*, 2017 AM. MED. ASSOC. J. ETHICS 1018, 1020, <https://journalofethics.ama-assn.org/article/safe-drinking-water-act-1974-and-its-role-providing-access-safe-drinking-water-united-states/2017-10> [https://perma.cc/6CFR-2KEC] (noting how congressional discussion centered on determination of which substances would be regulated and to what extent).

¹⁴⁹ See *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984) ("The legislative history of the Act as originally enacted contains no specific discussion of the reach of section 7003 and no mention of the reasons for its insertion."); *supra* note 132 and accompanying text.

¹⁵⁰ See William L. Kovacs & John F. Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COLUM. J. ENV'T L. 205, 216–20 (1976) (discussing the legislative history of RCRA).

¹⁵¹ See J.P. Sean Maloney, *A Legislative History of Liability Under CERCLA*, 16 SETON HALL LEGIS. J. 517, 539 (1992) (describing reactions to the Senate's "take it or leave it"

this, it appears likely that for both CERCLA and RCRA, Congress was minimally concerned with the coordination requirements and focused on more salient issues and contentious provisions.¹⁵²

Unlike RCRA and CERCLA, the legislative history of SDWA section 1431 includes some discussion of its inaction and consultation requirements, but not enough to sufficiently articulate its scope. Congressional statements around these coordination requirements were aspirational about the goals they sought to accomplish—striking the right balance between agency flexibility to respond to disasters while preserving local authority to manage pollution—but they provide no explanation why these requirements are different than other emergency provisions in different statutes.¹⁵³ The particulars of the consultation requirement received more attention than that of the inaction requirement—the 1974 House Report noted only that EPA should “refrain from precipitous preemption” but this language should “not bar prompt enforcement” if local efforts are ineffective.¹⁵⁴

CAA section 303 has a clearer legislative history that yielded a more cogent set of coordination requirements. In a rare instance of speaking directly to changes in coordination requirements, Congress noted that the most recent revision of the CAA “conform[ed] [EPA’s] emergency authority under the Act to emergency authorities under other environmental laws.”¹⁵⁵ Because it is the most recent emergency action provision to receive direct congressional attention on its coordination requirements,¹⁵⁶ section 303 has the benefit both of comparison to other emergency action provisions and of multiple rounds of discussion by Congress on the authority granted to EPA.¹⁵⁷ Each

attitude); *see also* 126 CONG. REC. 31970 (1980) (STATEMENT OF SEN. BROYHILL) (“This bill is technically flawed. A cursory reading reveals hundreds of errors.”).

¹⁵² Initial congressional discussion of CERCLA was dominated by the strength of the liability provisions and the mechanism of joint and several liability for polluters. *See* Maloney, *supra* note 151, at 526–28 (discussing the Gore Amendments to intermediate Superfund bills). Congressional discussion of RCRA was severely limited to only the broad structure of the statute due to the rushed nature of its passage. *See* Kovacs & Klucsik, *supra* note 150, at 220 (discussing how “no member of the House had read” the final compromise bill).

¹⁵³ *See supra* notes 82–90 and accompanying text.

¹⁵⁴ H.R. REP. NO. 93-1185, pt. D, at 35 (1974).

¹⁵⁵ S. REP. NO. 101-228, at 370 (1989), *as reprinted in* 1990 U.S.C.A.N. 3385, 3753 (citing other emergency actions).

¹⁵⁶ The most recent amendment to the CAA occurred in 1990. Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. § 7603). Of the statutes discussed, SDWA section 1431 was last amended in 2002 to protect against threatened terrorist attacks on water systems, but this amendment did not touch any of the relevant coordination requirements. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107-108, 116 Stat. 594, 687 (2002) (codified at 42 U.S.C. § 300i(a)).

¹⁵⁷ *See supra* notes 99–100 and accompanying text.

amendment to the CAA produced substantive changes to the language of the requirements, suggesting that Congress took multiple attempts to arrive at what they viewed as the most appropriate emergency action provision coordination requirements.

The above emergency provisions may have received limited attention in the legislative history due to higher priority items dominating discussion.¹⁵⁸ Still, of these provisions, CAA section 303 has the most supportive legislative history in understanding why Congress arrived at its specific coordination requirements.

B. Explaining the Differences

Notwithstanding what Congress expressed when enacting each of the provisions, there may be practical reasons why the requirements should be varied and interpreted differently across the statutes. Without so expressing, Congress could have designed each statute's coordination requirements to match the nature of the forms of pollution they were regulating. Alternatively, Congress could have considered the historical state expertise and capacity to respond to the different forms of pollution. This Section expands these arguments before considering equivalent policy reasons that emergency action provisions should be standardized. This conclusion is expanded upon in Section III.C.

The most straightforward explanation for the differences in coordination requirements would be that Congress was conscious of the different forms of pollution and intended to encourage a level of coordination relative to the nature of pollution. For example, to explain the inaction requirement of SDWA section 1431 not being present in CAA section 303, Congress could have been more concerned with federal government interference in local management of drinking water issues than they were with similar interference in the realm of air pollutants due to the scope of harm.¹⁵⁹ Drinking water system pollution—like the presence of lead in drinking water or an oil spill in a particular watershed—is considered to have more localized effects than some forms of harmful air pollution.¹⁶⁰ That airborne pollutants

¹⁵⁸ See *supra* note 146 and accompanying text.

¹⁵⁹ As discussed, the inaction requirement was removed by Congress from CAA section 303, but it has not been removed from SDWA section 1431. See *supra* Section II.B.

¹⁶⁰ Chemical pollution is dangerous because the polluted waterways often serve as drinking water sources. Tord Kjellstrom, Madhumita Lodh, Tony McMichael, Geetha Ranmuthugala, Rupendra Shrestha & Sally Kingsland, *Air and Water Pollution: Burden and Strategies for Control*, in DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 820 (Dean T. Jamison, Joel G. Breman, Anthony R. Measham, George Alleyne, Mariam Claeson, David B. Evans, Prabhat Jha, Anne Mills & Philip Musgrove, eds., 2d ed. 2006) [hereinafter,

are more likely to impact multiple states, and are more likely to require federal intervention to address interstate impacts, might have encouraged Congress to place fewer coordination requirements on the federal government in that context.¹⁶¹ This argument could be supported further by the real-world disasters that motivated Congress to enact and amend the emergency provisions.¹⁶²

An alternative rationale, albeit one that yields similar results, is that Congress could have considered the relative state capacity to respond to different forms of pollution as a reason for varying levels of coordination. Regional authorities may be better equipped to regulate forms of pollution that depend on local conditions and infrastructure. Plainly, there could be reasons for the federal government to be more deferential to state and local regulation of drinking water—which might be primarily influenced by local groundwater conditions—than of air, which has more interstate effects.¹⁶³ The technology to identify pollution in water may be more accessible at the state and local level than the technology to identify air pollution. While not instructive of congressional intent, in recent years, certain states have developed new tools for regulating other types of pollution—like localized pollution burdens on disadvantaged and overburdened communities—that could advantage state regulation.¹⁶⁴

However, congressional intent, the language of the coordination requirements, and the practical function of emergency enforcement do not adequately reflect these arguments. Congress drafted the overall

DISEASE CONTROL PRIORITIES], <https://www.ncbi.nlm.nih.gov/books/NBK11769> [https://perma.cc/7REA-5UB5]. Conversely, harmful air pollution can, in some cases, travel long distances due to the nature of aerosols and meteorological factors. *Id.* at 819.

¹⁶¹ See U.S. EPA, *Cross-State Air Pollution* (Oct. 22, 2024), <https://www.epa.gov/Cross-State-Air-Pollution/cross-state-air-pollution> [https://perma.cc/RRT2-96SP] (noting how certain air pollutants “can travel great distances affecting air quality and public health regionally”).

¹⁶² See Elizabeth T. Jacobs, Jefferey L. Burgess & Mark B. Abbott, *The Donora Smog Revisited: 70 Years After the Event That Inspired the Clean Air Act*, 108 AM. J. PUB. HEALTH 585, 587 (2018) (reflecting how the Donora disaster contributed to efforts to curb pollution, culminating in the passage of the Clean Air Act); Brian Vastag, *How the Clean Air Act Came to Be*, SMITHSONIAN (Apr. 18, 2010), <https://www.smithsonianmag.com/science-nature/supreme-court-clean-air-act-environmental-protection-agency-21017286> [https://perma.cc/VT7H-5DWY] (discussing natural disasters of the 1970s and 80s that prompted amendment of the CAA).

¹⁶³ See *supra* notes 160–62 and accompanying text.

¹⁶⁴ See Lew Daly & Idalmis Vaquero, *Where EPA Falls Short, States Lead the Way on Addressing Pollution Burden in Disadvantaged Communities*, JUST SOLUTIONS (May 22, 2024), <https://justsolutionscollective.org/addressing-pollution-burden-in-disadvantaged-communities> [https://perma.cc/VH59-GE5H] (discussing emerging technologies and how the use of cumulative impacts analysis in New Jersey, New York, and Massachusetts in permitting have innovated control of local pollution while avoiding overburdening communities).

schemes of each of the environmental statutes uniquely to the forms of pollution they regulate and did so through diverse mechanisms. Due to the diffuse nature of air pollution, CAA regulates mobile and stationary sources and primarily establishes ambient air quality standards, requiring states to develop implementation plans to meet those standards.¹⁶⁵ Unlike CWA, which primarily authorizes standards for point source discharges of water pollution,¹⁶⁶ SDWA regulates drinking water contaminants at the point of human consumption by setting maximum contaminant levels and requiring treatment standards.¹⁶⁷ RCRA sets proactive standards to track hazardous solid waste and prevent future contamination,¹⁶⁸ while CERCLA creates a liability scheme for cleaning up hazardous solid waste after contamination has occurred.¹⁶⁹ When Congress recognized scientific and practical distinctions in the forms and natures of pollution they sought to regulate, they created starkly unique statutory schemes that reflected those distinctions. But unlike the central substantive provisions of the statutes, there is no direct evidence to support that Congress considered the differences between the forms of pollution to justify different coordination requirements among the emergency action provisions. The emergency action provisions grant largely similar authority to EPA with slight—though ultimately impactful—nuances in the conditions for that authority.¹⁷⁰ Instead, there is direct evidence through congressional statements that

¹⁶⁵ U.S. EPA, *Summary of the Clean Air Act* (July 31, 2024), <https://www.epa.gov/laws-regulations/summary-clean-air-act> [<https://perma.cc/G9WC-MXX4>] (“Among other things, this law authorizes EPA to establish National Ambient Air Quality Standards (NAAQS) to protect public health and public welfare and to regulate emissions of hazardous air pollutants.”).

¹⁶⁶ U.S. EPA, *Summary of the Clean Water Act* (June 12, 2024), <https://www.epa.gov/laws-regulations/summary-clean-water-act> [<https://perma.cc/DG7H-SRX7>] (“The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.”).

¹⁶⁷ U.S. EPA, *Summary of the Safe Drinking Water Act* (July 31, 2024), <https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act> [<https://perma.cc/LLG8-R77R>] (“The Act authorizes EPA to establish minimum standards to protect tap water and requires all owners or operators of public water systems to comply with these primary (health-related) standards.”).

¹⁶⁸ U.S. EPA, *Summary of the Resource Conservation and Recovery Act* (July 31, 2024), <https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act> [<https://perma.cc/SY23-7AKU>] (“The Resource Conservation and Recovery Act (RCRA) gives EPA the authority to control hazardous waste from cradle to grave. This includes the generation, transportation, treatment, storage, and disposal of hazardous waste.”).

¹⁶⁹ U.S. EPA, *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)* (July 31, 2024), <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> [<https://perma.cc/F2U8-XKBQ>] (“[CERCLA] provides a Federal ‘Superfund’ to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment.”).

¹⁷⁰ See *supra* notes 62–66 and accompanying text.

Congress intended for the emergency provisions to grant similar levels of authority to EPA across statutes.¹⁷¹

Similarly, irrespective of congressional intent, the differences in pollution and state capability do not sufficiently warrant different coordination requirements under the emergency action provisions. State authorities may be better equipped to regulate the long-term forms of pollution that depend more on local conditions and infrastructure.¹⁷² In scenarios of emergent threats to human health and the environment, however, the required response to the different forms of pollution is similar. Airborne pollutants regulated by other provisions of the CAA may be long-term and have broad interstate effects, but air pollution presenting imminent and substantial endangerment through the emergency action provision has been predominantly local.¹⁷³ The nature of harm to public health might be different between forms of pollution,¹⁷⁴ but the risk and scale of harm without government intervention are the same.¹⁷⁵ For example, in 1994, EPA ordered a chemical manufacturing plant on Tohono O’odham Nation land in Arizona to temporarily cease operation under CAA

¹⁷¹ See S. REP. NO. 101-228, at 370 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3753 (amending CAA section 303 to “conform [EPA’s] emergency authority under the Act to emergency authorities under other environmental laws”); see also *supra* note 150 and accompanying text.

¹⁷² See *supra* notes 160–62 and accompanying text.

¹⁷³ See, e.g., Administrative Consent Order at 5, Det. Water and Sewerage Dep’t, EPA-5-11-113(a)-MI-01 (EPA Dec. 12, 2011), <https://archive.epa.gov/region5/swdetroit/web/pdf/r5-050697.pdf> [<https://perma.cc/MZ65-UMP7>] (ordering the City of Detroit, under CAA § 303, to control hydrogen sulfide emissions to protect public health in the vicinity of a sewage access shaft); U.S. EPA, *EPA’s Clean Air Act Enforcement Action Will Result in \$1.3 Million of Fixes at Puerto Rico Petroleum Storage Facility* (Sept. 27, 2022), <https://www.epa.gov/newsreleases/epas-clean-air-act-enforcement-action-will-result-13-million-fixes-puerto-rico> [<https://perma.cc/8P6L-LWQW>] (referencing a CAA section 303 order to prevent hazardous air pollutants from petroleum storage tanks).

¹⁷⁴ For example, exposure to air pollutants tends to cause “increased respiratory and cardiovascular morbidity and mortality,” DISEASE CONTROL PRIORITIES, *supra* note 160, at 819, while exposure to water pollutants may cause “nervous system diseases of methylmercury poisoning (Minamata disease), the kidney and bone diseases of chronic cadmium poisoning (Itai-Itai disease), and the circulatory system diseases of nitrate exposure (methemoglobinemia) and lead exposure (anemia and hypertension).” *Id.* at 822. See also *id.* (“Acute exposure to contaminants in drinking water can cause irritation or inflammation of the eyes and nose, skin, and gastrointestinal system . . .”).

¹⁷⁵ Compare, e.g., EPA Jackson Order, *supra* note 88, at 5 (ordering the City of Jackson to treat its drinking water after failing turbidity measurements, consumption of which could lead to “severe and sometimes fatal” gastrointestinal illness), with Clean Air Act Emergency Order at 28, Limetree Bay Terminals, LLC & Limetree Bay Refining, LLC, CAA-02-2021-1003 (EPA May 14, 2021), https://www.epa.gov/sites/default/files/2021-05/documents/limetree_bay_303_order_-_caa-02-2021-1003.pdf [<https://perma.cc/8LAK-7B6E>] (ordering a refinery in St. Croix to cease operations following flair failures that spewed oil droplets on the local community, causing “[s]kin and eye irritation,” “liver effects,” and risk of cancer).

section 303 following discharge of “substantial amounts of hydrogen sulfide” that caused “numerous individuals to be hospitalized”¹⁷⁶ To arrive at this decision, EPA consulted with county and tribal officials and decided that, notwithstanding diligent attempts by tribal authorities to decrease the level of contamination, the threat posed by air emissions required prompt protection of public health through an order.¹⁷⁷ Similarly, in 2020, EPA coordinated with the Mississippi State Department of Health (MSDH) to issue an order under SDWA section 1431 to the City of Jackson after residents were exposed to turbid water, likely containing a number of harmful pathogens, bacteria, viruses, and parasites.¹⁷⁸ While the nature of the harm was spread over a longer period, EPA’s coordination with MSDH—to understand their remediation attempts and provide technical expertise and strong enforcement authority—reflected a similar urgency to the tribal authorities in Arizona.¹⁷⁹ In many instances, the required level of coordination between levels of government in the face of an emergency is not sufficiently different between forms of pollution to warrant the current scheme of coordination requirements.

C. Standardization

Considering that both the legislative history and judicial interpretation of the various emergency provisions support standardization, the differences between the provisions are better explained by congressional inefficiency. That is to say, notwithstanding the various forms of pollution regulated, the coordination requirements likely diverge based on timing and the practical realities of promulgating laws.

When Congress has discussed the coordination requirements of the emergency action provisions in relation to the others, it has encouraged standardization. As discussed in the context of the CAA, the statute with the longest legislative history, the most recent adjustment by Congress to the coordination requirements was a move to make the language more consistent.¹⁸⁰ Congress drafted each of the provisions

¹⁷⁶ Clean Air Act Emergency Order at 2, Minerec Mining Chems., R9-94-34 (EPA Mar. 27, 2020).

¹⁷⁷ *Id.* at 2.

¹⁷⁸ EPA Jackson Order, *supra* note 88, at 5.

¹⁷⁹ EPA OFF. INSPECTOR GEN., STATE PROGRAM DEFICIENCIES AND INADEQUATE EPA OVERSIGHT OF STATE ENFORCEMENT CONTRIBUTED TO THE DRINKING WATER CRISIS IN JACKSON, MISSISSIPPI 28 (2024) [hereinafter EPA INSPECTOR GENERAL JACKSON REVIEW], https://www.epaoig.gov/sites/default/files/reports/2024-08/full_report_-_24-e-0055.pdf [https://perma.cc/HB6V-YTT5] (describing EPA’s coordination efforts with the MSDH to alleviate the crisis).

¹⁸⁰ See S. REP. NO. 101-228, at 370 (1989), as reprinted in 1990 U.S.C.C.A.N. 3385, 3753 (amending CAA section 303 to “conform [EPA’s] emergency authority under the Act

with the same purpose of providing EPA the appropriate authority and flexibility to protect public health in emergencies.¹⁸¹

Interpreting the statutes from this lens, the unique language and coordination requirements of the emergency action provisions stem not from differences in the forms of pollution, but instead from circumstantial differences in the ways each statute was passed and the levels of attention granted to each statute. For example, Congress could observe the field of other emergency action provisions when updating CAA section 303 in 1990 to more closely match the provisions promulgated during the prior few decades; the drafters of the language of SDWA section 1431 in 1974 could not have done the same. That Congress has not made further amendments to SDWA's emergency provision is not likely to be a purposeful choice to affirm its distinctive language and is more likely a symptom of the difficulties associated with congressional action.¹⁸²

Courts have similarly grouped these provisions together and brushed over explanations for their individual nuances. When evaluating claims under EPA's various emergency action provisions, they have generally viewed the judicial precedent under these laws as equally applicable in any given case.¹⁸³ Courts have frequently drawn reasoning and statutory interpretations from certain emergency action provisions and applied them to others.¹⁸⁴ For instance, in *United States v. Aceto Ag. Chems. Corp.*, the Eighth Circuit Court of Appeals regarded the theory of liability under RCRA section 7003 for actors who have "contributed to" waste disposal as virtually the

to emergency authorities under other environmental laws"); *see also supra* note 150 and accompanying text.

¹⁸¹ *See supra* notes 100–02, 115–20 and accompanying text.

¹⁸² *See, e.g.,* Moira Warburton, *Why Congress is Becoming Less Productive*, REUTERS (Mar. 12, 2024), <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq> [<https://perma.cc/R2FZ-T6R6>] (discussing the various factors contributing to Congress passing fewer laws in recent years).

¹⁸³ U.S. EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, USE OF CERCLA § 106 TO ADDRESS ENDANGERMENTS THAT MAY ALSO BE ADDRESSED UNDER OTHER ENVIRONMENTAL STATUTES 7–8 n.8 (2001), <https://www.epa.gov/sites/default/files/2013-10/documents/ise-crossmedia.pdf> [<https://perma.cc/V6CL-2YH7>] ("Further, courts evaluating claims under EPA's various ISE authorities generally view the judicial precedent under these laws as equally applicable in any given case.").

¹⁸⁴ *See, e.g.,* *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 982 (2d Cir. 1984) (holding that "[t]he similarity between the CWA and the later enacted SDWA and RCRA leads us to read all three acts in a similar manner"); *United States v. Ne. Pharm. & Chem. Co.*, 579 F. Supp. 823, 846 (W.D. Mo. 1984) (noting the similarity of CERCLA section 106(a) and RCRA section 7003); *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982) (noting the similarity in Congressional intent underlying RCRA section 7003 and SDWA section 1431).

same as “arranged for” liability under CERCLA.¹⁸⁵ EPA has likewise on many occasions grouped the emergency action provisions together, noting how action may be taken simultaneously under multiple of the provisions.¹⁸⁶ Courts have occasionally discussed the differences between the emergency action provisions to support arguments that outcomes of certain actions would vary under the laws.¹⁸⁷ In doing so, however, no court has explained the reasoning behind the differences among emergency action provisions, let alone those related to the coordination requirements.

As with most explanations of congressional intent, it is impossible to know the true meaning behind the different requirements of the emergency action provisions. However, the sum of the evidence shows these provisions should be treated in largely similar ways. Indeed, other commentators support the idea that, while Congress intended to create provisions that granted largely similar authority to EPA to act, amendments and judicial interpretations have inadvertently stratified the practical levels of authority within these provisions.¹⁸⁸ In Part IV, this Note—understanding that absence of normative explanation for this stratification—will recommend ways to correct for the apparently unintentional differences in coordination requirements.

For the coordination requirements of the emergency action provisions, neither legislative history, judicial review, nor practical policies sufficiently explain why they have different obligations. Instead, these differences are likely unintended consequences of congressional

¹⁸⁵ 872 F.2d 1373, 1384 (8th Cir. 1989) (holding plaintiff’s allegations for CERCLA liability as sufficient for RCRA).

¹⁸⁶ See, e.g., EPA 1983 CERCLA GUIDANCE, *supra* note 138, at 4 (“A comparison of § 106(a) and § 7003 of [RCRA] . . . reveals similarities in the two sections, and therefore many of the criteria for issuance of a § 7003 order also apply to § 106 Orders.”); OECA COOKBOOK, *supra* note 62, at 2 (“The framework of these statutes, legislative history and case law demonstrate the strong similarities between these provisions and how they can be used on a combined basis.”); *id.* at 18 (“EPA is also interpreting these terms consistently with the legislative history and case law previously discussed for the other environmental statutes with similar emergency powers provisions.”).

¹⁸⁷ See, e.g., *United States v. Price*, 577 F. Supp. 1103, 1111 (D.N.J. 1983) (finding the imminent hazard provisions of CERCLA section 106(a) broader than those articulated in RCRA section 7003).

¹⁸⁸ See, e.g., Senack, *supra* note 63, at 225 (“While the initial emergency provisions developed in the 1970s and 1980s were intended to be treated similarly, differing interpretations by the courts and amendments by Congress have led to substantive differences in EPA’s authority to respond to emergency scenarios.”).

inefficiencies and a lack of political salience of the provisions. In the next section, this Note considers these differences, the policy factors described above, and the practical feasibility of reform to recommend a solution for the disordered scheme of coordination requirements within environmental emergency action provisions.

IV RECOMMENDATION

The existing scheme of coordination requirements across environmental emergency action provisions, while originally intended to be consistent, has become disorganized. The substantive differences between these requirements have created confusion for the EPA, the public, and the regulated community.¹⁸⁹ This confusion, by requiring additional analysis and introducing legal uncertainty, has caused delays where enforcement authority is unclear.¹⁹⁰ As displayed in the Flint Water Crisis and other environmental emergencies, these delays lead to meaningfully worse outcomes for public health and the environment where the federal government could have had more discretion to pursue earlier protective enforcement actions.¹⁹¹ Additionally, there are opportunities for federal and state authorities to improve their coordination in joint enforcement activities and facilitate the benefits of combined resources and information exchange.¹⁹²

This Part provides a series of recommendations to minimize confusion and maximize beneficial coordination in emergency action provision enforcement for all parties. Beginning with higher priority solutions, this Part continues with three categories of action the branches of government should take: congressional action to standardize the statutory scheme, judicial action to standardize the statutory scheme, and executive action to provide additional guidance on the coordination requirements. After introducing each recommendation, this Note assesses how each recommended change

¹⁸⁹ *Id.* at 225–26 (“These differences, in addition to creating confusion for EPA, the public, and the regulated community, may also contribute to delays or enforcement uncertainty in cases where enforcement authority is unclear.”).

¹⁹⁰ *Id.*

¹⁹¹ See *supra* Introduction. In reviewing its response to the Jackson Water Crisis, EPA noted a similar lack of familiarity with an enforcing SDWA statute led to unnecessary delays when EPA should have enforced earlier to prevent harms to public health. See EPA INSPECTOR GENERAL JACKSON REVIEW, *supra* note 179, at 36–37 (“[T]here were opportunities to take earlier enforcement action . . . [G]uidance could ensure that the EPA is consistent and equitable in its application in the future.”).

¹⁹² See *supra* notes 42–43 and accompanying text.

maximizes policy benefits and the likelihood of success for each proposal in the second Trump administration and beyond. While progress in all three domains is preferable, the solutions are ordered by their effectiveness for proper allocation of authority and coordination in future emergency scenarios.

A. Congressional Action – Statutory Standardization

At the outset, congressional amendment presents the most direct way to reduce confusion associated with the inconsistencies across these provisions. Some scholars have called for a “Uniform Emergency Authority”—a single replacement statutory provision that EPA could utilize for emergency enforcement of any pollution type.¹⁹³ This type of provision could ameliorate most confusion about what coordination is necessary for EPA to employ, but this drastic level of change may not be wholly necessary and could lead to adverse consequences.¹⁹⁴ For example, a single provision for all statutes would increase the risk of adverse judicial interpretation that weakens EPA’s emergency enforcement powers across the board.¹⁹⁵

While this Note is not inherently opposed to such a change, it instead recommends a series of revisions to the existing statutes that would eliminate the highest sources of confusion and maximize benefits of coordination. Table 2 summarizes the proposed changes.

¹⁹³ See, e.g., Senack, *supra* note 63, at 223 (“[T]here were calls to create a unified emergency provision as early as 1979.” (citing Richard B. Skaff, *The Emergency Powers in the Environmental Protection Statutes: A Suggestion for a Unified Emergency Provision*, 3 HARV. ENV’T L. REV. 298 (1979))).

¹⁹⁴ See *id.* at 225 (“If all emergency authority was found in a single provision, and courts began to interpret that provision more narrowly in even one or a few instances, emergency authority could be similarly weakened across the board.”).

¹⁹⁵ *Id.*

TABLE 2. EMERGENCY ACTION PROVISION COORDINATION REQUIREMENTS
PROPOSAL¹⁹⁶

Statute	Inaction Requirement	Consultation Requirement	Notice Requirement
Safe Drinking Water Act (SDWA) Section 1431	State and local authorities “have not acted”	To the extent practicable, EPA shall consult with State and local authorities	None
Clean Air Act (CAA) Section 303	None	<u>To the extent practicable, EPA shall consult with State and local authorities</u>	None
Resources Conservation and Recovery Act (RCRA) Section 7003	None	<u>To the extent practicable, EPA shall consult with State and local authorities</u>	EPA shall notify State of suit or any other action
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 106	None	<u>To the extent practicable, EPA shall consult with State and local authorities</u>	EPA shall notify State of any other action
Toxic Substances Control Act (TSCA) Section 208	Local educational agency “is not taking sufficient action”	<u>To the extent practicable, EPA shall consult with State and local authorities</u>	State shall notify EPA before taking emergency action
Clean Air Act (CAA) Section 112(r)(9)(A)	None	<u>To the extent practicable, EPA shall consult with State and local authorities</u>	EPA shall notify State of any other action
Clean Water Act (CWA) Section 504	None	<u>To the extent practicable, EPA shall consult with State and local authorities</u>	None

First, Congress should remove the inaction requirement from SDWA section 1431. The current language of the section prohibits

¹⁹⁶ All recommended additions of statutory language are underlined, and all recommended removals are denoted with strikethroughs. Without having properly assessed the function of TSCA section 208, this Note avoids recommending removal of its existing notice and inaction provisions.

EPA from taking emergency enforcement action unless state and local authorities “have not acted” to protect public health.¹⁹⁷ As discussed earlier, this inaction requirement was a culprit in EPA’s delayed response to the Flint Water Crisis.¹⁹⁸ When Congress amended CAA section 303, it removed an inaction requirement that mirrored the language in SDWA section 1431, deeming it a relic of antiquated concerns about federal government overreach that never came to fruition and that were adequately mitigated by a consultation requirement.¹⁹⁹ As SDWA section 1431 could stand via amendment, EPA would not be required to get involved in every emergency, regardless of how well state and local authorities are managing the issue. Nevertheless, EPA could more clearly get involved even where state and local authorities have taken affirmative, yet insufficient protective action. Removing the excess requirement to find state inaction would facilitate federal action by mitigating uncertainty surrounding federal authority. Other restraints on federal overreach would remain, such as the requirement that public health or the environment be imminently endangered, and the consultation requirement discussed below.

Second, Congress should amend or add consultation requirements to the emergency action provisions to match SDWA section 1431.²⁰⁰ While the bounds of their authority are unclear, the existing consultation requirements encourage federal officials to capitalize on the benefits of coordination between levels of government. Consultation could entail EPA communicating with state and local governments, providing general information about the action they are contemplating, and soliciting local insight about the impending emergency. These communications would not entail EPA consulting with an intent of getting the approval of the relevant state and local authorities to intervene. By introducing this requirement to consult, to the extent practicable, the relevant subnational authorities would ensure that information and local expertise flows up to EPA and improves overall enforcement outcomes.

While CAA section 303, the most recently amended emergency action provision, already contains a consultation provision, Congress should take the opportunity to adopt the language of SDWA section 1431 to include the “if practicable” language. Without the “if

¹⁹⁷ 42 U.S.C. § 300i(a).

¹⁹⁸ See *supra* note 7 and accompanying text.

¹⁹⁹ See *supra* notes 99–105 and accompanying text.

²⁰⁰ Consultation requirements (i.e., “To the extent practicable, EPA shall consult with State and local authorities”) should be added to RCRA section 7003, CERCLA section 106, TSCA section 208, CAA section 112(r)(9)(A), and CWA section 504. The practicability language (i.e., “To the extent practicable”) should be appended to the existing consultation requirement of CAA section 303.

practicable” language, there is a risk that courts could impose a more restrictive interpretation of consultation that would hamstring EPA by delaying urgent enforcement actions until they can reach the proper regional authorities. With the practicability caveat included, EPA would have the proper flexibility to take emergency action even where coordination is infeasible.²⁰¹

Lastly, Congress, considering the above consultation requirement, should remove all notice requirements. This change is a lower priority, but the requirements in many emergency action provisions to provide notice before certain actions would become redundant with associated consultation requirements. That is, the requirement to provide notice to a party is inherent in a requirement to consult and exchange information with that party. Leaving the notice requirements in the provision could lead to some interpretative confusion around the meaning of consultation.

If implemented, these four changes would maximize the benefits and minimize the drawbacks of cooperation between federal and regional authorities. The removal of the inaction requirement could avoid certain duplicative, parallel enforcement activities. Additionally, without removing the inaction requirement, states may find that they cannot take full control of their response to emergency environmental harms, an especially concerning prospect if a vindictive presidential administration were to intentionally interfere with productive state efforts. However, these concerns are tempered considering the emergency action provisions provide affirmative enforcement authority to protect public health rather than for political goals, and any pernicious activity would still be regulated judicially. These concerns similarly do not overcome the advantages, considering EPA could more responsibly enforce in jurisdictions that are captured by industry or acting insufficiently for other reasons.²⁰² Through the consultation requirement, EPA would benefit from local expertise while avoiding some of the associated administrative costs due to impracticability. Encouraging enhanced coordination would also result in better local politics—by introducing some recognition of inherent state and local authority—and more effective relief, depending on what the consultation yields.²⁰³

The prospect of congressional action to amend these provisions, particularly in the near term, appears dim, but there are glimmers

²⁰¹ No court has held directly on the bounds of the practicability requirement. However, coordination might be infeasible if, for instance, a state authority refuses to communicate with EPA.

²⁰² See *supra* note 58 and accompanying text.

²⁰³ See *supra* notes 47–52 and accompanying text.

of promise. For a variety of institutional reasons and political trends, affirmative congressional action is much less frequent and less focused on statutory amendment compared to the 1970s.²⁰⁴ The lack of political will to revise existing statutes, and functional difficulties of legislation even if that will existed, appear to make this an uphill battle. However, these proposed changes might be able to avoid the politicization of many contemporary issues. In the 1970s, addressing environmental issues often attracted bipartisan support, and major environmental statutes were often supported by Democrats and Republicans.²⁰⁵ While climate change has been negatively politicized by Republicans in recent years, the changes proposed in this Note would facilitate federal action to address tangible forms of pollution that members of Congress from any party might find political value in supporting.²⁰⁶ Indeed, except for the removal of inaction requirements, the proposed changes encourage enhanced cooperation with state and local authorities—a stated priority of the Trump EPAs of both terms.²⁰⁷ If federal response to environmental emergencies gains political salience, there may be an opportunity to amend the emergency provisions in the environmental statutes.

B. Judicial Action – Interpretative Standardization

Should congressional action prove infeasible, courts may be able to reduce confusion costs from the emergency action provisions by interpreting the statutes in a more standardized fashion. They should do so both by extending the holding of *Trinity Am. Corp. v. EPA* for a narrow reading of the inaction requirement of SDWA section 1431, and by defining the bounds of the consultation requirements of SDWA section 1431 and CAA section 303.

²⁰⁴ See, e.g., Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1691 (2015) (discussing congressional polarization as an explanation for congressional inaction).

²⁰⁵ See RICHARD NIXON FOUND., *The Environmental Legacy of President Nixon* (Apr. 21, 2022), <https://www.nixonfoundation.org/2022/04/environmental-legacy-president-nixon> [<https://perma.cc/76KY-TREH>] (“President Nixon’s consequential environmental record is surprising to many people. The Nixon administration initiated many of the most important, and enduring, environmental policies in American history . . .”).

²⁰⁶ Still, empowering EPA to function more effectively might be unpopular in an administration focused on broad deregulation and disempowering agencies.

²⁰⁷ See *supra* notes 34–35 and accompanying text; see also U.S. EPA, *Administrator Zeldin Takes Action to Prioritize Cooperative Federalism, Improve Air Quality Faster* (Mar. 12, 2025), <https://www.epa.gov/newsreleases/administrator-zeldin-takes-action-prioritize-cooperative-federalism-improve-air> [<https://perma.cc/B5VT-VYP6>] (quoting EPA Administrator Zeldin as saying, “with more than 140 million Americans living in nonattainment areas around the country, cooperative federalism and clearing out the State Implementation Plan backlog will make significant strides to improving the air we breathe”).

As discussed in Part III, *Trinity Am. Corp. v. EPA* is the case most on point for interpretation of the inaction requirement of SDWA section 1431, and it holds that “EPA retains authority to act when it has a rational basis for concluding that a state’s efforts at abating a potentially hazardous situation are ‘not effective.’”²⁰⁸ This case has not been widely discussed or extended by courts in the Fourth Circuit or any others. To confirm that EPA maintains some discretion to define requisite action by state and local governments, if given the opportunity, other courts—in addition to the Fourth Circuit—should expressly extend the holding of *Trinity*.

Additional uncertainty in the emergency action provisions stems from underdefined consultation requirements. While opportunities to do so might be rare, courts should take relevant opportunities to provide guidance on what types of activity would constitute consultation. A reasonable definition might point to the distinct notice requirements and say that mere contact would not constitute consultation. Beyond that, a court might wish to defer to agencies on the methods of consultation but require some attempt to discuss valuable information related to the case. The exact outcome of consultation requirements is less important than the discussion itself providing valuable guidance to EPA. Without direct language to work from, it would be unwise to recommend that courts incorporate consultation requirements into the notice requirements of provisions like RCRA section 7003 and CERCLA section 106, notwithstanding the policy merits of doing so.²⁰⁹

While less effective than direct congressional statutory amendment, these actions would enhance cooperation benefits at a level similar to congressional changes. Extending *Trinity* would have a similar effect as removing the inaction requirement and would encourage EPA to protect environmental health where local governments have incentives not to do so (e.g., because of insufficient local capacity or political capture by local industry). Defining consultation requirements would also extend and affirm the cooperation benefits discussed for SDWA section 1431 and CAA section 303 actions.

However, this solution would only function in a post-hoc manner: an environmental emergency—in the realm of SDWA—presenting imminent and substantial endangerment to the public would need to occur (or be likely) in a new circuit court’s jurisdiction, and EPA would need to take action in response (where state and local authorities have

²⁰⁸ 150 F.3d 389, 398 (4th Cir. 1998) (quoting H.R. REP. NO. 93-1185, at 35-36 (1974), reprinted in 1974 U.S.C.A.N. 6454, 6487).

²⁰⁹ If courts were to change the meaning of the statutory language through interpretations that are based on policy advantages instead of canons of interpretation, those decisions would likely be overturned.

taken some action), file a civil case (or defend an administrative order), and then litigate the case to a decision (and appeal, etc.), arguing for an extension of *Trinity*.²¹⁰ This solution thus requires environmental harm to fall, or be threatened, on some population before it is implemented, and the result is incremental—only the jurisdictions that ultimately extend the precedent benefit from the certainty provided.

Extending *Trinity* may also raise concerns that drawing attention to this case could lead to an adverse ruling in many courts, including the Supreme Court of the United States. For example, EPA’s innovative use of an under-utilized provision of the CAA partially motivated *West Virginia v. EPA*, which discouraged “major questions” of domestic importance from being confronted within infrequently-used—“ancillary”—statutory provisions.²¹¹ Hypothetically, the circumstances surrounding potential use of SDWA section 1431 could be deemed “unprecedented.”²¹² Recent trends in Supreme Court jurisprudence might also lead courts to take a more textualist approach to interpreting SDWA section 1431 and hold that inaction requires factual inaction.²¹³ Similarly, a court affirmatively defining the bounds of consultation might lead to an unnecessarily strict interpretation that inhibits proper EPA enforcement.

Despite these risks, judicial action appears a more feasible way to provide authoritative guidance to standardize and clarify EPA’s authority under the emergency action provisions. In this moment, the federal courts of appeals are more immune from partisan politics than Congress and are more likely to extend the well-justified precedent of *Trinity*.²¹⁴

²¹⁰ Other factual scenarios may exist, like private challenges to mandate EPA action under the emergency provisions, but courts have held there is no obligation under these statutes for EPA to act. *See Burgess v. United States*, 375 F. Supp. 3d 796, 816 (E.D. Mich. 2019) (holding EPA had no mandate to respond to the Flint Water Crisis under SDWA section 1431).

²¹¹ 597 U.S. 697, 710 (2022) (“Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970.”).

²¹² *Id.* at 721–24 (identifying the unprecedented nature of claimed authority as an indication that Congress may have not delegated power). *But see* Robert L. Glicksman & Johanna Adashek, *Agency Authority to Address Chemicals of Emerging Concern: EPA’s Strategic Use of Emergency Powers to Address PFAS Air Pollution*, 48 HARV. ENV’T L. REV. 369, 422–28 (2024) (arguing the major questions doctrine should not apply to prevent EPA from using CAA section 303 to regulate PFAS).

²¹³ *See supra* note 100 and accompanying text.

²¹⁴ *But see* Alma Cohen & Rajeev H. Dehejia, *Judges Judging Judges: Partisanship and Politics in the Federal Circuit Courts of Appeals* (Nat’l Bureau of Econ. Rsch., Working Paper No. 32920, 2024), <https://www.nber.org/papers/w32920> [<https://perma.cc/W3S9-RG7N>] (noting how federal judges’ decisions show evidence of polarization, particularly in the last two decades).

C. Executive Action – Guidance on Coordination

Because of the difficulties associated with potential congressional and judicial action, executive action might be a more feasible route. In response to the difficulties surrounding the Flint Water Crisis, EPA released guidance on the scope of its authority under the emergency action provisions.²¹⁵ Additionally, in 2023, EPA released a memorandum to update EPA's enforcement policies to promote civil enforcement and compliance assurance work between EPA and states.²¹⁶ To reduce further confusion surrounding the emergency action provisions, EPA should issue additional guidance focusing specifically on the coordination requirements.

While the existing guidance covers interactions with state and local authorities under SDWA section 1431,²¹⁷ and general best practices for engagement with states in enforcement,²¹⁸ EPA and ENRD attorneys could benefit from agency guidance that clarifies EPA's legal authority under the coordination requirements. This guidance could include legal interpretation of the existing coordination requirements of emergency action provisions, clarification on elevation protocols for the provisions, and additional recommendations for means of engagement with regional authorities. The details are flexible—and could include insights uncovered in Parts III and IV of this Note—but the guidance should ultimately facilitate meaningful coordination with regional authorities and enhance the benefits of agency-lawyer cooperation without overly restricting EPA discretion.

In a normal administration, executive action presents the lowest barrier to entry for productive change, but also the smallest scope of positive impact and the lowest barrier for withdrawal. It is unlikely that the second Trump administration will prioritize this type of reform because it would empower EPA in a way that goes against the administration's policies. The first Trump EPA did state that it would prioritize a similar effort to encourage cooperation in environmental enforcement with state agencies.²¹⁹ The second Trump EPA has also made early statements—if pretextual—that it would encourage the

²¹⁵ EPA SDWA GUIDANCE, *supra* note 11, at 3 (“One of the purposes of this guidance is to encourage a more widespread use of EPA’s Section 1431 authority by more fully explaining situations where this authority may be applied.”).

²¹⁶ 2023 EPA MEMO, *supra* note 42, at 1 (setting the “principles and best practices regarding the relationship between [EPA] and . . . state partners” while emphasizing that the “success protecting the environment and public health depends upon effective collaboration between federal and state environmental programs”).

²¹⁷ EPA SDWA GUIDANCE, *supra* note 11.

²¹⁸ 2023 EPA MEMO, *supra* note 42.

²¹⁹ See *supra* note 89 and accompanying text.

enhanced cooperation of state and federal authorities.²²⁰ It is unclear to what extent they will do so, but, as the Trump administration strips environmental enforcement resources at the federal level,²²¹ EPA lawyers enforcing emergency provisions may need to rely on state resources to help manage their cases. Thus, guidance on coordination might nonetheless be feasible considering this likely shift in authority.

CONCLUSION

While residents of Flint, Michigan, suffered from increased blood-lead levels and bacterial disease, EPA grappled with confusion about their legal authority and delayed action in a way not intended by Congress. EPA has since taken steps to mitigate future uncertainty under SDWA section 1431, but the scheme of inconsistent coordination requirements across emergency action provisions could lead to similar public health crises. If the inaction required had not existed within SDWA section 1431 as recommended, EPA might not have delayed its enforcement authority in both Flint, Michigan, and Jackson, Mississippi, leading to earlier action and better health outcomes for their residents. Similarly, in future emergency actions under any environmental statute, with the addition of the recommended consultation provision, states could be assured that they would be coordinated with and notified.

Considering the early actions of the second Trump administration, EPA clearly has other institutional barriers to proper enforcement of environmental statutes. The recommendations presented in this Note might thus make more sense and see more progress in a different administration, Congress, or Supreme Court. However, if there is room for any action, the recommendations proposed can help improve outcomes of environmental emergencies by providing clearer understanding of responsibilities among federal, state, and local authorities.

²²⁰ See Press Release, U.S. EPA, *EPA Administrator Zeldin Addresses Environmental Council of States' 2025 Spring Meeting, Highlights Commitment to Cooperative Federalism*, EPA (Mar. 25, 2025), <https://www.epa.gov/newsreleases/epa-administrator-zeldin-addresses-environmental-council-states-2025-spring-meeting> [https://perma.cc/NF7F-86T6].

²²¹ Tom Perkins, *The Trump Administration Has All but Stopped Enforcing Environmental Laws*, GRIST (May 8, 2025), <https://grist.org/accountability/the-trump-administration-has-all-but-stopped-enforcing-environmental-laws> [https://perma.cc/54ZP-7XCK] (noting how environmental enforcement actions have slowed during the second Trump administration).