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REIMAGINING EMERGENCY POWERS FOR ENVIRONMENTAL PROTECTION

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Modern U.S. environmental law is saturated with emergencies. In an environmental context, the term "emergency powers" typically conjures thoughts of exemptions from protection: suspension of environmental provisions following declarations of an energy or national security emergency, enforcement waivers during the COVID-19 pandemic or extreme weather, and more. This Article tells a different story. It excavates and explains what I term "affirmative emergency powers": statutory provisions in federal and state environmental laws that authorize officials to issue orders to prevent or redress imminent and substantial endangerment to health or the environment. This Article flips the script on emergency powers from tools that circumvent environmental protections to strategies for redressing sudden disasters and slow-moving crises. Yet despite their potential to mitigate urgent harms, affirmative emergency powers are rarely used and thinly theorized.

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This Article fills a scholarly and practical gap with three interventions. First, it offers the most comprehensive account to date of statutory authorizations for affirmative emergency powers in the most commonly enforced federal environmental laws and parallel state statutes, including many provisions not yet explored in legal scholarship. It maps who may act, what conditions trigger emergency authority, and what remedial measures are available. Second, this Article establishes why affirmative emergency powers are especially valuable now. It demonstrates their potential to foster protection from modern threats like data center pollution, climate-driven hazards, dire environmental injustices, and "forever chemicals"—while avoiding burgeoning doctrinal barriers in a constrained administrative landscape. Third, this Article develops a prescriptive framework to guide more frequent initiation of these actions while supporting the self-determination values inherent in environmental justice and promoting democratic norms of consistency and transparency.

These interventions respond to the current time of profound destabilization in environmental law. By advancing a fuller account of affirmative emergency powers, this Article contributes to the broader project of reimagining environmental governance that this moment demands. It reveals that old tools, rooted in clear authorities, can become creative strategies to meet a new administrative law world increasingly hostile to environmental protection.

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INTRODUCTION

Environmental law has always been entwined with emergencies, with their interplay acting as a persistent force in shaping statutes and their implementation. Mass chemical exposures, oil spills, and toxic waste leaks spurred our landmark environmental legislation.[1] Today, some environmental emergencies are unforeseen disasters, and others have

[1] Professor William Buzbee has summarized this phenomenon:

> Few environmental initiatives and resulting laws emerged from periods of cool, rational discussion. Instead, most environmental laws emerged from periods of widespread perceptions of crisis. The first federal Clean Water Act with legal teeth was enacted following the Cuyahoga River fire and widespread concern about the environment following the first Earth Day. The Clean Air Act was similarly enacted after . . . heightened awareness of environmental ills. The federal Superfund law . . . was enacted following widespread concern and publicity regarding hazardous waste contamination at Love Canal in upstate New York . . . .

William W. Buzbee, Urban Sprawl, Federalism, and the Problem of Institutional Complexity, 68 Fordham L. Rev. 57, 128–29 (1999) (footnotes omitted). Indeed, many agencies and administrative laws have arisen as Congress acted in the wake of emergencies such as natural disasters and economic crises. See Eric A. Posner & Adrian Vermeule, Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008, 76 U. Chi. L. Rev. 1613, 1637–39 (2009) (tracing the pattern of enactment of administrative laws and grants of authority to the executive following the 2008 financial crisis and September 11th).

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their roots in long-term failures of risk assessment or gaps in the law.[2] Indeed, not all modern environmental emergencies resemble sudden, high-visibility crises that dominate public attention.

Take the St. Croix Limetree Bay Refinery in the U.S. Virgin Islands. From above, the refinery pierces a cyan gradient of turquoise waters and verdant hills. But when the refinery restarted in 2021 after a hiatus in operations, it subjected 20,000 people to harrowing conditions.[3] That February, an "oily mist" rained down on the refinery's downwind communities, coating housing, contaminating water cisterns, and leaving gardens slick and soiled.[4] For weeks, people reported nausea and other symptoms linked to exposure to toxic chemicals, particularly hydrogen sulfide.[5] A community survey revealed the severity of health and property damage from these choking emissions. Residents near the refinery reported a "dense fog" entering homes and daycares; intense sensations of suffocation; burning in their eyes, noses, and throats; workers and children collapsing.[6] One resident described being "overt[aken]" by a cloud of emissions, then feeling "like it was eating [their] nervous system from the inside."[7]

In response, the U.S. Environmental Protection Agency ("EPA") did something extremely rare: it issued an emergency order under Section 303 of the Clean Air Act ("CAA").[8] The EPA ordered the refinery to cease operations, conduct audits, and submit a plan to undertake corrective measures.[9] As Section 303's sixty-day limit on administrative orders

[2] See Buzbee, supra note 1, at 129; Wendy E. Wagner, Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment, 53 Duke L.J. 1619, 1670–78 (2004); William W. Buzbee, Recognizing the Regulatory Commons: A Theory of Regulatory Gaps, 89 Iowa L. Rev. 1, 48–51 (2003).

[3] Bennington Coll. Ctr. for the Advancement of Pub. Action, Environmental Justice Begins in St. Croix, https://www.bennington.edu/center-advancement-of-public-action/environment-and-public-action/environmental-justice-begins-st [https://perma.cc/XAL9-RAXP] (last visited Sep. 12, 2026) (evaluating results from a community impact survey of 681 St. Croix residents and documenting widespread health and environmental harms from the Limetree Bay refinery restart).

[4] Limetree Bay Terminals, LLC, No. CAA-02-2021-1003, at 8–10 (EPA Region 2 May 14, 2021) [hereinafter Limetree Emergency Order] (Clean Air Act emergency order).

[5] Id. at 12, 14–15, 18–20.

[6] Bennington Coll. Ctr. for the Advancement of Pub. Action, supra note 3.

[7] Id.; see also Limetree Emergency Order, supra note 4, at 12–18 (finding that the refinery had failed to properly use its hydrogen sulfide monitoring and capture system, and ignored community reports of health impacts).

[8] Limetree Emergency Order, supra note 4, at 1, 31.

[9] Id. at 31–40.

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approached, the federal government filed a civil action seeking injunctive relief to continue the order's protections.[10] At the same time, Limetree Bay agreed by joint stipulation to keep the refinery idled unless it satisfied corrective requirements designed to eliminate endangerment from the facility's emissions.[11]

This Article uses the term "affirmative emergency powers" to refer to the type of provisions in environmental statutes that the EPA invoked against the Limetree Bay Refinery. These provisions authorize officials to sue for or order the immediate abatement or prevention of conditions that endanger health, welfare, or the environment. Federal and state legislatures have included affirmative emergency powers in numerous environmental statutes across the nation.[12]

Affirmative emergency powers differ from conventional enforcement actions—the far more common and familiar administrative or civil judicial suits for permit violations or unpermitted pollution.[13] Environmental permits generally grant a holder limited rights to pollute.[14] Conventional enforcement actions address compliance with permit limits for regulated pollutants or whether a polluter holds the appropriate permit. Permitting regimes across air, water, and land also tend to focus on individual sources or single pollutants, oftentimes without considering

[10] Id. at 45; Complaint at 14–15, 18, United States v. Limetree Bay Refin., LLC, No. 21-cv-00264 (D.V.I. July 12, 2021).

[11] See Joint Stipulation ¶¶ 1–12, *Limetree Bay Refin.*, No. 21-cv-00264 (D.V.I. July 12, 2021) (filed simultaneously with the Complaint, stipulating that the refinery was idled, and detailing corrective action requirements should the refinery seek to restart operations). Limetree Bay ultimately sold the refinery. Following negotiations and litigation, the EPA and the new owners agreed on the necessary conditions to reopen the facility. Kit MacAvoy, EPA, Port Hamilton Enter New Order on Consent, V.I. Daily News (Aug. 26, 2024), https://www.virginislandsdailynews.com/news/epa-port-hamilton-enter-new-order-on-consent/article_21d22482-6343-11ef-b919-c3032de0f8ef.html [https://perma.cc/6CHL-S4CS].

[12] See infra Section I.A.

[13] Elsewhere I have detailed the processes and participants in conventional enforcement actions. See Sara A. Colangelo, Forging Complete Justice: Equitable Relief in Environmental Enforcement, 46 Harv. Env't L. Rev. 315, 322–30 (2022). For additional information on the goals of environmental enforcement programs, see David L. Markell & Robert L. Glicksman, A Holistic Look at Agency Enforcement, 93 N.C. L. Rev. 1, 10–13 (2014); Mark Seidenfeld & Janna Satz Nugent, "The Friendship of the People": Citizen Participation in Environmental Enforcement, 73 Geo. Wash. L. Rev. 269, 270–71 (2005).

[14] See generally NPDES Permit Basics, EPA, https://www.epa.gov/npdes/npdes-permit-basics [https://perma.cc/RE2K-K5NS] (last updated July 22, 2026) (noting that, under the Clean Water Act permitting regime, a permit will specify an allowable amount of pollution).

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their collective effects on a particular location.[15] And though they are a powerful check on violations of environmental law, conventional enforcement actions are sometimes insufficient to address serious threats.[16]

When that happens, affirmative emergency powers can function as a critical backstop for environmental protection because they center risk and harm rather than numeric permit limits. So unlike conventional enforcement actions, officials can invoke affirmative emergency powers even when: polluters are in compliance with a permit;[17] rulemaking or standard setting has yet to address new threats;[18] regulatory systems result in toxic hotspots;[19] pollution control approximations in permits or standards have drifted out of sync with real-world conditions; or individual facilities operate in compliance with their permits but nonetheless contribute to acute cumulative environmental burdens.[20]

This distinctive ability of affirmative emergency powers to mitigate dangerous conditions regardless of permit status can enable them to protect people and places from urgent hazards, including data center

[15] See, e.g., Sanne H. Knudsen, Regulating Cumulative Risk, 101 Minn. L. Rev. 2313, 2316 (2017) (observing that "myopic, chemical-by-chemical analysis" misses cumulative risk); Off. of Rsch. & Dev., EPA, Cumulative Impacts Research: Recommendations for EPA's Office of Research and Development 1–2 (2022), https://www.epa.gov/system/files/documents/2022-09/Cumulative%20Impacts%20Research%20Final%20Report_FINAL-EPA%20600-R-22-014a.pdf [https://perma.cc/6UFN-7MWJ] (noting that "[t]he landmark environmental statutes [the] EPA draws its authority from . . . have historically been implemented by evaluating the risks and effects associated with exposure to a single pollutant in a single exposure medium" and highlighting their inadequacy to address the reality of pollution-based harms in certain locations).

[16] See infra Section II.A.

[17] See infra Subsection II.A.1.

[18] See infra Subsection II.A.1.

[19] See, e.g., Ann E. Carlson, The Clean Air Act's Blind Spot: Microclimates and Hotspot Pollution, 65 UCLA L. Rev. 1036, 1036, 1047, 1060–78 (2018) (arguing that "the ambient focus of the CAA, which requires the monitoring and regulation of large air districts to produce background levels of pollution that meet stringent federal standards, actually masks pollution hotspots," which result in "[l]ow-income communities and communities of color [being] much more likely to live in polluted microclimates").

[20] See, e.g., Todd S. Aagaard, Environmental Law Outside the Canon, 89 Ind. L.J. 1239, 1241 (2014) ("Many environmental harms continue relatively unregulated."); Off. of Enf't & Compliance Assurance, EPA, Guidance on Section 303 of the Clean Air Act 13 (1999) [hereinafter Guidance on Section 303], https://www.epa.gov/sites/default/files/2021-05/documents/transmittalofguidanceonsection303ofcaa040199.pdf [https://perma.cc/W7X5-9CN2] ("Section 303 applies to a broad range of endangerment scenarios. It applies regardless of whether a pollutant is regulated, or how it is regulated . . . [or] even if the plant is in compliance with its regulatory emissions limits . . . .").

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pollution, climate-driven environmental and health threats, severe cumulative pollution, and "forever chemicals."[21] This is one reason I argue that affirmative emergency powers should not be seen as exceptional departures from democratic governance, a framing that understandably troubles many scholars.[22] Rather, they should be understood as corrective mechanisms that re-anchor environmental governance to its underlying protective purpose when regulatory systems or conventional enforcement mechanisms fail and when unforeseen circumstances inevitably arise. Accordingly, affirmative emergency powers are—to borrow a phrase used by Professors Elena Chachko and Katerina Linos—"emergency powers for good."[23]

Despite these benefits, the use of affirmative emergency powers is exceedingly rare under three of the nation's most commonly enforced environmental laws, namely the CAA, the Clean Water Act ("CWA"), and the Safe Drinking Water Act ("SDWA").[24] For example, the EPA has issued orders under Section 303 of the CAA *fewer than twenty times* since 1970.[25] Even in situations as extreme as the Flint Water Crisis, the EPA's

[21] See infra Subsections II.A.3, III.A.1 & III.A.3.

[22] See infra Subsection II.B.3.

[23] Elena Chachko & Katerina Linos, Emergency Powers for Good, 66 Wm. & Mary L. Rev. 1, 69 (2024). However, affirmative emergency powers do not align with one element of their framework: societal-level transformation. Chachko and Linos "argue . . . that there exist narrow circumstances in which societal transformations can be appropriately achieved through emergency powers." Id. at 9. That is beyond the scope of this Article.

[24] See generally John C. Cruden & Bruce S. Gelber, Federal Civil Environmental Enforcement: Process, Actors, and Trends, 18 Nat. Res. & Env't, Spring 2004, at 10, 17 (classifying the CAA and CWA as the most frequently enforced statutes in the federal civil context). While imperfect, the EPA's case and consent decree dataset indicates that most enforcement matters concern alleged violations of the CAA or CWA. See Civil and Cleanup Enforcement Cases and Settlements, EPA, https://www.epa.gov/enforcement/civil-and-cleanup-enforcement-cases-and-settlements [https://perma.cc/4CX6-QDNB] (last updated July 10, 2026).

[25] 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, 410 n.266 (2024) (listing sixteen invocations of Section 303 authority beginning in 1970). Enforcement officials act more frequently under the imminent hazard provisions of both the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as described below. Arnold W. Reitze, Jr., Emergency Response and Planning Requirements Applicable to Unpermitted Air Pollution Releases, 2005 BYU L. Rev. 1075, 1154, 1156 (noting "[t]he emergency power to deal with imminent hazards under RCRA [S]ection 7003 has been used extensively" whereas "[t]he emergency power found in the CAA [S]ection 303 is rarely used"). Further scholarship may examine legal and administrative practice-based reasons for the significant divergence in implementation of these provisions.

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deployment of SDWA-based emergency powers has been infamously belated.[26]

Why affirmative emergency powers are so rarely deployed under these laws remains unclear, in part because they have not been the subject of significant scholarly attention.[27] The Flint Water Crisis inspired a spate of scholarship exploring emergency powers under the SDWA, but research has since waned.[28] Other scholarship has focused on discrete uses of the provisions, such as cleanups at federal facilities or their application under a single statutory provision.[29] For instance, Professors Robert Glicksman and Johanna Adashek recently analyzed the affirmative emergency powers provision of the CAA within a larger

[26] Noah D. Hall, Essay, Flint's Fight for Environmental Rights, 117 Nw. U. L. Rev. 123, 136–38 (2022). Some estimates count roughly five emergency orders issued under the SDWA per year. See Margot J. Pollans, Drinking Water Protection and Agricultural Exceptionalism, 77 Ohio St. L.J. 1195, 1239–40 & n.268 (2016) (describing the types of enforcement actions contemplated by the SDWA and the likely quantity of emergency actions per year, and hypothesizing as to why so few are brought).

[27] See infra Section I.A (providing quantitative comparison between invocations of affirmative emergency powers and related scholarship under the CAA, CWA, and SDWA versus the RCRA and CERCLA). Further, as exemplified in the citations throughout this Article, these authorities are rarely the direct subject of legal scholarship. When discussed, they tend to be a peripheral component of an analysis. See, e.g., Michael S. Alushin, Enforcement of the Clean Air Act Amendments of 1990, 21 Env't L. 2217, 2224–25 (1991).

[28] The majority of legal scholarship focused on the Flint Water Crisis and the SDWA emergency authority specifically was published in or before 2021. See, e.g., Eric Moorman, "A Greater Sense of Urgency": EPA's Emergency Authority Under the SDWA and Lessons from Flint, Michigan, 47 Envtl. L. Rep. (Envtl. Law Inst.) 10786, 10787 (2017) ("EPA's emergency powers under the SDWA are not well-known or well-studied; very little academic literature has explored § 1431 authority in any detail."). A recent search on HeinOnline is illustrative. I searched for "Flint Water Crisis" in the heading of articles for the date ranges 2015–2021 and 2021–2026. For the former, HeinOnline returned thirty-nine search results; for the latter, only five.

[29] See, e.g., 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, 91–92 (2008) (examining affirmative emergency powers with a focus on leveraging the authorities to litigate cleanups of federal facilities polluted by government actors). Two academic articles from the 1970s centrally address the emergency authority under the CAA. See George E. Hardy, Jr., Paul Pate, Charles B. Robison & W.T. Willis, First Use of the Federal Clean Air Act's Emergency Authority: A Local Analysis, 64 Am. J. Pub. Health 72, 75 (1974); Doug Rendleman, Legal Anatomy of an Air Pollution Emergency, 2 Env't Affs. 90, 91–93 (1972); see also Joseph Brau, Note, Coordinating Coordination Requirements in Environmental Emergency Action Provisions, 100 N.Y.U. L. Rev. 1211, 1233–41 (2025) (cataloging disparities in the consultation and coordination requirements across several affirmative environmental powers provisions in federal environmental laws).

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project to identify authorities to address contaminants known colloquially as "forever chemicals."[30]

This Article builds on the limited literature on these provisions and extends environmental enforcement scholarship by foregrounding underexamined authorities to fill gaps in regulatory design and implementation. It engages with the principles of environmental justice and supporting scholarship to consider the goals of protection from disproportionate environmental burdens, but also of participatory power in decision-making. Further, this Article grapples with whether common critiques of broader executive emergency powers have salience for affirmative emergency powers.

Indeed, like other forms of emergency authority, the use of affirmative emergency powers involves trade-offs between expediency and process. This conceptual tension and associated criticisms feature prominently in the abundant literature on emergency powers vested in or delegated to the President. A deep bench of scholars has raised due process, pretextual use, emergency normalization, and other objections to constitutional and statutory-based executive emergency powers.[31] But in the environmental context, I adopt Chachko and Linos's contention that these eminently justified critiques nonetheless "miss[] . . . part of the picture. Emergency powers can be used in *constructive* ways that promote public goods."[32] Building on that view, I argue that when deployed with practices that

[30] See Glicksman & Adashek, supra note 25, at 379 (discussed infra Section III.A).

[31] See infra Sections II.B & III.B. Many of the articles critiquing emergency authority involve presidential declarations, which, though distinct from the authorities discussed herein, are nonetheless instructive for the types of concerns arising from use of emergency-based powers. See, e.g., Amy L. Stein, Energy Emergencies, 115 Nw. U. L. Rev. 799, 801 (2020) ("Emergency powers are also subject to abuse. Without meaningful constraints on a direct presidential delegation, a president is free to declare questionable emergencies to unlock these statutory powers. Even more controversial is when a president declares questionable emergencies to unlock these powers in direct contradiction of congressional intent. Because emergency powers are so broadly granted and representative procedure is so easily abandoned, the inevitable result can involve unaccountability and aggrandizement of the President." (footnotes omitted)). Another vein of scholarship focuses on congressional delegation of emergency authority to an agency and whether that ameliorates the critiques Stein summarizes above. See, e.g., Nina A. Mendelson, Another Word on the President's Statutory Authority over Agency Action, 79 Fordham L. Rev. 2455, 2458–61 (2011); Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 592–93 (1994) (discussing the extent of congressional power to structure agencies); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2255–58 (2001) (tracing the history and extent of congressional control of agencies).

[32] Chachko & Linos, supra note 23, at 7 (emphasis added).

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increase procedural transparency and participation, affirmative emergency powers can be reconciled with democratic norms and environmental justice aspirations for self-determination.[33]

Threaded throughout this Article is an urgency to better understand and harness existing authorities at a time when the landscape of legal options to advance environmental protection shrinks under federal retrenchments and burgeoning doctrinal barriers. Those retrenchments are reflected in diminished agency capacity, extensive rollbacks of environmental rules, and repudiation of longstanding statutory public health and welfare mandates.[34] Contemporaneously, the U.S. Supreme Court's reworking of administrative law principles has constrained agencies' interpretive authority and capacity for proactive regulation.[35] Affirmative emergency powers, however, rest on clear, longstanding statutory delegations and operate at the level of individual facilities. Therefore, as detailed below, their use is comparatively well-insulated from many of the novel doctrines that could hinder more transformative regulatory strategies.

This Article also intervenes in a larger reimagining of environmental law necessitated by these changes to core aspects of administrative and environmental governance. My views here are animated by scholars across law, political science, and ecology who recast times of significant

[33] See infra Sections II.B & III.B.

[34] As of this writing, and based on publicly available information, over 200,000 federal employees have resigned or been terminated, with the EPA losing nearly 3,700 employees. Federal Harms Tracker: The Cost to Your Government, P'ship for Pub. Serv., https://ourpublicservice.org/federal-harms-tracker/cost-to-your-government/ [https://perma.cc/C3FR-TZKG] (last visited Sep. 12, 2026); Press Release, EPA, EPA Announces Reduction in Force, Reorganization Efforts to Save Taxpayers Nearly Three-Quarters of a Billion Dollars (July 18, 2025), https://www.epa.gov/newsreleases/epa-announces-reduction-force-reorganization-efforts-save-taxpayers-nearly-three [https://perma.cc/39AS-8VDA]; see also Climate Backtracker, Sabin Ctr. for Climate Change L., https://climate.law.columbia.edu/content/climate-backtracker [https://perma.cc/5MMT-RZBU] (last visited Sep. 12, 2026) (identifying "steps taken by the Trump-Vance administration to scale back or wholly eliminate federal climate mitigation and adaptation measures"); Erika Kranz, Carrie Jenks & Sara Dewey, EPA's Proposal to Eliminate the Endangerment Finding and Motor Vehicle Greenhouse Gas Regulations 2–3, 6, 9–14 (2025).

[35] See infra Subsection II.A.2.

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instability as predicates for reform.[36] Within this framing, I argue it is time to revisit affirmative emergency powers with a fresh lens.[37]

This Article proceeds in three parts. Part I is descriptive. It details the statutory provisions granting affirmative emergency powers to officials under the CAA, CWA, SDWA, and state analog statutes. To elucidate their scope, I highlight the statutes' operative terms and standards, identify triggers for action, and describe the types of orders various officials may impose. I then briefly highlight the differences between these authorities and the far more prevalent emergency powers that circumvent environmental protections and processes.

Part II explores affirmative emergency powers' capacity to advance environmental protection. First, it identifies key benefits regarding responsiveness to instances of dire environmental injustices and to threats that do not involve permit violations. It then outlines the reasons why deployment of affirmative emergency powers avoids much of the doctrinal upheaval inflicted by recent Supreme Court decisions. I conclude that affirmative emergency powers are neglected yet powerful tools for environmental protection and justice, and particularly so in this era of administrative law constraints and regulatory inertia. This Part also surfaces potential counter-considerations. I assess the merits of theoretical and practical challenges, while sketching the limits and drawbacks of using these authorities.

[36] For example, "punctuated equilibrium theory" posits that policymaking is typically stable and incremental but occasionally experiences transformational change. See, e.g., Frank R. Baumgartner, Punctuated Equilibrium Theory and Environmental Policy, *in* Punctuated Equilibrium and the Dynamics of U.S. Environmental Policy 24, 25–26 (Robert Repetto ed., 2006).

[37] Legal scholars have explored the concept of punctuated equilibrium theory in dialogues about administrative change and legal evolution. See Mark C. Niles, Punctuated Equilibrium: A Model for Administrative Evolution, 44 J. Marshall L. Rev. 353, 377 (2011) ("[An] administrative version of 'punctuated equilibrium' provides a model for understanding the limited, but significant dynamic of administrative evolution."); cf. Karrigan S. Börk, An Evolutionary Theory of Administrative Law, 72 SMU L. Rev. 81, 91–96 (2019) (delineating an evolutionary approach to administrative law change); J.B. Ruhl, Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law, 34 Hou. L. Rev. 933, 939–40 (1997) (critiquing barriers that preclude administrative agencies and environmental law from adapting to evolving regulatory needs); Richard J. Lazarus, Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law, 83 Geo. L.J. 2407, 2415–19 (1995) (describing the process of "legal assimilation" of societal "priorities and information" in environmental law).

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Part III offers a prescriptive framework to guide more effective deployment of affirmative emergency powers. It enumerates contexts where these interventions are especially well-suited to advance environmental protection because conventional enforcement tools have failed to respond adequately or contemporary regulatory regimes have left persistent gaps. I also set forth proposals to inform the use of affirmative emergency powers in ways that complement environmental justice values and diminish common concerns over broad executive emergency authorities.

I. AFFIRMATIVE EMERGENCY POWERS IN ENVIRONMENTAL LAWS

Contrary to what the infrequency of their use might suggest, the landscape of federal and state environmental statutes is replete with language authorizing officials to address imminent and substantial endangerment to health and the environment. A prominent theory as to the sparse invocation of these authorities, and one this Article seeks to mitigate directly, is an institutional lack of clarity around their scope.[38] Accordingly, Section I.A explicates these statutory provisions' overlap and distinguishing features. In doing so, it highlights state authorities at a moment necessitating a nuanced understanding of subnational powers to address environmental hazards. Section I.B turns briefly to differentiating them from emergency authorities that generally result in *exemptions* from environmental processes and protections—what I term, somewhat reductively for distinction purposes, "exemption-oriented" emergency authorities.[39]

[38] Off. of Inspector Gen., EPA, Management Alert: Drinking Water Contamination in Flint, Michigan, Demonstrates a Need to Clarify EPA Authority to Issue Emergency Orders to Protect the Public 5–6, 8 (2016), https://www.epa.gov/sites/default/files/2016-10/documents/_epaoig_20161020-17-p-0004.pdf [https://perma.cc/F5U7-3PMB] (describing the EPA's delay in issuing the Flint order, positing reasons for that delay such as lack of clarity over its authority, and urging the EPA to "be better prepared and able to timely intercede in public health emergencies"). Other scholars have also explored this question in the context of the year-plus delay on emergency orders in the Flint Water Crisis. See, e.g., Hall, supra note 26, at 136–38; Moorman, supra note 28, at 10786–87 (detailing the delayed exercise of emergency powers in the Flint Water Crisis and providing examples in two additional drinking water crises wherein the EPA did not invoke its emergency authority).

[39] I use this term for ease of distinction from the more familiar exercises of emergency authority in environmental contexts that result in exemptions from environmental protection and have generated the most significant scholarly focus.

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A. Delineating Federal Authorities and State Analogs

To delineate the scope of these provisions, Section I.A identifies triggers for action, the types of orders officials may impose, and other operative terms and standards within the CAA, CWA, SDWA, and their state equivalents. These three federal statutes are the focus of this Article because they are among the most commonly enforced in environmental law as the core media protection and permitting statutes,[40] yet their affirmative environmental powers provisions are rarely invoked and receive little scholarly attention. Legal databases indicate that government actions under the Resource Conservation and Recovery Act ("RCRA") and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") provisions addressing "imminent and substantial endangerment" eclipse those under the CAA, CWA, and SDWA by approximately tenfold.[41] Scholarly focus on these waste management and remediation authorities has followed pace, with the CAA, CWA, and SDWA provisions receiving comparatively sparse direct treatment in the literature.[42]

This Section chronicles affirmative emergency powers across air and water to clarify their scope—including triggering thresholds, range of remedial measures, and other operational boundaries for environmental enforcers, policymakers, community members, and other stakeholders. It also spotlights state-level affirmative emergency powers. The EPA can delegate portions of federal regulatory programs to states under a cooperative federalism framework: "[S]tates serve 'as co-regulators [with] a shared commitment to work together to protect human health and the environment . . . .' Authorized states are responsible for the primary

[40] That is, they are the principal federal environmental statutes that regulate pollution based on the environmental medium affected: primarily air, water, or land. See Cruden & Gelber, supra note 24, at 10, 17.

[41] Westlaw's database of citing references for each provision authorizing officials to act to address "imminent and substantial endangerment" is instructive, though the methodology in categorizing "cases" is not clear on the site. As of this writing, Westlaw links CAA's affirmative emergency powers provision to 366 citing references (17 cases and 158 appearances in secondary sources); the SDWA's affirmative emergency powers provision has 475 citing references (40 cases and 189 secondary sources); and the CWA's affirmative emergency powers provision has 578 (36 cases and 160 secondary sources). The CERCLA provision is linked to 5,880 (797 cases and 1,749 secondary sources) and RCRA's provision to 3,092 citing references (313 cases and 806 secondary sources). Westlaw, "Citing References" for 42 U.S.C. §§ 300i, 6973, 7603, 9606 and 33 U.S.C. § 1364 (Oct. 19, 2026) (on file with the *Virginia Law Review*).

[42] See id.

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day-to-day implementation and enforcement of federal programs, while the EPA retains concurrent enforcement authority . . . ."[43] State legislatures also enact independent environmental legislation, often crafting statutes that parallel the subjects of federal laws, as detailed below. These abundant and variable subnational authorities offer a rich landscape to examine procedural and substantive facets that might be adapted at the federal level. They also demonstrate that affirmative emergency powers have plenty of muscle across the nation during periods of anemic federal enforcement.[44]

1. The Clean Air Act

Congress passed the CAA "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[45] The CAA authorizes the EPA,

> upon receipt of evidence that a pollution source or combination of sources . . . is presenting an imminent and substantial endangerment to public health or welfare, or the environment, [to] bring suit . . . to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary.[46]

If filing a lawsuit is not practicable, the Administrator may issue "such orders as may be necessary" to address the endangerment.[47] Before acting pursuant to this provision, the EPA must "consult . . . [s]tate and local authorities" to "attempt to confirm the accuracy of the information on which the action proposed to be taken is based."[48]

The statute provides that administrative orders are effective immediately, mandating the recipient to act by a deadline, e.g., to stop

[43] Memorandum from Lawrence E. Starfield, Acting Assistant Adm'r, EPA, to Reg'l Staff, EPA (June 21, 2023) (second alteration in original) (footnote omitted) (quoting Memorandum from Michael S. Regan, Adm'r, EPA, to Assistant & Reg'l Adm'rs & Deputy Assistant & Reg'l Adm'rs, EPA (Feb. 17, 2023)), https://www.epa.gov/system/files/documents/2023-06/effectivepartnershipsbetweenepaandthestatesincivilenforcementandcomplianceassurance062123.pdf [https://perma.cc/EDZ6-SA6G].

[44] See infra notes 53–65 and accompanying text.

[45] 42 U.S.C. § 7401(b)(1) (declaration of purpose).

[46] Id. § 7603 (emergency powers).

[47] Id.

[48] Id.

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emissions, monitor pollution levels, test for contamination, or pursue other abatement steps.[49] Recipients may seek federal judicial review of an administrative order.[50] Orders can remain in effect for sixty days.[51] But the filing of a civil action extends that timeline such that the order "remain[s] in effect for an additional 14 days or for such longer period as may be authorized by the court."[52] In other words, officials can file a lawsuit under this provision to address an imminent and substantial endangerment, or they can issue an administrative order which would take effect immediately but only last a short duration. To pursue longer-term relief, officials must follow the order with a lawsuit.

Approximately thirty state analogs to the federal CAA confer some emergency authority.[53] Many include a trigger related to "imminent and substantial endangerment" to public health, welfare, or the environment.[54] While some states adopt this exact language of the federal CAA, others contain verbiage that conveys a comparable need for urgency or severity to act pursuant to such authority.[55]

[49] Id. ("Any order issued by the Administrator under this section shall be effective upon issuance . . . .").

[50] See Sackett v. EPA, 566 U.S. 120, 130–31 (2012) (establishing the right to pre-enforcement judicial review of an EPA order where the CWA did not bar review). If the recipient does not comply, the EPA must go to court to compel compliance or seek monetary penalties for violations.

[51] 42 U.S.C. § 7603.

[52] Id.

[53] See infra notes 54–76. Some air pollution state statutory analogs do not include emergency authorities. See, e.g., Me. Stat. tit. 38, §§ 581, 585-A, 585-B (2026).

[54] E.g., Ariz. Rev. Stat. Ann. § 49-433(B) (2026); Idaho Code § 39-112(1)–(2) (2026); N.M. Stat. Ann. § 74-2-10(A) (2026); Or. Rev. Stat. § 468.115(1) (2025); id. § 468A.405.

[55] Several state statutes use the phrase "requiring immediate action." E.g., Ala. Code § 22-28-21(a) (2026); Ark. Code Ann. § 8-4-220(a) (2026); Mont. Code Ann. § 75-2-402(1) (2025); N.H. Rev. Stat. Ann. § 125-C:9 (2026); N.D. Cent. Code § 23.1-06-13 (2026); Wis. Stat. § 285.85(1) (2025); Utah Code Ann. § 19-2-112(1)(a) (LexisNexis 2026). Others refer to the risk or danger itself. E.g., Haw. Rev. Stat. § 342B-43(a) (2025) ("imminent peril"); N.J. Stat. Ann. § 26:2C-29 (West 2025) ("unreasonable and emergency risk"); Ohio Rev. Code Ann. § 3704.032 (LexisNexis 2026) ("imminent and substantial danger"); S.C. Code Ann. § 48-1-90(A)(4) (2025) ("immediate action is necessary"); S.D. Codified Laws § 34A-1-45 (2026) ("imminent danger"); Tenn. Code Ann. § 68-201-109 (2026) (same); Wash. Rev. Code § 70A.15.6020 (2026) (same). A handful of jurisdictions use qualifying language such as "may endanger," specifying a threshold for emergency action based on risk as well as actual harm. E.g., D.C. Code § 8-101.05g(a) (2026) ("may endanger"); Md. Code Ann., Env't § 2-105(a)(1) (LexisNexis 2026) ("when an air pollution emergency exists or is reasonably certain to occur"); Mo. Ann. Stat. § 643.090(1) (West 2026) ("may constitute an emergency risk"); Nev. Rev. Stat. § 445B.560(1) (2025) ("constituting, or likely to constitute, an imminent and substantial danger to the health of persons"). However, the federal terminology has also been consistently construed to refer to risk. See infra Section II.B.

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The types of endangerment that qualify for action under these authorities often mirror the "public health or welfare, or the environment" language in the federal CAA.[56] Certain statutes authorize emergency action upon threats to human health alone,[57] but most concern at least "public health or welfare,"[58] and others account for "safety" as well.[59] Different definitions of the term "welfare" create variety across state codes. In Colorado, for example, "welfare" explicitly includes disruption to homes and businesses.[60] In Arkansas, "[t]he imminent loss of federal funding . . . shall establish a prima facie case of imminent peril to the public health, safety, or welfare."[61]

Multiple state statutes adopt notably broader authorizations for action than the federal CAA.[62] For instance, in D.C., emergency authority is triggered when the Mayor identifies a threat to "health or safety of the residents or *property*, or the environment in the District."[63] In Virginia, emergency action is authorized if the designated officials find unreasonable harm to "public health, safety or welfare, or the health of *animal or plant life*, or *property*."[64] Colorado's standard allows action not

[56] 42 U.S.C. § 7603.

[57] For example, multiple state laws refer to the "health of persons." E.g., Ariz. Rev. Stat. Ann. § 49-433(B) (2026); Nev. Rev. Stat. § 445B.560(1) (2025); Or. Rev. Stat. § 468.115(1) (2025). Other codes contain a similar formulation. E.g., N.J. Stat. Ann. § 26:2C-29 (West 2025) ("risk to the health of those present within said area of the State").

[58] Ark. Code Ann. § 8-4-220(a) (2026); Idaho Code § 39-112(1) (2026).

[59] Ark. Code Ann. § 8-4-202(e)(1) (2026); N.H. Rev. Stat. Ann. § 125-C:9 (2026).

[60] Colo. Rev. Stat. § 25-7-113(1) (2026) ("[A]n immediate danger to the welfare of the public [arises when] such pollutants make habitation of residences or the conduct of businesses subjected to the pollutants extremely unhealthy or disruptive . . . .").

[61] Ark. Code Ann. § 8-4-202(e)(3) (2026). This provision may spur a unique application of affirmative emergency powers as efforts to withhold or rescind federal environmental funding (e.g., grants authorized by the Inflation Reduction Act for air monitoring or environmental justice) continue to proliferate. See, e.g., Letter from Russell T. Vought, Dir., Exec. Off. of the President, to Susan Collins, Chair, Senate Comm. on Appropriations 1, 14 (May 2, 2025) (communicating President Trump's discretionary budget request for 2026, including significant proposed cuts to programs such as Clean and Drinking Water State Revolving Funds); FEMA Ends BRIC Program, Leaving States in the Lurch, Ass'n of State Floodplain Managers (Apr. 8, 2025), https://www.floods.org/news-views/fema-news/fema-ends-bric-program-leaving-states-in-the-lurch/ [https://perma.cc/3RXC-NJDE] (describing efforts in 2025 to reduce multiple FEMA grant programs, including the Building Resilient Infrastructure and Communities grant program, FEMA's largest pre-disaster mitigation program).

[62] E.g., S.C. Code Ann. § 48-1-90(A)(4) (2025) ("to protect . . . public health or *property*" (emphasis added)).

[63] D.C. Code § 8-101.05g(a) (2026) (emphasis added).

[64] Va. Code Ann. § 10.1-1309(B) (2026) (emphasis added).

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only where there is a significant risk of air pollution but also where that activity "is of such a nature as to *cause extreme discomfort*."[65]

Across jurisdictions, the authority to determine whether an imminent and substantial endangerment exists is vested in different actors and offices. Under the CAA, the EPA Administrator determines whether the emergency threshold is met.[66] Often, state statutes similarly afford the lead environmental agency the authority to determine whether a qualifying emergency exists.[67] Some vest a health agency[68] with this authority, and others empower a governor or mayor.[69] Split authority models, found in multiple jurisdictions, either require a joint emergency finding or separate the emergency *determination* authority from the power to *act* based on that determination.[70]

Once officials conclude that the requisite endangerment exists, authorities' ability to act varies across jurisdictions. As noted above, the EPA Administrator must "consult with . . . [s]tate and local authorities" and then may bring suit to "restrain any person causing or contributing to" the "endangerment" or issue "orders as may be necessary" to address the endangerment.[71] Most states empower an official to act, but a handful *require* action once a threshold emergency condition is met. For example,

[65] Colo. Rev. Stat. § 25-7-113(1) (2026) (emphasis added).

[66] 42 U.S.C. § 7603.

[67] E.g., Conn. Gen. Stat. § 22a-181 (2025); Idaho Code § 39-112(1) (2026); Md. Code Ann., Env't § 2-105(a)(1) (LexisNexis 2026); Mo. Ann. Stat. § 643.090(1) (West 2026); N.H. Rev. Stat. Ann. § 125-C:9 (2026); N.D. Cent. Code § 23.1-06-13 (2026); Or. Rev. Stat. § 468A.405 (2025).

[68] See, e.g., N.J. Stat. Ann. § 26:2C-29 (West 2025).

[69] Haw. Rev. Stat. § 342B-43(a) (2025) (Governor or Director of Health); D.C. Code § 8-101.05g(a) (2026) (Mayor); Wash. Rev. Code § 70A.15.6020 (2026) (Governor).

[70] E.g., Idaho Code § 39-112(1) (2026) ("[T]he director, with the concurrence of the governor as to the existence of such an emergency shall order" remedial measures.); Ind. Code § 13-17-4-2 (2026) ("If the commissioner determines" there is an emergency, then "[t]he governor may" act.); Md. Code Ann., Env't § 2-105(a)(1)–(2) (LexisNexis 2026) ("[T]he Secretary shall advise the Governor" and "[w]hen so advised, the Governor may issue an executive order . . . ."); N.H. Rev. Stat. Ann. § 125-C:9 (2026) ("Whenever the commissioner finds [an emergency threatening public health, welfare, or safety] . . . he may with consent of the governor and council issue an order . . . ."); Tenn. Code Ann. § 68-201-109 (2026) ("[T]he commissioner may, with the approval of the governor, order" remedial measures.); Utah Code Ann. § 19-2-112(1)(a) (LexisNexis 2026) ("[T]he executive director, with the concurrence of the governor, shall order" remedial measures.); Vt. Stat. Ann. tit. 10, § 560(a) (2026) ("[T]he Secretary . . . with the concurrence of the Governor . . . shall order persons causing or contributing to the air pollution to reduce or discontinue immediately the emission of air contaminants . . . ."); W. Va. Code § 22-5-8 (2026) ("[T]he director may, with the written approval of the Governor" enter a remedial order.).

[71] 42 U.S.C. § 7603.

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Montana directs that following an emergency finding, "the [Department of Environmental Quality] *shall* order persons causing or contributing to the air pollution to immediately reduce or discontinue the emission of air contaminants."[72] Alabama, South Dakota, and Vermont similarly mandate that emergency orders be issued immediately.[73]

State statutes vary in the latitude they provide a decision-maker to address an emergency. Several states grant discretion through provisions authorizing any action deemed necessary or action against any activity contributing to the emergency.[74] For example, statutes in Arizona, New Jersey, and Ohio authorize multi-sector orders for traffic restrictions, business shutdowns, and combustion bans.[75] In others, emergency authority is limited to issuing cease-and-desist, compliance, or similar orders targeting specific polluters.[76]

[72] Mont. Code Ann. §§ 75-2-103(7), 75-2-402(1) (2025) (emphasis added).

[73] Ala. Code § 22-28-21(a) (2026) ("[T]he director shall order persons causing or contributing to the air pollution to reduce or discontinue immediately the emission of air contaminants . . . ."); S.D. Codified Laws § 34A-1-45 (2026) ("[T]he secretary shall order the person to reduce or discontinue immediately the emission of air contaminants."); Vt. Stat. Ann. tit. 10, § 560(a) (2026) ("[T]he Secretary shall order persons causing or contributing to the air pollution to reduce or discontinue immediately the emission of air contaminants . . . .").

[74] E.g., Ariz. Rev. Stat. Ann. § 49-465 (2026); Ark. Code Ann. § 8-4-220(a) (2026) ("as [the Division of Environmental Quality] deems necessary to meet the emergency"); Haw. Rev. Stat. § 342B-43(a) (2025) ("any and all other actions as may be necessary"); N.H. Rev. Stat. Ann. § 125-C:9 (2026) ("such action be taken as [the commissioner] deems necessary to meet the emergency"); N.J. Stat. Ann. § 26:2C-29(f) (West 2025) (action "[t]o prohibit, restrict or condition any and all other activity in the area which contributes or may contribute to the air pollution emergency"); N.D. Cent. Code § 23.1-06-13 (2026) ("action be taken as necessary to meet the emergency"); Ohio Rev. Code Ann. § 3704.032 (LexisNexis 2026); S.C. Code Ann. § 48-1-90(A)(4) (2025) ("such action as the department deems necessary to address the emergency").

[75] Ariz. Rev. Stat. Ann. § 49-465 (2026) ("The governor . . . may prohibit, restrict or condition the following: 1. Motor vehicle traffic. 2. The operation of retail, commercial, manufacturing, governmental, industrial, or similar activity. 3. Operation of incinerators. 4. The burning or other consumption of fuels. 5. The burning of any materials whatsoever. 6. Any and all other activity which contributes or may contribute to the emergency."); N.J. Stat. Ann. § 26:2C-29 (West 2025) (providing nearly identical language); Ohio Rev. Code Ann. § 3704.032 (LexisNexis 2026) (same).

[76] The permissible form and substance of orders differ slightly. See, e.g., Colo. Rev. Stat. §§ 25-7-112, 25-7-113 (2026) (cease-and-desist); D.C. Code § 8-101.05g(a) (2026) (cease-and-desist); Conn. Gen. Stat. § 22a-428 (2025) (may order municipality to stop or reduce endangering contamination); Haw. Rev. Stat. § 342B-43 (2025); Idaho Code § 39-112 (2026); Ind. Code § 13-17-4-2 (2026); Md. Code Ann., Env't § 2-105 (LexisNexis 2026); Mo. Ann. Stat. § 643.090(2) (West 2026); Or. Rev. Stat. § 468.115 (2025); 23 R.I. Gen. Laws § 23-23-16 (2026); S.C. Code Ann. § 48-1-90 (2025); Tex. Water Code Ann. § 5.514 (West 2025).

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2. The Clean Water Act

The purpose of the federal CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[77] Emergency authority under the statute is triggered by "imminent and substantial endangerment" and the Administrator can "bring suit . . . to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants . . . or to take such other action as may be necessary."[78] But unlike the CAA, the endangerment is limited to "health" and "welfare," which is also defined more narrowly as threats to "livelihood," such as an "inability to market shellfish."[79] At least seven states and D.C. adopt the "imminent and substantial endangerment" language in their statutory analogs to the CWA.[80] Many other CWA analogs include a similar standard.[81]

The conception of "endangerment," however, takes different forms across state provisions. Some explicitly include threats to livelihood as part of the emergency trigger.[82] Other provisions address loss of property from water hazards or harm to other resources.[83] In Puerto Rico, for example, officials can activate affirmative emergency powers where scientific information indicates that a fishery resource is in grave jeopardy or a health hazard exists.[84] Florida law contains particularly capacious language, covering public health, safety, welfare, animal or aquatic life health, and recreational or agricultural water uses, among others.[85] Tennessee and Virginia laws similarly blend environmental and public use protections with a formulation encompassing "public health, safety,

[77] 33 U.S.C. § 1251.

[78] Id. § 1364; accord City & County of San Francisco v. EPA, 145 S. Ct. 704, 719 (2025) (describing options for the EPA to address permittee noncompliance and noting "[i]f necessary, [the EPA] can make use of its emergency powers").

[79] 33 U.S.C. § 1364.

[80] Ariz. Rev. Stat. Ann. § 49-221(G)(7) (2026); D.C. Code § 8-103.08(b) (2026); N.J. Stat. Ann. § 58:12A-6 (West 2025); N.M. Stat. Ann. § 74-6-11(A) (2026); Ohio Rev. Code Ann. § 6109.05(A) (LexisNexis 2026); Or. Rev. Stat. § 468.115(1) (2025); 46 R.I. Gen. Laws § 46-12-10 (2026); Va. Code Ann. § 62.1-44.15(8b) (2026).

[81] See, e.g., Colo. Rev. Stat. § 25-8-307 (2026) ("clear, present, and immediate danger"); Wis. Stat. § 281.19(2)(b) (2025) ("necessitates such immediate action").

[82] E.g., 46 R.I. Gen. Laws § 46-12-10 (2026); Colo. Rev. Stat. § 25-8-307 (2026); D.C. Code § 8-103.08 (2026).

[83] E.g., Conn. Gen. Stat. § 22a-363d (2025) ("significant loss of property"); D.C. Code § 8-101.05g(a) (2026) ("residents or property"); Md. Code Ann., Env't § 5-906(h)(1) (LexisNexis 2026) ("severe loss of property"); S.C. Code Ann. § 48-1-90(A)(4) (2025) ("property").

[84] P.R. Laws Ann. tit. 12, § 25j (2025).

[85] Fla. Stat. § 373.119(2) (2026).

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or welfare, or the health of animals, fish, or aquatic life, or a public water supply, or recreational, commercial, industrial, agricultural, or other reasonable uses."[86] Alternatively, certain states add qualifying language that circumscribes the ability to declare an emergency. For example, Connecticut requires that the situation be "immediate, unforeseen and unacceptable."[87]

As with CAA analogs, the authority to act is typically vested in a mix of executive agency heads, commissions, and governors.[88] In many states, authority lies with the environmental agency heads,[89] while others split power between boards, local officials,[90] or similar shared governance structures.[91] In several jurisdictions, including Ohio, North Carolina, and New Mexico, responsible parties must either fail to act[92] or be unlikely to respond properly without government action in order for officials to invoke clean water affirmative emergency powers.[93]

The powers granted to protect water during emergency conditions vary in scope but are generally within the discretion of the designated official

[86] Tenn. Code Ann. § 69-3-109(b)(1) (2026); Va. Code Ann. § 62.1-44.15(8b) (2026) (referring to "(i) the public health, safety, or welfare, or the health of animals, fish, or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural, or other reasonable uses").

[87] Conn. Gen. Stat. § 22a-363d (2025) ("In situations which may result in immediate, unforeseen and unacceptable hazards to life, health or welfare or significant loss of property if corrective action otherwise requiring a permit or a certificate of permission is not undertaken, the commissioner shall [act] . . . .").

[88] See, e.g., id. (Commissioner); Colo. Rev. Stat. § 25-8-208 (2026) (Commission); id. § 25-8-307 (Division); N.C. Gen. Stat. § 143-355.3 (2025) (Governor and Secretary); Or. Rev. Stat. § 468.115 (2025) (Governor); see also D.C. Code § 8-103.08 (2026) (Mayor).

[89] E.g., Ohio Rev. Code Ann. § 6111.06 (LexisNexis 2026); Wash. Rev. Code § 90.48.240 (2026).

[90] E.g., Tenn. Code Ann. § 69-3-123(a)–(b) (2026) (sharing power between the "local administrative officer[s] of any pretreatment agency").

[91] See Conn. Gen. Stat. § 22a-378 (2025) (providing that the governor declares an emergency, but the commission may act); Fla. Stat. § 373.119(1)–(2) (2025) (providing that the executive director, with concurrence and advice of the governing board, may act); Haw. Rev. Stat. § 342D-10(a) (2025) (providing that either the governor or director may determine if an emergency exists).

[92] E.g., Ohio Rev. Code Ann. § 6109.05(B) (LexisNexis 2026).

[93] E.g., N.C. Gen. Stat. § 143-355.3(b) (2025) (authorizing emergency measures when a water shortage emergency cannot be "effectively managed" without government intervention); N.M. Stat. Ann. § 74-6-11(B) (2026) (authorizing emergency orders when civil action alone cannot provide prompt protection of public health).

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or government body.[94] Emergency powers may include ordering the immediate cessation or modification of discharges or water withdrawals;[95] suspending or issuing conditional permits;[96] conducting emergency rulemaking;[97] bringing suit for injunctive relief;[98] adding a body of water to a protected list on an emergency basis;[99] or closing an affected body of water.[100] A small minority of state statutes contemplate monetary relief as well. For example, Tennessee's statute empowers officials to recover emergency costs from responsible parties.[101] Finally, several state statutes authorize *any* action deemed necessary to abate the imminent and substantial endangerment, including provisions in Hawaii, Florida, Oklahoma, Rhode Island, and West Virginia codes.[102]

3. The Safe Drinking Water Act

The primary objective of the SDWA is to "protect public health by regulating the nation's public drinking water supply."[103] Under Section 1431 of the SDWA, the EPA Administrator, upon discovering

> that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to the

[94] E.g., Colo. Rev. Stat. § 25-8-307 (2026); Ind. Code § 13-18-17-4 (2026); P.R. Laws Ann. tit. 12, §§ 409, 410 (2025). However, each of the preceding jurisdictions also imposes mandatory duties following a qualifying determination.

[95] E.g., Mont. Code Ann. § 75-5-621(1) (2025); Or. Rev. Stat. § 468.115(1) (2025); Va. Code Ann. § 62.1-268(B) (2026).

[96] E.g., Conn. Gen. Stat. § 22a-363d (2025).

[97] E.g., Colo. Rev. Stat. § 25-8-208 (2026).

[98] E.g., Md. Code Ann., Env't § 4-416(a) (LexisNexis 2026); D.C. Code § 8-103.08(b) (2026); N.M. Stat. Ann. § 74-6-11(A) (2026).

[99] E.g., Ariz. Rev. Stat. Ann. § 49-221(G)(7) (2026).

[100] E.g., Va. Code Ann. § 32.1-248 (2026).

[101] Tenn. Code Ann. §§ 69-3-123(b)(2), 69-3-109(b)(2) (2026).

[102] Haw. Rev. Stat. § 342D-10(a) (2025) (granting the governor or director the power to "take any and all . . . actions as may be necessary" to mitigate the emergency); Fla. Stat. § 373.119(2) (2025) (granting the executive director the power to issue an order "requiring that such action be taken as the executive director deems necessary to meet the emergency"); Okla. Stat. Ann. tit. 27A, § 2-6-308(B) (West 2026) ("The Department may issue an emergency order to any public water supply system . . . which, in the Executive Director's judgment, is necessary to safeguard the health of the consumers or the environment."); 46 R.I. Gen. Laws § 46-12-10 (2026) ("[T]he director . . . may . . . take such action as the director deems necessary to protect the public health or safety or the environment."); W. Va. Code § 22-11-19 (2026) (authorizing the director to "requir[e] such other action to be taken as the director, with the concurrence aforesaid, deems necessary to abate such danger").

[103] EPA, Understanding the Safe Drinking Water Act (June 2004), https://www.epa.gov/sites/default/files/2015-04/documents/epa816f04030.pdf [https://perma.cc/JG3H-747Z].

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> health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons.[104]

The provision requires that the EPA Administrator "consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken . . . is based," but only if "practicable."[105] The SDWA provides a nonexclusive list of actions the Administrator may take in response to the imminent endangerment, including: "(1) issuing such orders as may be necessary to protect . . . health . . . and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction."[106]

Approximately twenty states and Puerto Rico have statutory analogs to the SDWA that confer emergency authority. Compared to clean air and clean water statutes, these analogs more frequently afford broad discretion in defining what constitutes an emergency circumstance or situation,[107] with a common trigger being an official determining that an emergency condition threatens public health.[108] States including Indiana and Florida also consider private water supply contamination to pose an imminent threat.[109]

Some jurisdictions require more specific determinations of harm, such as water infrastructure breakdown or failures to act by system owners. Maryland's provision, for example, only allows affirmative emergency intervention when water infrastructure is both in "imminent danger" of

[104] Safe Drinking Water Act, Pub. L. No. 93-523, § 1431(a), 88 Stat. 1660, 1680 (1974) (codified as amended at 42 U.S.C. § 300i).

[105] Id.

[106] Id.; see also Hannah J. Wiseman, Delegation and Dysfunction, 35 Yale J. on Regul. 233, 272, 280–99 (2018) (comparing the cooperative federalism schemes in the CAA and SDWA and suggesting reforms to better align the structure and implementation of delegated state authority under environmental laws).

[107] E.g., Haw. Rev. Stat. § 340E-5 (2025) ("[w]hen the director determines that emergency circumstances exist"); Mo. Ann. Stat. § 640.120(2) (West 2026) ("[i]n an emergency situation"); N.H. Rev. Stat. Ann. § 485:23(II) (2026) ("an emergency condition exists such that a petition . . . and the adoption of rules would not adequately protect the water supply"); N.J. Stat. Ann. § 58:12A-7 (West 2025) ("[w]hen, in the judgment of the commissioner, emergency circumstances exist").

[108] E.g., N.H. Rev. Stat. Ann. § 485:23 (2026); Miss. Code Ann. § 41-26-11 (2025); Mo. Ann. Stat. § 640.130(1) (West 2026); N.D. Cent. Code § 61-28.1-08 (2026).

[109] Ind. Code § 13-18-17-4 (2026); Fla. Stat. § 403.855 (2026).

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failure and the owner has not responded or when an "asset is failing" and the owner has not taken "adequate" protective actions.[110] Ohio's provision includes the inability to comply with water quality standards due to fiscal constraints as a qualifying emergency.[111] And many states, such as Utah, focus on the endangerment that water *quantity* shortages from drought or system failure can impose.[112]

State parallels to the SDWA affirmative emergency powers provision contain both preemptive powers, such as emergency planning, and reactive authority in the face of an imminent threat. These state provisions commonly authorize ordering shutdowns or other actions to mitigate or prevent harms, such as providing access to safe drinking water. For example, in Missouri, the designated official "may order more frequent testing" of the water system during an emergency "to protect . . . public health."[113] In Indiana, an emergency requires the commissioner to issue a health advisory, take emergency action, and order well abandonment if necessary.[114] Many states including Texas, Missouri, South Dakota, Nebraska, and Ohio allow emergency action to stop unsafe operations or compel corrective action where health hazards exist.[115] In Tennessee and Puerto Rico, a qualifying emergency requires proactive creation of a plan for supplying safe drinking water.[116]

As discussed above, the CAA, CWA, and SDWA are not the only federal statutes authorizing rapid governmental intervention to prevent or address serious environmental or health harms. Notably, CERCLA Section 106 and RCRA Section 7003 also contain "imminent hazard"

[110] Md. Code Ann., Env't § 5-509(d) (LexisNexis 2026).

[111] Ohio Rev. Code Ann. § 6109.18 (LexisNexis 2026) ("If the director of environmental protection determines that the municipal corporation is unable to comply . . . by reason of existing debt and tax limitations, the director may find that an emergency exists requiring the immediate issuance of bonds.").

[112] Utah Code Ann. § 19-4-104(1)(c)(iii) (LexisNexis 2026) ("when declining drinking water quality or quantity creates a serious health risk"); see also N.H. Rev. Stat. Ann. § 485:23(II) (2026) ("[w]henever [specified entities have] reason to believe that a public water supply . . . is otherwise threatened").

[113] Mo. Ann. Stat. § 640.120(2) (West 2026).

[114] Ind. Code § 13-18-17-4(b) (2026).

[115] Tex. Health & Safety Code Ann. § 341.0356(b)(2) (West 2025); Mo. Ann. Stat. § 640.130 (West 2026); S.D. Codified Laws § 34A-3A-4(3) (2026); Neb. Rev. Stat. § 71-5304.01 (2025); Ohio Rev. Code Ann. § 6109.05(B) (LexisNexis 2026).

[116] P.R. Laws Ann. tit. 12, § 410 (2025) ("shall promulgate an adequate plan to supply drinking water in a state of emergency"); Tenn. Code Ann. § 68-221-710(b) (2026) ("may take such actions as . . . deem[ed] necessary in order to provide such water where it otherwise would not be available").

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provisions, but those cleanup-oriented authorities have generated more enforcement actions—particularly under the CERCLA provision—and scholarship over time.[117] Other federal environmental statutes contain narrower mechanisms for addressing discrete hazards posed by storage or accidental release of hazardous substances,[118] chemical substances and mixtures,[119] or emergency conditions necessitating the withdrawal of public lands.[120]

B. Distinguishing Exemption-Oriented Emergency Powers

Perhaps the conceptual antithesis of affirmative emergency powers is exemption-oriented ones—some rooted in statutory authority and others in constitutionally vested powers.[121] This Article does not wade into the deep reservoir of scholarly thought or revisit debates on the breadth of National Emergencies Act ("NEA") delegations or Article II authorities. Professor David Landau has recently summarized the dialogue between scholars "fear[ful] of the effect of emergency powers," who thus espouse "reduc[ing] the risks posed by presidents engaging in abusive overreach,"[122] and what he terms a "revisionist view, associated mainly with Posner and Vermeule, [which] argues that legal constraint on emergencies is doomed to failure and that legally unconstrained executive power during emergencies is a good thing."[123]

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[117] See supra note 41 and accompanying text.

[118] 42 U.S.C. § 11004 (emergency notification of a release of hazardous substance); 42 U.S.C. § 7412(r) (accidental release prevention provision requiring, among other things, a risk management plan for emergency response to a release).

[119] 15 U.S.C. § 2606 (authorizing government interventions to protect public from hazardous chemicals, substances, or mixtures).

[120] 43 U.S.C. § 1714(e) (emergency withdrawal of lands under the Federal Land Policy and Management Act).

[121] See, e.g., Mark Nevitt, Delegating Climate Authorities, 39 Yale J. on Regul. 778, 805 (2022) (mapping delegated emergency authorities under statutes as well as "independent authorities under the Commander in Chief Clause, Take Care Clause, and Vesting Clause" (footnotes omitted)).

[122] David Landau, Rethinking the Federal Emergency Powers Regime, 84 Ohio St. L.J. 603, 606 (2023).

[123] Id. (first citing Posner & Vermeule, supra note 1, at 1636, 1641; then citing Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 7 (2010); and then citing Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts 6 (2007)); see also Sanford Levinson, Constitutional Norms in a State of Permanent Emergency, 40 Ga. L. Rev. 699, 736 (2006) ("I increasingly believe, however, that the discussion of emergency powers is ultimately a profoundly political one, with law, at least as traditionally conceived, having relatively little to do with the resolution of any truly

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In the environmental context, most emergency declarations result in circumventing environmental processes and protections, and they have long been the subject of critical legal commentary.[124] As Professor Mark Nevitt has explained, because emergencies are not defined under key authorizing statutes like the NEA, the executive has "considerable discretion" when determining what constitutes an emergency.[125] Further, many environmental laws contain provisions authorizing exemptions from pollution controls or review processes because of national or regional energy emergencies, emergencies or natural disasters, when "in the national security interests of the United States," and more.[126] Accordingly, many scholars, including Dan Farber, Robin Kundis Craig, Amy Stein, Hope Babcock, and others, have detailed concerns about pretextual claims of emergency that exempt unrelated actions from environmental protections.[127] For example, critical assessment and legal challenges have arisen in response to the exercise of emergency powers to construct a border wall without otherwise mandated environmental

live controversy."); cf. Michael Stokes Paulsen, The Constitution of Necessity, 79 Notre Dame L. Rev. 1257, 1258 (2004) (arguing for a necessity-based interpretation of the Constitution which provides expanded powers to the President in times of emergency); Mark Tushnet, Controlling Executive Power in the War on Terrorism, 118 Harv. L. Rev. 2673, 2673–74 (2005) (positing "that neither the separation-of-powers nor the judicial-review mechanism of control is adequate" to legally constrain use of emergency powers).

[124] See, e.g., Michael B. Gerrard, Emergency Exemptions from Environmental Laws After Disasters, 20 Nat. Res. & Env't, Spring 2006, at 10, 13–14 (enumerating environmental exemptions related to disasters and emergency declarations).

[125] Nevitt, supra note 121, at 804–05. An emergency declaration pursuant to the NEA unlocks emergency authorities in other statutes. See A Guide to Emergency Powers and Their Use, Brennan Ctr. for Just. (July 1, 2025), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [https://perma.cc/4946-8BBH] (identifying "150 statutory powers that may become available to the president upon declaration of a national emergency" and explaining the "framework" statutes such as the NEA, Public Health Service Act, and Stafford Act).

[126] E.g., 42 U.S.C. §§ 7410(f), 7412(i)(4); see also Gerrard, supra note 124, at 13–14 (listing exemptions under federal environmental laws and noting interaction with the Stafford Act).

[127] See, e.g., Daniel A. Farber, Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies, 71 Hastings L.J. 1143, 1145, 1174–76 (2020) (discussing the first Trump Administration's invocation of emergency powers and the precedent those assertions may set for potential future use for climate change, as well as the risks inherent in over- or under-use of emergency powers); Amy L. Stein, Domestic Emergency Pretexts, 98 Ind. L.J. 479, 494–504 (2023); Stein, supra note 31, at 853; Mark P. Nevitt, Defending the Environment: A Mission for the World's Militaries, 36 U. Haw. L. Rev. 27, 32–35, 37–38, 43–44 (2014); Hope Babcock, National Security and Environmental Laws: A Clear and Present Danger?, 25 Va. Env't L.J. 105, 126–36 (2007); Stephen Dycus, NEPA Secrets, 2 N.Y.U. Env't L.J. 300, 311 (1993).

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procedures,[128] authorization of the Navy to conduct sonar training exercises that harm marine mammals due to "emergency circumstances,"[129] and forcing coal plants scheduled to retire to continue operating pursuant to a purported "energy emergency."[130]

These emergency exemptions reduce the duly promulgated protections against the very types of endangerments this Article addresses.[131] I discuss them here to highlight the focus of the prevailing literature concerning emergency powers and the environment. But this Article does not suggest emergency governance strategies exist only in a binary: affirmative *or* exemption-based, helpful *or* harmful to people or places.[132] For example, exemptions from environmental processes are not homogeneous or uniformly inadvisable. Some allow for efficient responses to emergency situations in ways consistent with environmental and public health values. The Council on Environmental Quality ("CEQ") has explained in the context of the National Environmental Policy Act ("NEPA") that "[a]s agencies respond to situations involving immediate threats to human health or safety, or immediate threats to valuable natural resources, they must consider whether there is sufficient time to follow the procedures for environmental review established in CEQ's [NEPA] Implementing Regulations" or whether instead they can follow "alternative arrangements in emergency circumstances."[133] Indeed, one's

[128] See Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); Bruce Ackerman, No, Trump Cannot Declare an 'Emergency' to Build His Wall, N.Y. Times (Jan. 5, 2019), https://www.nytimes.com/2019/01/05/opinion/no-trump-cannot-declare-an-emergency-to-build-his-wall.html; Sierra Club v. Trump, 977 F.3d 853, 863 (9th Cir. 2020) (challenging the President's invocation of the NEA for border wall construction and evasion of environmental law requirements), *vacated sub nom.* Biden v. Sierra Club, 142 S. Ct. 56 (2021).

[129] See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 12–20 (2008); Robin Kundis Craig, Beyond *Winter v. NRDC*: A Decade of Litigating the Navy's Active Sonar Around the Environmental Exemptions, 36 B.C. Env't Affs. L. Rev. 353, 359–60 (2009).

[130] See, e.g., Initial Opening Brief of Public Interest Organization Petitioners at 15–16, 38, Michigan v. U.S. Dep't of Energy, No. 25-1159, 2026 WL 2671756 (D.C. Cir. Sep. 11, 2026).

[131] See, e.g., Benjamin Rolsma, The New Reliability Override, 57 Conn. L. Rev. 789, 818–21 (2025) (critiquing implications of emergency exemptions from environmental laws pursuant to Section 202(c) of the Federal Power Act).

[132] See generally Oren Gross & Fionnuala Ní Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice 17–85 (2006) (cataloging and describing several "models of accommodation" for emergency conditions).

[133] Memorandum on Emergencies and the National Environmental Policy Act Guidance from Brenda Mallory, Chair, Council on Env't Quality, to Heads of Fed. Dep'ts & Agencies 1 (Dec. 18, 2024), https://web.archive.org/web/20260130005655/https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Emergencies-and-nepa-guidance-2024.pdf [https://perma.cc/35RM-VMTQ].

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conception of what may qualify as "affirmative" emergency powers may be influenced by normative judgments as to desirable outcomes: here, the concern is public health, welfare, and the environment. One whose chief concern is perpetuating the operation of coal-fired power plants might view an emergency order under Section 202(c) of the Federal Power Act to continue the operation of plants that would otherwise retire as "affirmative," though it portends negative health consequences.[134]

Although emergency powers have often been used to erode environmental protections through exemptions and waivers, our federal and state legal architecture contains authorities that can be turned toward rapid protection. In a time of heightened constraints on protective and progressive agency action, affirmative emergency powers demand renewed creative and critical attention.

II. ENVIRONMENTAL PROTECTION BY EMERGENCY POWERS

The federal and state statutory provisions described above serve important functions in safeguarding health, welfare, and ecological integrity. This Part synthesizes key benefits of these authorities and argues why their use is of growing salience for contemporary environmental governance against an evolving administrative law landscape. It also surfaces and examines limitations and counterarguments to their use.

A. Benefits

1. Enabling Responsiveness to Imminent Endangerment

By their nature, affirmative emergency powers permit officials to act quickly to prevent or abate environmental harms, circumventing the delays attendant to negotiations or litigation in conventional enforcement actions. Specifically, conventional enforcement actions generally do not change the status quo in the short term. While government officials and a defendant may reach an agreement and avoid lengthy litigation, the

[134] See Initial Opening Brief of Public Interest Organization Petitioners, supra note 130, at 11–12, 15, 20–21. See generally Alexandra B. Klass & Dave Owen, The President and the Power Grid, 125 Mich. L. Rev. Online 1, 2–4, 19–25 (2026) (arguing that the administration inappropriately invoked a wartime emergency authority, displacing "[t]echnocratic, expert-driven decisionmaking").

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timeline for completing remedial action or achieving compliance can still last months or years.[135]

Orders issued or suits filed pursuant to affirmative emergency powers, by contrast, demand prompt action from a source endangering health, welfare, or the environment. For example, a paper mill in Catawba, South Carolina, was the subject of a 2021 EPA Section 303 emergency order involving hydrogen sulfide emissions.[136] Following a major overhaul of the plant's manufacturing process in late 2020,[137] nearby residents began complaining about strong odors and health issues consistent with hydrogen sulfide exposure, such as nausea, migraines, and nose, throat, and eye irritation.[138] The plant's emissions spurred more than 22,000 complaints within six months of its conversion, prompting the state and the EPA to investigate.[139] After finding high levels of hydrogen sulfide around the mill, the EPA quickly issued an affirmative emergency order requiring the mill to reduce, monitor, and create a long-term plan to control its emissions of the toxic chemical.[140]

[135] Empirical work on the precise duration of civil judicial environmental enforcement across statutes is limited, but available sources suggest that these matters often extend over many months and frequently years. The EPA's civil enforcement overview acknowledges that, while some cases are resolved quickly, others "take[] years to resolve" when contested in court. Fact Sheet: EPA's Civil Enforcement Program, EPA (July 10, 2026), https://www.epa.gov/enforcement/fact-sheet-epas-civil-enforcement-program [https://perma.cc/U6LE-FHDY]. That characterization aligns with this author's experience as an Environmental Enforcement Section trial attorney in the Environment and Natural Resources Division of the U.S. Department of Justice. Scholarly and practitioner accounts likewise describe environmental enforcement matters that, at the short end, are resolved in "a matter of months" (usually administrative matters), but at the long end require agency staff effort for nearly a decade. See Jerry L. Anderson & Amy Grace Vaughan, Environmental Penalties: Discretion and Disparity, 42 Stan. Env't L.J. 3, 9 (2023) (quoting Cal. Coastal Comm'n, CCC-16-CD-03 / CCC-16-AP-01 (Lent), Staff Report: Recommendations and Finding for Cease and Desist Order and Administrative Civil Penalty 36 (Dec. 6, 2016), https://documents.coastal.ca.gov/reports/2016/12/th5.3s-12-2016.pdf [https://perma.cc/E2AT-PS6Q]).

[136] New-Indy Catawba, LLC at 2, 13 (EPA Region 4 May 13, 2021) [hereinafter New-Indy CAA Emergency Order], https://response.epa.gov/sites/15198/files/New%20Indy%20Order%205132021.pdf [https://perma.cc/A2PJ-YHWW] (Clean Air Act emergency order).

[137] Id. at 3.

[138] Id. at 4.

[139] United States v. New-Indy Catawba, LLC, No. 21-cv-02053, 2022 WL 18357257, at *2 (D.S.C. Sep. 15, 2022).

[140] New-Indy CAA Emergency Order, supra note 136, at 15–16. The order expired after sixty days, and the government filed a civil action seeking the paper mill's continued compliance with the order. *New-Indy Catawba, LLC*, 2022 WL 18357257, at *3. The parties then simultaneously filed a joint motion for entry of a consent order that would allow defendants to continue their efforts to reduce their emissions in coordination with the EPA. Id.

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Beyond efficiency, affirmative emergency powers provisions have another feature that facilitates their responsiveness to imminent dangers. Unlike conventional enforcement tools, they empower officials to take protective action even when a pollution source is in compliance with permits or where regulations or permit levels have yet to be established.[141] Because affirmative emergency powers center *endangerment* to health and welfare, they help fill gaps in statutory schemes that may not account for all forms of harm, that may result in hot spots of contamination, or where permits have been under-enforced or administratively extended without adjusting pollution control requirements to be sufficiently protective.[142] This feature is particularly critical in the present era of congressional dysfunction regarding environmental issues.[143]

Finally, affirmative emergency powers can serve a vital information-generating function. These provisions can be used to require sampling and monitoring, which generates information quickly—often at low cost to the entity causing imminent endangerment.[144] Officials might pursue such orders under statutes with broad remedial authorization language such as "orders that may be necessary" or "any action deemed necessary" to address a qualifying emergency condition.[145] They are also specifically

[141] See, e.g., Guidance on Section 303, supra note 20, at 1; see also Susan F. Mandiberg & Michael G. Faure, A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe, 34 Colum. J. Env't L. 447, 492 (2009) (observing that "administrative laws usually allow authorities to impose urgent safety measures upon a licensee when public health and similar interests are at stake, even when the conditions of a license are followed" and collecting sources).

[142] Many forms of pollution permits can be "administratively extended" when a permittee timely files for renewal but the reviewing agency delays in revising and/or renewing the permit. See, e.g., EPA, supra note 14.

[143] Alison Peck, Withdrawing from NAFTA, 107 Geo. L.J. 647, 690 (2019) ("Passage of legislation . . . might be ambitious to hope for from a Congress that is better known for its failure to act." (first citing Shi-Ling Hsu, Introduction: Environmental Law Without Congress, 30 J. Land Use & Env't L. 1, 1 (2014); and then citing Evan C. Zoldan, Congressional Dysfunction, Public Opinion, and the Battle Over the Keystone XL Pipeline, 47 Loy. U. Chi. L.J. 617, 618 (2015))); see also Rachel Rothschild, The Jurisprudence of Justice Gorsuch and Future Efforts to Address Climate Change, 122 Mich. L. Rev. Online 48, 55 (2023) (lamenting congressional dysfunction and the attendant "inability to pass climate legislation"); Nina A. Mendelson, Tribes, Cities, and Children: Emerging Voices in Environmental Litigation, 34 J. Land Use & Env't L. 237, 238 (2019) (espousing the utility of lawsuits to address environmental harms given "congressional dysfunction on environmental issues").

[144] Authorities may order more frequent testing, characterizing of pollutants emitted or discharged, or sharing of information through health advisories. See supra Section I.A (identifying such authorities at the federal and state levels).

[145] For examples, see 42 U.S.C. § 7603 and several parallel state statutes with similarly capacious language cited supra note 74.

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contemplated under multiple state provisions like those of Maine and Missouri, which authorize orders for more frequent testing and issuance of health advisories.[146] This benefit is deceptively simple. Scholars such as Wendy Wagner have decried the "significant deficiencies in scientific knowledge [which] result in large part from the failure of the environmental laws to require the production of basic information about the harms caused by polluting activities and hazardous products."[147]

In these ways, affirmative emergency powers facilitate responsive interventions to prevent or mitigate discrete harms, and they have the potential to address gaps in our environmental governance system. These authorities allow federal and state environmental agencies to fulfill their statutory functions and meet legislative bodies' goals of environmental protection—often in unanticipated circumstances.

2. Bypassing Novel Doctrinal Challenges

Recent years have seen a flurry of Supreme Court decisions reshape bedrock principles of administrative law.[148] At a minimum, these decisions, such as *Loper Bright Enterprises v. Raimondo*, *SEC v. Jarkesy*, and *West Virginia v. EPA*, collectively place a premium on agency action grounded in clear, existing statutory delegations of authority.[149] The use of affirmative emergency powers will face more searching judicial review under the interpretive principles articulated in the decisions described

[146] Me. Stat. tit. 22, § 2614(2)(C)–(D) (2026); Mo. Ann. Stat. § 640.120 (West 2026).

[147] Wagner, supra note 2, at 1623–30 (critiquing regulatory design that excuses regulated actors from producing information and discussing health consequences).

[148] See, e.g., Matthew Calabrese, DACA's Major Questions Exception, 52 Hofstra L. Rev. 283, 301 (2024) ("[T]he Supreme Court is in the midst of a radical transformation in its administrative law jurisprudence—through the major questions doctrine."); Lisa Heinzerling, The Supreme Court's Self-Coronation, Regul. Rev. (Mar. 18, 2024), https://www.theregreview.org/2024/03/18/heinzerling-the-supreme-courts-self-coronation/ [https://perma.cc/5HPJ-HPY9]; Natasha Brunstein & Richard L. Revesz, Mangling the Major Questions Doctrine, 74 Admin. L. Rev. 217, 219 (2022).

[149] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); SEC v. Jarkesy, 144 S. Ct. 2117 (2024); West Virginia v. EPA, 142 S. Ct. 2587 (2022); see also Richard L. Revesz, New Challenges for Federal Regulations: Executive Branch Responses, 100 N.Y.U. L. Rev. 2051, 2112–15 (2025) (discussing the relevance of regulatory antecedents); Elena Chachko, The Anti-Regulation Quartet and Internationally Informed Regulation, Harv. L. Rev. Blog (Aug. 6, 2024), https://harvardlawreview.org/blog/2024/08/the-anti-regulation-quartet-and-internationally-informed-regulation/ [https://perma.cc/PQF7-VRTT] (examining how recent administrative law decisions collectively render regulatory action more difficult and vulnerable).

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below; yet they are less vulnerable than other strategies for environmental protection that could be characterized as novel or transformative.

Through a series of holdings, most notably *West Virginia v. EPA*, the Court articulated a resurgent and expanded version of the major questions doctrine, which demands clear congressional authorization for whatever a court may deem "extraordinary" agency action.[150] Experts have distilled a series of factors relevant to whether an agency action may meet the vague moniker of "extraordinary." Most considerations relate to vast economic or political impact or a "transformative expansion in [an agency's] regulatory authority."[151] For instance, agency actions could run afoul of the major questions doctrine if the claimed power is novel or "economically or politically significant," among other characteristics.[152]

Despite its anti-regulatory bent,[153] the major questions doctrine would not apply to affirmative emergency powers. Far from being a new assertion of authority, these powers, though used more sparsely than conventional enforcement authorities, have been invoked since the inception of modern environmental statutes.[154] Longstanding, continuous assertion of authority weighs against the application of the major questions doctrine.[155] That authority has also never been reduced by

[150] 142 S. Ct. at 2609; see, e.g., Kansas v. Kennedy, 787 F. Supp. 3d 906, 927 (N.D. Iowa 2025) (noting that "identifying an 'extraordinary' case is a context-dependent judgment" and adopting then-Judge Kavanaugh's observation that "'[t]o be sure, determining whether a rule constitutes a major rule sometimes has a bit of a "know it when you see it" quality'" (alteration in original) (citation omitted)).

[151] *West Virginia*, 142 S. Ct. at 2610 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). For discussion and textualist critique, see William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, Textualism's Defining Moment, 123 Colum. L. Rev. 1611, 1676 (2023) (critiquing the most expansive vision of the doctrine as being "at odds with textualism," "the rule of law," and "separation of powers" (citing Chad Squitieri, Who Determines Majorness?, 44 Harv. J.L. & Pub. Pol'y 463, 465 (2021))).

[152] Daniel E. Walters, The Major Questions Doctrine at the Boundaries of Interpretive Law, 109 Iowa L. Rev. 465, 467 n.3, 511 (2024) (quoting Note, Major Question Objections, 129 Harv. L. Rev. 2191, 2191 (2016)); see also Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 Va. L. Rev. 1009, 1049–50 (2023) (discussing indicia of "majorness," including political significance and novelty).

[153] See, e.g., Lisa Heinzerling, The Major Answers Doctrine, 16 N.Y.U. J.L. & Liberty 506, 515–16 (2023).

[154] See Hardy et al., supra note 29, at 74–75.

[155] See, e.g., United States v. Freeman, 147 F.4th 1, 16 (1st Cir. 2025) (finding an agency's longstanding exercise of administrative authority to weigh against application of the major questions doctrine), *cert. denied*, 146 S. Ct. 1616 (2026); Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 617 (5th Cir. 2024) (highlighting how the Court's major questions analysis "turns in part on whether the agency has previously claimed the authority at issue").

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Congress, providing clear and consistent authorization.[156] For example, throughout multiple amendments to Section 303 of the CAA, Congress endorsed and expanded the affirmative emergency powers assigned to the EPA by broadening the provision's "authority to protect the environment," removing the "'willful' standard of liability," expanding the "length of time that an order is valid," and striking the "need to defer to state efforts."[157] In addition, the statutory provisions described in Section I.A demonstrate that affirmative emergency powers are both explicitly *authorized* and carefully *circumscribed*.[158]

The deployment of affirmative emergency powers also does not implicate issues of vast economic or political significance.[159] Orders typically target single polluting facilities or an infrastructure system. Recipients of affirmative emergency orders might argue that the importance of their industry *as a whole* sweeps an action within the "major" designation; for example, a power plant might cite the importance of the energy grid. But courts have found such logic unpersuasive. A "court cannot conclude that a regulation raises a major question simply because it relates to an important industry. Rather, it is 'the history and breadth and economic and political significance of the action *at issue*' that requires application of the major questions doctrine."[160]

[156] See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'").

[157] Reitze, supra note 25, at 1157; see also Alushin, supra note 27, at 2224–25 (characterizing the 1990 CAA amendments as "clarifying and increasing the Agency's emergency hazard authorities"); Glicksman & Adashek, supra note 25, at 424–25 (explaining that EPA used its Section 303 authority in 1970 against a combination of sources and that Congress thereafter twice expanded the scope of emergency authority); H.R. Rep. No. 95-294, at 327–28 (1977) (proposing an expansion of power under the CAA).

[158] See supra Section I.A.

[159] See Glicksman & Adashek, supra note 25, at 422–28 (summarizing the major questions doctrine factors and reviewing Section 303 authority favorably against each, including economic impact); accord *Mayfield*, 117 F.4th at 616–17 (finding regulations resulting in "$472 million in the first year" and affecting 1.2 million workers insufficient to trigger application of the major questions doctrine, while acknowledging no threshold exists); see also Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (examining the student loan forgiveness program under the major questions doctrine and elucidating the economic and political significance factors).

[160] N.C. Farm Bureau Fed'n, Inc. v. U.S. Dep't of Lab., 781 F. Supp. 3d 455, 471–72 (E.D.N.C. 2025) (emphasis added) (quoting N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 296 (4th Cir. 2023)) (reviewing an effort to point to the more

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Further constraining agency interpretive authority beyond the limits imposed by the major questions doctrine, the Court in *Loper Bright* overruled the longstanding practice of deferring to an agency's reasonable interpretation of an ambiguous statute.[161] Instead, as explored further in Section II.B, the Court now charges judges with using their "independent judgment" to determine the "single, best meaning" of a statute.[162] The majority also opined that "every statute's meaning is fixed at the time of enactment."[163] That particular addition troubles scholars considering the age of our major environmental statutes (most enacted fifty or so years ago) and the ability of their language to accommodate today's profoundly evolved set of challenges. Professor Nina Mendelson argues that the Court "expressly reject[ed] the notion that statutes could have gaps or ambiguities, which [previously] warranted deference to agency interpretations."[164] This "anti-change" gloss, she and others contend, is likely to strain the capacity of traditional rulemaking when it comes to using old statutes to solve new problems.[165] In practice, this now puts a thumb on the scale for using longstanding, explicit statutory authorities, like affirmative emergency powers, for environmental protection.

Finally, in another 2024 decision, *SEC v. Jarkesy*, the Court held that when the SEC seeks civil penalties for violations of securities fraud provisions, the defendant is entitled to a jury trial under the Seventh Amendment.[166] The practical effect of the ruling limits the SEC's use of its *administrative* judges for cases in which the agency seeks civil penalties. While the Court's holding applies to SEC fraud allegations, lower courts are likely to examine other agency uses of administrative law judges in varied enforcement contexts. Even before *Jarkesy*, environmental respondents challenged the EPA's use of administrative

significant "impact of agriculture on the national and state economies" and acknowledging the economic and political importance of the industry but declining to look beyond the action at issue to determine significance).

[161] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[162] Id. at 2265–66.

[163] Id. at 2266 (quoting Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018)).

[164] Nina A. Mendelson, Tossing Sand in the Regulatory Gears: Hurdles to Policy Progress in the Supreme Court, 62 Harv. J. on Legis. Online 77, 89 (2024).

[165] Id. at 93. Other scholars, such as Lisa Heinzerling, have raised different questions about the applicability of *Loper Bright* to "most of the rules issued under the [CAA]." Lisa Heinzerling, Does *Loper Bright* Apply to the Clean Air Act?, 43 Yale J. on Regul. Bull. 1, 17 (2025). But she questions "whether the lower courts will seriously take on board the possibility that *Loper Bright* does not apply to all cases raising interpretive issues." Id.

[166] SEC v. Jarkesy, 144 S. Ct. 2117, 2127 (2024).

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proceedings on Seventh Amendment grounds for enforcement matters with civil penalties.[167] Those suits track the legal theory later adopted in *Jarkesy*.[168]

However, affirmative emergency powers provisions focus on preventing and abating endangerments. They generally eschew civil penalties and only involve the government's pursuit of injunctive relief.[169] Thus, the exercise of affirmative emergency powers should avoid the reach of the *Jarkesy* ruling.

3. Addressing Dire Conditions of Environmental Injustices

Communities with environmental justice concerns often live in a state of ongoing, yet unremedied, endangerment from layered exposure to pollution, aging infrastructure, and regulatory neglect, among other systemic factors. Existing legal strategies have struggled to deliver relief. Affirmative emergency powers offer one pathway for governments to act quickly in the face of such harms and deliver environmental justice benefits. "The foundational principles of environmental justice are that all people have the right to live in healthy environments, be protected from disproportionate amounts of pollution, enjoy an equitable distribution of environmental benefits, and participate in environmental decision-making that will affect their lives."[170] Invocations of affirmative emergency powers, though rare, have targeted imminent and substantial endangerment of populations historically overburdened with environmental harms. Deployment of these powers to abate

[167] For details on these cases from the attorneys who filed them, see EPA's In-House Tribunal Undermines Fairness and Political Accountability, Pac. Legal Found., https://pacificlegal.org/case/ro-cher-epa-agency-tribunal/ [https://perma.cc/KLZ5-AS9Q] (last visited Sep. 12, 2026); Landowners Fight In-House Agency Prosecution to Restore Fairness and Political Accountability, Pac. Legal Found., https://pacificlegal.org/case/epa-administrative-enforcement-fair-trial/ [https://perma.cc/UG7U-62N2] (last visited Sep. 12, 2026).

[168] Commentary suggests that in response to *Jarkesy*, the EPA and DOJ have begun resolving enforcement matters that might normally proceed administratively with a federal district court consent decree instead. See David LaRoss, EPA Floats Settlement in Post-*Jarkesy* TSCA Enforcement Litigation, Inside TSCA, Sep. 9, 2024, at 1 (interpreting strategic enforcement choice from a lead-paint enforcement case with only a $168,000 civil penalty that proceeded judicially rather than administratively after *Jarkesy*).

[169] See supra Section I.A (quoting authorizations under the CAA, CWA, and SDWA).

[170] Sara A. Colangelo, Bridging Silos: Environmental and Reproductive Justice in the Climate Crisis, 112 Calif. L. Rev. 1255, 1266–70 (2024) (summarizing the history and animating principles of the environmental justice movement and noting key scholars and practitioners).

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environmental threats thus advances several environmental justice tenets: among them, rights to clean air, land, and water, freedom from ecological destruction, and equitable enforcement of laws.[171]

One vivid example was a 2023 CAA emergency order issued in the heart of Louisiana's "Cancer Alley"—an eighty-five-mile corridor with industrial facilities so densely concentrated that the majority-Black residents experience cancer risks from air pollution nearly fifty times the level that the EPA deems acceptable.[172] There, the Denka neoprene facility was located half a mile from an elementary school and emitted chloroprene, a likely human carcinogen.[173] After lengthy EPA and state engagement, and even after Denka installed additional pollution control equipment,[174] fence-line emissions monitors revealed chloroprene spikes several orders of magnitude above recommended exposure levels.[175]

In a now-withdrawn lawsuit[176] on behalf of the EPA, the U.S. Department of Justice ("DOJ") sought an order under its affirmative

[171] These goals echo throughout foundational environmental justice literature and have been consistently espoused by leaders of the movement. See, e.g., Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality, at xiii, 138 (3d ed. 2000); Bunyan Bryant, Introduction *to* Environmental Justice: Issues, Policies, and Solutions 1, 5–6 (Bunyan Bryant ed., 1995); Robert D. Bullard, Paul Mohai, Robin Saha & Beverly Wright, Toxic Wastes and Race at Twenty: 1987–2007, at 6 (2007).

[172] See Complaint at 1–2, 11, United States v. Denka Performance Elastomer, LLC, No. 23-cv-00735 (E.D. La. Feb. 28, 2023) [hereinafter Denka Complaint] (noting why chloroprene is classified as a hazardous air pollutant and how it induces cellular mutations by attacking DNA and increasing lifetime risk of cancers); Kimberly A. Terrell, Gianna N. St. Julien & Maeve E. Wallace, Toxic Air Pollution and Concentrated Social Deprivation Are Associated with Low Birthweight and Preterm Birth in Louisiana, 2 Env't Rsch. Health, Mar. 14, 2024, at 1, 1–2, 6–7.

[173] Denka Complaint, supra note 172, at 11; EPA, Toxicological Review of Chloroprene 96 (2010).

[174] See Denka Performance Elastomer, LLC, No. AE-AOC-17-00011 (La. Dep't of Env't Quality Jan. 6, 2017) (admin. order on consent).

[175] See Letter from Michael S. Regan, Adm'r, EPA, to Toshio Imai, President & Chief Exec. Officer, Denka Corp., and Edward D. Breen, Exec. Chairman & Chief Exec. Officer, DuPont (Jan. 24, 2022) [hereinafter Denka Letter], https://www.epa.gov/system/files/documents/2022-01/messrs.-toshio-imai-and-edward-d.-breen.pdf [https://perma.cc/Y3DQ-4S9K]; Press Release, EPA, EPA and Justice Department File Complaint Alleging Public Health Endangerment Caused by Denka Performance Elastomer's Carcinogenic Air Pollution (Feb. 28, 2023), https://epa.gov/newsreleases/epa-and-justice-department-file-complaint-alleging-public-health-endangerment-caused [https://perma.cc/VYB8-AXWT].

[176] Press Release, U.S. Dep't of Just., Justice Department Dismisses Suit Against Denka, Delivering on President Trump's Mandate to End Radical DEI Programs (Mar. 7, 2025), https://justice.gov/opa/pr/justice-department-dismisses-suit-against-denka-delivering-president-trumps-mandate-end [https://perma.cc/896U-VVQP]. Citing financial losses due to slowdown in global demand, the Denka plant suspended operations in May 2025. Press Release, Denka Co.

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emergency powers for Denka to reduce chloroprene emissions and eliminate imminent and substantial endangerment to residents.[177] In particular, the complaint highlighted the disparate impacts of chloroprene exposure to children and infants. It alleged that babies born near the highest chloroprene exposures surpass the "estimated *lifetime* of acceptable excess cancer risk within approximately their *first two years* of life."[178]

Affirmative emergency powers can also serve as potent tools to address endangerment from environmental injustices where other legal strategies have foundered.[179] Decades of environmental justice-oriented litigation struggles throw into relief the advantages of government enforcement to redress these hazards.[180] Options for communities to challenge pollution, such as constitutional claims, civil rights actions, citizen suits, or common law claims, have often fallen short of meaningful legal redress. To be sure, environmental citizen suits play critical roles in advancing environmental protection and public health.[181] But success has come in spite of the web

Ltd., Announcement Concerning the Recording of Extraordinary Losses of a U.S. Subsidiary of the Company and of the Suspension of Chloroprene Rubber Production (May 13, 2025), https://www.denka.co.jp/eng/storage/news/pdf/535/20250513_denka_dpe_en.pdf [https://perma.cc/7RSA-Q24L].

[177] Denka Complaint, supra note 172, at 19–21.

[178] Id. at 5 (second emphasis added).

[179] For example, there have been unsuccessful tort claims brought against pollution-generating facilities in Cancer Alley. Butler v. Denka Performance Elastomer, L.L.C., 16 F.4th 427, 442–44 (5th Cir. 2021) (affirming dismissal of negligence claim for failure to state a duty); Ellis v. Evonik Corp., 604 F. Supp. 3d 356, 370–75 (E.D. La. 2022) (dismissing multiple tort claims against facility emitting ethylene oxide, but finding plaintiffs' allegations "sufficient at the pleadings stage to support a nuisance claim").

[180] See, e.g., Sheila R. Foster, Vulnerability, Equality and Environmental Justice: The Potential and Limits of Law, *in* The Routledge Handbook of Environmental Justice 136, 137 (Ryan Holifield, Jayajit Chakraborty & Gordon Walker eds., 2018); Uma Outka, Environmental Injustice and the Problem of the Law, 57 Me. L. Rev. 209, 223 (2005); see also Douglas A. Henderson, Cynthia A.M. Stroman & Joseph A. Eisert, Environmental Justice Litigation: Few Wins, Still Effective, 36 Nat. Res. & Env't, Fall 2021, at 17, 17 (noting that while "[environmental justice] lawsuits have not resulted in big judgments," they have "forc[ed] federal and state agencies to grapple with [environmental justice] in the assessment and approval of projects").

[181] See, e.g., Jordan C. Budd & Margaret Sova McCabe, Standing to Enforce the Future: Citizen Suits and Climate Change, 66 B.C. L. Rev. 423, 424, 426 (2025) (espousing citizen suits as a "central enforcement mechanism" for climate policy); Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 211 (1992) (positing that private enforcement through environmental citizen suits is democratically valuable and often necessary to realize statutory environmental mandates).

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of obstacles that can stymie litigation by individuals or affected communities.[182]

For example, community members may not be cognizant of violations of environmental laws or the link between contaminant exposures and indicia of harm—particularly if the impacts manifest years later or risks stem from invisible pollutants. Further, some state legislatures now severely restrict their residents from collecting and publicizing information about environmental conditions or bar state agencies from taking enforcement or regulatory action based on community-derived science.[183] For example, under a 2024 Louisiana law, residents face sanctions up to $1 million for monitoring the quality of their air, and then sharing that information publicly or using it to challenge polluting facilities.[184] By contrast, government enforcers retain powerful information-gathering authority and technical expertise, and they face no requirement to establish standing.[185]

Identifying legal strategies with the capacity to redress instances of environmental injustice is an urgent task. Myriad environmental justice-related policies and programs have been rescinded or their effect limited in 2025.[186] For instance, Executive Order 14151 led the EPA to close

[182] Several scholars catalog the failed promise of citizen suits to remedy environmental injustices for affected communities. See, e.g., Eileen Gauna, Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice, 22 Ecology L.Q. 1, 4 (1995); see also David E. Adelman & Robert L. Glicksman, Reevaluating Environmental Citizen Suits in Theory and Practice, 91 U. Colo. L. Rev. 385, 391–92 (2020) (observing that "expectations of citizen suits are inflated" and can "reinforc[e] a common narrative among critics that environmental regulation has been usurped by extreme special interests whose goals diverge from the public interest").

[183] E.g., La. Rev. Stat. Ann. §§ 30:2381.1–2381.11 (2025); Tenn. Code Ann. § 4-5-232 (2026); Ky. Rev. Stat. Ann. § 77.155 (West 2026); see also S.B. 71, Reg. Sess. (Ala. 2026) (proposing a similar regime, which was enacted into law); S.B. 234, 66th Leg., Gen. Sess. (Utah 2026) (same); S.B. 475, 87th Leg., Reg. Sess. (W. Va. 2026) (proposing a similar regime, which was not enacted).

[184] Complaint at 1, 17, Rise St. James La. v. Burdette, No. 25-cv-00429 (M.D. La. May 22, 2025).

[185] See, e.g., 42 U.S.C. § 7414 (authorizing the EPA to request records and reports from, monitor, and inspect regulated entities); 33 U.S.C. § 1319 (granting the EPA authority to take enforcement actions "[w]henever . . . the Administrator finds that any person is in violation of any condition or limitation").

[186] Actions taken under previous administrations that supported or advanced environmental justice included, among others: Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021); Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021); and Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13990, 86 Fed. Reg. 7037

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offices working on environmental justice and end related programs.[187] EJScreen, a tool used to map environmental and demographic indicators, is no longer available on the EPA's website.[188] An executive order also shuttered the Justice40 Initiative, a program aimed at ensuring that forty percent of certain federal investments benefit disadvantaged communities.[189] In addition, certain executive orders have threatened the implementation of congressional acts related to environmental justice.[190] As of this writing, a presidential proclamation granted multiple facilities in Cancer Alley pollution control exemptions.[191]

(Jan. 25, 2021). In January 2025, President Trump issued Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 28, 2025), revoking those orders. He also issued a second order revoking President Clinton's thirty-year-old executive order on environmental justice. See Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (revoking Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994)).

[187] Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025); see Tracy J. Wholf, EPA Eliminating Environmental Justice Jobs, CBS News (Mar. 12, 2025, at 12:50 ET), https://cbsnews.com/news/epa-eliminating-environmental-justice-jobs-dei/ [https://perma.cc/E2FK-M9HV]; Press Release, EPA, EPA Administrator Lee Zeldin Cancels Nine More Contracts, Saving Nearly $60 Million (Feb. 14, 2025), https://epa.gov/newsreleases/epa-administrator-lee-zeldin-cancels-nine-more-contracts-saving-nearly-60-million [https://perma.cc/P63Z-F5TD]; Press Release, EPA, EPA Administrator Lee Zeldin Cancels 400+ Grants in 4th Round of Cuts with DOGE, Saving Americans More than $1.7B (Mar. 10, 2025), https://epa.gov/newsreleases/epa-administrator-lee-zeldin-cancels-400-grants-4th-round-cuts-doge-saving-americans [https://perma.cc/6E7Q-L2NW]; Nada Hassanein, Trump Has Canceled Environmental Justice Grants. Here's What Communities Are Losing., Stateline (Apr. 14, 2025, at 05:00 ET), https://stateline.org/2025/04/14/trump-has-canceled-environmental-justice-grants-heres-what-communities-are-losing/ [https://perma.cc/XDG9-LEEC].

[188] EDGI, EPA Removes EJScreen from Its Website, Env't Data & Governance Initiative (Feb. 12, 2025), https://envirodatagov.org/epa-removes-ejscreen-from-its-website/ [https://perma.cc/CFM7-RPNU].

[189] Executive Order No. 14148 rescinded Executive Order No. 14008, which established the Justice40 Initiative in 2021. See Exec. Order No. 14148 § 2(s), 90 Fed. Reg. 8237, 8238 (Jan. 20, 2025); Exec. Order No. 14008 § 223, 86 Fed. Reg. 7619, 7631–32 (Jan. 27, 2021).

[190] For example, Executive Order No. 14154 ordered federal executive agencies to "pause the disbursement of funds appropriated through the Inflation Reduction Act of 2022 (Public Law 117-169) or the Infrastructure Investment and Jobs Act (Public Law 117-58)." Exec. Order No. 14154 § 7(a), 90 Fed. Reg. 8353, 8357 (Jan. 20, 2025); see also President Trump Issues Sweeping Executive Orders to Eliminate Federal Environmental Justice Programs, O'Melveny & Myers LLP (Jan. 24, 2025), https://omm.com/insights/alerts-publications/president-trump-issues-sweeping-executive-orders-to-eliminate-federal-environmental-justice-programs/ [https://perma.cc/J7JZ-G22D] (characterizing the executive orders as "introduc[ing] uncertainty about the future of . . . grant programs established under the Inflation Reduction Act").

[191] Proclamation No. 10957, 90 Fed. Reg. 34587 (July 17, 2025) (invoking 42 U.S.C. § 7412(i)(4) to exempt several Cancer Alley polluters, including Denka). The administration has announced a series of deregulatory actions, including reconsideration of multiple NESHAPs (limits on how much toxic air pollution a source may emit) that apply to various

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These benefits for environmental protection, however, do not automatically countenance the use of these authorities. To further explore the propriety of affirmative emergency powers, this Article turns to surfacing and examining potential challenges to their use.

B. Limitations

This Section considers the evolving standards of deference in judicial review of agency action and the limitations inherent to a discretionary environmental enforcement tool. It also explores ideological tensions with the principle of self-determination embedded in environmental justice and the normative critiques of broader executive emergency authority.

1. Emergency Designation Deference

Entities subject to emergency orders or civil suits may allege that an agency's determination that a circumstance constituted an imminent and substantial endangerment was arbitrary and capricious or otherwise lacked sufficient evidence.[192] That is, while the agency authority for these actions is explicit, the meaning of terms within the provisions or the propriety of their deployment in specific situations may be subject to challenge. As previewed above, *Loper Bright* will likely result in a more searching review of affirmative emergency powers deployment. Now courts must not defer to agencies in resolving "legal questions"[193] and instead "use every tool at their disposal to determine the best reading of [a] statute."[194] Further, according to the Chief Justice's opinion in *Learning Resources, Inc. v. Trump*, an assertion of "unbounded"

industrial sectors, including the synthetic organic chemical manufacturing industry. See Press Release, EPA, Trump EPA Announces Reconsideration of Air Rules Regulating American Energy, Manufacturing, Chemical Sectors (NESHAPs) (Mar. 12, 2025), https://epa.gov/newsreleases/trump-epa-announces-reconsideration-air-rules-regulating-american-energy-manufacturing [https://perma.cc/WFP9-FVVC]; see also Press Release, EPA, EPA Launches Biggest Deregulatory Action in U.S. History (Mar. 12, 2025), https://epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history [https://perma.cc/6G87-2M9G].

[192] A hypothetical defendant might also argue that the government agency could and should have addressed the situation through another nonemergency provision in the statute. But as discussed previously, agencies have discretion to decide whether to invoke emergency authority, and relevant statutory provisions typically provide that emergency powers actions may be pursued "notwithstanding" any other provision. See supra Section I.A.

[193] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).

[194] Id. at 2266.

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emergency authority "[a]gainst [a] backdrop of clear and limited delegations" represents an impermissible "transformative expansion" of presidential authority.[195] That decision further underscores the judiciary's insistence on "clear statutory authority" especially when executive actors claim "extraordinary" or transformative power.[196]

However, neither is likely to implicate the use of affirmative emergency powers described herein because they rest on specific, longstanding, and cabined delegations and operate at a facility level, often with built-in time limits, consultations, and/or judicial backstops. Still, independent and more searching judicial review of the invocation of affirmative emergency powers—or any emergency powers—provides critical guardrails on agency action and could allay some concerns about overreach and pretextual abuse of power.[197]

Post-*Loper Bright* administrative decisions will clarify how significantly judicial review may evolve. Review of agency action involving scientific expertise and emergency action were both traditionally arenas of heightened deference.[198] But moving forward,

[195] Learning Res., Inc. v. Trump, 146 S. Ct. 628, 640 (2026) (opinion of Roberts, C.J.) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022)); accord Michigan v. DOE, No. 25-1159, 2026 WL 2671756, at *1–2, *12–13, *16 (D.C. Cir. Sep. 11, 2026) (holding that under the Federal Power Act, "a section 202(c) 'emergency' means a grid-reliability risk that calls for an immediate response by DOE in particular" considering "the backdrop of states' exclusive regulatory power over the generation of electricity"). While this opinion was issued following the close of substantive edits, I am grateful to the staff at the *Virginia Law Review* for allowing me to reference the decision in this Article. Like *Learning Resources*, the court in *Michigan v. DOE* rejected a "boundless" and "sweeping conception of its 'emergency' authority" where the DOE identified "fragments of two documents" as the support for its emergency determination. Id. at *2, *10–11.

[196] *Learning Res., Inc.*, 146 S. Ct. at 646–47 (Gorsuch, J., concurring) (relying on application of the major questions doctrine). Justices Kagan, Sotomayor, and Jackson concur in the result but would not use the major questions doctrine. They opine that it is unnecessary because "the ordinary tools of statutory interpretation amply support" the holding. Id. at 674 (Kagan, J., concurring in the judgment).

[197] Multiple scholars have discussed the lack of searching judicial review for determinations related to a national emergency. Professor Evan Criddle has asserted that "[a]s long as our administrative law depends upon flexible legal standards, courts will be tempted to distort those standards during emergencies in deference to the Executive Branch." Evan J. Criddle, Mending Holes in the Rule of (Administrative) Law, 104 Nw. U. L. Rev. 1271, 1274 (2010). Prominently, Adrian Vermeule has argued that such heightened deference is inevitable. See Adrian Vermeule, Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095, 1096 (2009) (terming the *appearance* of legal constraint through formal procedures and review which, in practice, give officials very broad discretion with little oversight as "grey holes").

[198] Cases challenging recent executive emergency declarations (such as state attorneys general challenging the 2025 Executive Order No. 14156 declaring an energy emergency) will

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agencies must consider the increased likelihood that judges will engage in searching examination of affirmative emergency orders. *Loper Bright* quotes early, canonical administrative law cases that endorse the view that the weight afforded to an agency's "judgment" depends on the "thoroughness" of its "consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[199]

Though courts have historically deferred to agency determinations regarding imminent and substantial endangerments and crafting of associated remedial action,[200] officials must be prepared to demonstrate thorough, evidence-based reasoning for invoking an emergency provision. Because judges are charged with determining the single, "best" meaning of a statute, officials should also anticipate judges may turn to legal and lay dictionaries in evaluating whether a circumstance falls within the authorizing language of an emergency provision.[201]

For example, relevant case law and dictionary definitions support government intervention based on imminence where there is an "ongoing

sharpen the contours of emergency authority and clarify the level of judicial deference to related determinations. See, e.g., New York v. Trump, 811 F. Supp. 3d 215, 241–44 (D. Mass. 2025) (vacating federal agencies' moratorium on wind power projects pursuant to an energy emergency declaration, and holding that the indefinite pause violated the Administrative Procedure Act ("APA") for lack of reasoned explanation and lawful basis).

[199] *Loper Bright*, 144 S. Ct. at 2259 (citing with approval and quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). For example, in *Michigan v. DOE*, the court arrived at the "best interpretation" by "reference to statutory text and structure," the "states' exclusive regulatory power over the generation of electricity," and the agency's historical use as "epitomized by wartime disturbances." 2026 WL 2671756, at *1–2, *11–12, *15. Moreover, courts are likely not only to examine whether an agency's interpretation of its emergency authority comports with statutory text and structure, but also to probe the sufficiency of evidence of emergency conditions or other statutorily required thresholds for action. See generally id. at *16 ("Had DOE pinpointed a concrete supply issue beyond the state's competency that was likely to trigger a blackout in an identified area . . . , immediate intervention might have been appropriate. But the mere possibility of an electricity supply shortfall—with no specifics about its potential severity, timing, location, or likelihood—does not warrant an emergency federal response."). As described above, I view such analytic rigor in judicial review as more likely to mitigate emergency powers pathologies such as pretextual abuses of authority.

[200] See, e.g., United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 988 (2d Cir. 1984). But see W.R. Grace & Co. v. EPA, 261 F.3d 330, 340 (3d Cir. 2001) (declining to defer to agency determinations).

[201] See, e.g., *Michigan v. DOE*, 2026 WL 2671756, at *12 (noting that "[t]he Federal Power Act does not define 'emergency,' so 'we look to the word's ordinary definition'" and considering dictionary definitions (quoting CSX Transp., Inc. v. Ala. Dep't of Revenue, 562 U.S. 277, 284 (2011))); Sarkisov v. Bondi, 160 F.4th 696, 707 (6th Cir. 2025) (opining that the meaning of the relevant term was a legal question and applying dictionary definitions).

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threat of future harm."[202] Courts have clarified that imminence does not require an existing harm but rather that "there must be a threat which is present now, although the impact of the threat may not be felt until later."[203] Courts have interpreted a "substantial" endangerment under emergency provisions to be a circumstance which entails "a 'serious' threat of injury."[204] They require a "reasonable cause for concern that someone or something may be exposed to risk of harm . . . in the event remedial action is not taken."[205] And courts also consistently find "endangerment" means a threatened or potential harm, and do not require proof of actual harm.[206] Still, it seems plausible that institutional hesitancy

[202] E.g., Liebhart v. SPX Corp., 917 F.3d 952, 961 (7th Cir. 2019) (citing Albany Bank & Tr. Co. v. Exxon Mobil Corp., 310 F.3d 969, 972 (7th Cir. 2002)); see also Dague v. City of Burlington, 935 F.2d 1343, 1356 (2d Cir. 1991) ("A finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present . . . ."), *rev'd in part on other grounds*, 505 U.S. 557 (1992). The *Dague* court also found that the legislative history of RCRA supported interpreting "imminent" in accordance with its plain meaning. "Imminence refers 'to the nature of the threat rather than identification of the time when the endangerment initially arose.' " *Dague*, 935 F.2d at 1356 (quoting United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982)). The legislative history further provides "[t]he section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment." Staff of H.R. Subcomm. on Oversight & Investigations, Comm. on Interstate & Foreign Com., 96th Cong., 1st Sess., Report on Hazardous Waste Disposal 32 (Comm. Print 1979).

[203] Meghrig v. KFC W., Inc., 516 U.S. 479, 486 (1996) (emphasis omitted) (quoting Price v. U.S. Navy, 39 F.3d 1011, 1019 (9th Cir. 1994)). In making that distinction, the *Meghrig* decision also found an endangerment is "imminent" if it "threaten[s] to occur immediately." Id. at 485 (alteration in original) (quoting Imminent, Webster's New International Dictionary of English Language 1245 (2d ed. 1934)). This viewpoint is longstanding in case law related to environmental threats. See, e.g., Env't Def. Fund, Inc. v. EPA, 510 F.2d 1292, 1297 (D.C. Cir. 1975) (under the Federal Insecticide, Fungicide, and Rodenticide Act). Further, in reaching these conclusions, courts have noted that legislative history supports the argument that for the United States to take action, "the risk of harm must be imminent but the harm itself need not be." United States v. Waste Indus., Inc., 734 F.2d 159, 165 n.3 (4th Cir. 1984) (citing H.R. Rep. No. 93-1185, at 36 (1974)).

[204] See, e.g., Talarico Bros. Bldg. Corp. v. Union Carbide Corp., 73 F.4th 126, 140 (2d Cir. 2023) (citing Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc., 575 F.3d 199, 210 (2d Cir. 2009)).

[205] E.g., Burlington N. & Santa Fe Ry. Co. v. Grant, 505 F.3d 1013, 1021 (10th Cir. 2007).

[206] E.g., Crandall v. City & County of Denver, 594 F.3d 1231, 1237 (10th Cir. 2010) ("[T]he term 'endangerment' . . . mean[s] a threatened or potential harm . . . ." (second and third alterations in original) (quoting *Burlington N.*, 505 F.3d at 1020)); Rsrv. Mining Co. v. EPA, 514 F.2d 492, 529 (8th Cir. 1975) (en banc); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985); United States v. Vertac Chem. Corp., 489 F. Supp. 870, 885 (E.D. Ark. 1980); see also Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc) ("Case law and dictionary definition agree that endanger means something less than actual harm.").

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to use affirmative emergency powers could stem in part from the burden to establish imminent endangerment as opposed to the strict liability standard applicable in most conventional enforcement matters involving violations of statutory obligations or permit conditions.[207]

These judicially derived understandings align with the plain meanings of each term. When referring to a "danger or calamity," "imminent" is defined as "threatening to occur immediately"[208] and "impending threateningly."[209] "Substantial" has a variety of legal definitions but is most likely to be construed here as meaning "material," "important," or "considerable in extent."[210] Endangerment is defined as "[t]he act or an instance of putting someone or something in danger; exposure to peril or harm."[211]

Finally, where statutory provisions contain the term "emergency" itself, officials should be prepared to explain why their use of these authorities involves either a sudden event and/or an urgent circumstance in which redress or assistance is needed. *Black's Law Dictionary* defines

[207] Basic Information on Enforcement, EPA, https://www.epa.gov/enforcement/basic-information-enforcement [https://perma.cc/8YC4-UDL5] (last updated Apr. 10, 2026) ("Environmental civil liability is strict; it arises simply through the existence of the environmental violation. It does not take into consideration what the responsible party knew about the law or regulation they violated."). Additional institutional hesitancy may derive from slight differences in the language of certain affirmative emergency powers provisions, which also authorize action when a source (or combination of sources) "is presenting" an imminent and substantial endangerment. E.g., 42 U.S.C. § 7603. The more frequently invoked analogous provisions under CERCLA and RCRA authorize action when "there may be" or sources "may present" an imminent and substantial endangerment. 42 U.S.C. §§ 6973, 9606. The EPA indicated in its 1999 guidance on use of Section 303 authority under the CAA that the standards were not meaningfully different based on its review of the relevant legislative histories and case law interpreting operative phrases. Agency officials opined that "[a]t worst" this discrepancy "may mean that the emissions that would pose the [requisite] threat be either ongoing or reasonably predicted, as distinct from theoretically potential emissions." Guidance on Section 303, supra note 20, at 8.

[208] Imminent, Black's Law Dictionary (12th ed. 2024). Legal definitions may not be the only ones that matter. Some climate scientists offer a different view that underscores risk and urgency but de-emphasizes whether an emergency was unforeseeable. See, e.g., Timothy M. Lenton et al., Climate Tipping Points—Too Risky to Bet Against, 575 Nature 592, 592–95 (2019).

[209] Imminent, Oxford English Dictionary, https://doi.org/10.1093/OED/7369441684 [https://perma.cc/Q3ZP-E2PB] (last visited Sep. 12, 2026).

[210] Substantial, Black's Law Dictionary (12th ed. 2024).

[211] Endangerment, Black's Law Dictionary (12th ed. 2024); accord Endangerment, Oxford English Dictionary, https://doi.org/10.1093/OED/8980941185 [https://perma.cc/ZCN6-RR7K] (last visited Sep. 14, 2026) ("The action of putting in danger; the condition of being in danger.").

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emergency as both (1) "[a] sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm" and (2) "[a]n urgent need for relief or help; an exigent circumstance in which immediate assistance is needed to protect property, public health, or safety, or to lessen or avert the threat of disaster."[212] General dictionaries similarly reflect the dual nature of emergencies: "an unforeseen combination of circumstances or the resulting state that calls for immediate action" and "an urgent need for assistance or relief."[213] The uses of affirmative emergency powers described in this Article fit within one or both conceptions of emergency. That said, the longer a situation has persisted, the more it may strain cabined conceptions of "emergency."[214]

Still, *Loper Bright* seems to have left intact some level of deference that should apply to an agency's use of affirmative emergency powers. The Court observes that judges should give "due respect for the views of the Executive Branch."[215] Under the majority's rationale, this due respect or "power to persuade" will apply in multiple situations implicated in the use of affirmative emergency powers: where agencies apply specialized factual knowledge within their expertise[216] and when an agency's interpretation of a statute and administrative practice have "remained consistent over time."[217] Further, the Court also advises that "[w]hen the

[212] Emergency, Black's Law Dictionary (12th ed. 2024).

[213] See, e.g., Emergency, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/emergency [https://perma.cc/X7YM-BXC7] (last visited Sep. 12, 2026). The D.C. Circuit recently espoused this approach, construing the term "emergency" in Section 202(c) of the Federal Power Act by reference to dictionaries defining the term as "includ[ing] an unforeseen occurrence *or* combination of circumstances which calls for immediate action or remedy, a pressing necessity, and an exigency." Michigan v. DOE, No. 25-1159, 2026 WL 2671756, at *12 (D.C. Cir. Sep. 11, 2026) (emphasis added) (internal quotation marks omitted). The court clarified that "the need for an immediate federal response might arise even when a crisis is foreseeable or will occur in the future." Id.

[214] Courts have construed poor environmental conditions existing for twenty years as "hardly 'unexpected'" and thus not constituting an "emergency" excusing noncompliance with environmental requirements. United States v. Virgin Islands, 363 F.3d 276, 289 n.10 (3d Cir. 2004) (quoting *Black's Law Dictionary* and rejecting the Government of the Virgin Islands' argument that the dilapidated sewer system created a state of emergency).

[215] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024).

[216] Id. at 2259, 2267 (citing with approval and quoting Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

[217] Id. at 2262. For a detailed explanation of the Court's "warm[] embrace[]" of *Skidmore* and ongoing areas of deference, such as "factbound determinations" and explicit or implicit congressional delegations, see Cass R. Sunstein, Our *Marbury*: *Loper Bright* and the

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best reading of a statute is that it delegates discretionary authority to an agency" (as is the case with the delegations in the statutory language parsed in Section I.A), "the role of the reviewing court . . . is . . . ensuring the agency has engaged in 'reasoned decisionmaking' within th[e] boundaries" of the delegated authority.[218]

2. Agency Acquiescence and Discretion

Affirmative emergency orders could also be susceptible to challenges rooted in theories of regulatory acquiescence. Recipients of an order may assert that the EPA acquiesced to certain emissions or discharges over time.

Because officials will, in some instances, have permitted the facility or pollutants at issue, a respondent might argue that the EPA acted inconsistently with its later characterization of the situation as an "emergency." Agencies also typically issue warnings in advance of emergency actions—whether to provide an entity the opportunity to address the situation or to investigate or characterize dangerous conditions, as in the examples chronicled above—which might fuel similar claims of acquiescence or administrative inconsistency.

Separately, whether the agency invokes emergency powers at all is committed to agency discretion.[219] Thus, for all their benefits, affirmative emergency powers lie vulnerable to political wills, raising concerns over what scholars have termed "underreach" of emergency authority: "a failure to marshal adequate emergency power to deal with a serious crisis."[220] Officials may engage in underreach for any number of reasons. They might consider an emergency declaration too politically sensitive in many instances. Federal enforcers may be risk-averse to potential federalism-tinged tension with local or state officials.[221] Contributing

Administrative State, 74 Duke L.J. 1893, 1900–04 (2025) (quoting *Loper Bright*, 144 S. Ct. at 2259).

[218] *Loper Bright*, 144 S. Ct. at 2263 (quoting Michigan v. EPA, 576 U.S. 743, 750 (2015)).

[219] See, e.g., Heckler v. Chaney, 470 U.S. 821, 832 (1985); Burgess v. United States, 375 F. Supp. 3d 796, 812–13 (E.D. Mich. 2019) (explaining that the EPA had discretion to decide if and how to respond to the lead contamination crisis in Flint, Michigan).

[220] Landau, supra note 122, at 606 (relying on a formulation by David Pozen and Kim Lane Scheppele).

[221] See, e.g., Brie D. Sherwin, Pride and Prejudice and Administrative Zombies: How Economic Woes, Outdated Environmental Regulations, and State Exceptionalism Failed Flint, Michigan, 88 U. Colo. L. Rev. 653, 703, 711 (2017) (detailing contestation from the State of Michigan over the EPA's emergency orders during the Flint Water Crisis); see also

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factors might also include the deficiency in institutional scaffolding to support identifying and reacting to emergency situations under the CAA, CWA, and SDWA, as opposed to established institutional support for emergencies under CERCLA or RCRA.[222] Moreover, the risks of "underreach" during periods of lax enforcement cannot be offset by citizen suits to compel the government to take emergency action.[223]

This limitation cannot be overstated. As of this writing, the United States is in an era of significantly reduced federal enforcement,[224] which carries several implications for affirmative emergency powers. First, it almost certainly means that the slight increase in deployment of federal

Memorandum from Lawrence E. Starfield, supra note 43, at 5 (noting that one of the "specific situations where [the] EPA may choose to take direct action under its concurrent enforcement authority" includes "[e]mergency situations or situations where a community's health may be impacted by noncompliance").

[222] By contrast, for hazards implicating CERCLA or RCRA, under which the emergency provisions are used more frequently, entire risk and emergency management teams within the EPA manage this work. See About the Office of Land and Emergency Management, EPA, https://www.epa.gov/aboutepa/about-office-land-and-emergency-management [https://perma.cc/8ALA-GK8Q] (last updated Aug. 17, 2026).

[223] See, e.g., United States v. New-Indy Catawba, LLC, No. 21-cv-02053, 2022 WL 18357257, at *9–10 (D.S.C. Sep. 15, 2022) (holding that there is no private right of action for intervention in the emergency provision of the CAA); 42 U.S.C. § 7604(a)(2) (providing that citizen suits can only be brought for a failure of the Administrator to perform an act that is "not discretionary with the Administrator"); Hassig v. EPA, No. 02-1001, 2002 WL 1364297, at *1 (D.C. Cir. May 24, 2002) (per curiam) (granting a motion to dismiss on the grounds that the decision to invoke emergency authority is a matter of agency discretion); Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train, 387 F. Supp. 526, 529–30 (D. Md. 1975) (holding that where the CWA allows the Administrator to exercise emergency powers with discretion, private citizens could not compel him to seek injunctive relief against an alleged polluter).

Unlike the CAA and CWA, the language of the citizen suit provision in RCRA explicitly empowers affected parties to sue for "imminent and substantial endangerment[s]." See, e.g., 42 U.S.C. § 6972(a)(1)(B); see also Complaint at 1, Me. People's All. v. Holtrachem Mfg. Co., 211 F. Supp. 2d 237 (D. Me. 2002) (No. 00-cv-00069) (suing under the citizen suit provision of the RCRA); Kurt Wohlers, Note, The Particle Problem: Using RCRA Citizen Suits to Fill Gaps in the Clean Air Act, 121 Mich. L. Rev. 325, 336 (2022) (emphasizing protective capacity of the RCRA citizen suit provision due to inclusion of "imminent and substantial" authorizing language); Note, RCRA as a Tool for Environmental Justice Communities and Others to Compel Climate Change Adaptation, 131 Harv. L. Rev. 2409, 2417 (2018) (describing the breadth of the citizen suit provision of the RCRA and the elements of a claim brought thereunder).

[224] See, e.g., Laura Thoms, The Laws Still Exist, The Consequences Don't: America's Vanishing Environmental Enforcement, Earthjustice (Dec. 15, 2025), https://earthjustice.org/experts/laura-thoms/the-laws-still-exist-the-consequences-dont-americas-vanishing-environmental-enforcement [https://perma.cc/KPM4-VAF9] (collecting and summarizing available data on precipitous enforcement reduction and contextualizing the decline).

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affirmative emergency powers in recent years will dissipate in the short term. Second, it elevates and underscores the importance of identifying and, when appropriate, invoking the state-based powers described herein—many for the first time in legal scholarship.[225] Third, it renders the speed of these authorities particularly critical when federal focus returns to environmental protection.

3. Ideological Tensions

While environmental protection may be a laudable goal from a normative perspective, the use of emergency powers to achieve that aim could be subject to multiple theoretical critiques. This Subsection explains why the exercise of affirmative emergency powers is not necessarily aligned with all principles of environmental justice. Any analysis of their utility must also contend with whether the most common critiques of broader executive emergency authority apply, and if so, to what degree.

i. Resident Participation and Control

The environmental justice movement espouses multiple goals related to protection from pollution to support health and ecological integrity, but it also centers self-determination, participatory parity, and informed consent.[226] Potential tensions thus surface when considering *government*-directed action against polluters, a topic I have taken up in previous work.[227] Administrative or civil judicial affirmative emergency actions

[225] State authorities are not necessarily immune from federal policy changes. An April 2025 executive order directs the Attorney General to "identify" and "stop" "all State and local laws . . . burdening the identification, development, siting, production, or use of domestic energy resources that are or may be unconstitutional, preempted by Federal law, or otherwise unenforceable." Exec. Order No. 14260 § 2, 90 Fed. Reg. 15513, 15514 (Apr. 8, 2025). However, by its terms, the focus of the Order is subnational authorities "purporting to address 'climate change' or involving 'environmental, social, and governance' initiatives, [and] 'environmental justice.'" Id. Given their statutory language, the state environmental authorities discussed in Section I.A very likely fall outside the terms and vision of this Order, which the government has cited in suits targeted at climate change superfund laws, for example. See generally Litigation Pursuant to Executive Order 14260, State Power Project, https://statepowerproject.org/litigation-pursuant-to-executive-order-14260/ [https://perma.cc/KSD3-WGXM] (last visited Sep. 12, 2026) (tracking the litigation brought pursuant to Executive Order No. 14260).

[226] See, e.g., The Principles of Environmental Justice, EJnet.org, https://www.ejnet.org/ej/principles.pdf [https://perma.cc/3LVK-ZUYP] (last visited Sep. 14, 2026).

[227] See Colangelo, supra note 13, at 356–60.

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are not necessarily community-driven. Affected communities do not control the initiation or progression of an emergency action and may not influence fundamental components, such as the demand for relief to allay imminent dangers. Further, courts have held that there is no citizen intervention as of right in instances of affirmative emergency powers use under the CAA and CWA.[228]

One high-profile example of these tensions arose in Jackson, Mississippi, where the EPA invoked its emergency power under the SDWA.[229] The City's public water system had deteriorated such that contaminants entered the system following major rain events, regularly leaving nearly 160,000 residents without safe drinking water.[230] Following an investigation in February 2020, the EPA issued an emergency order requiring the City to make repairs to the monitoring and disinfectant systems, provide alternative drinking water during exceedances of SDWA limits, and increase bacteria sampling.[231] Yet the City infamously failed to come into compliance, culminating in a catastrophic lack of water for weeks.[232]

Residents argued that their dearth of participatory power compounded this environmental injustice[233] after DOJ filed a civil action against the City[234] and the court appointed a third-party manager ("TPM") for the City's water system.[235] The community objected to the selection of the TPM, the scope of his powers, the lack of oversight, and the TPM's paltry

[228] See sources cited in the first paragraph supra note 223.

[229] City of Jackson, No. SDWA-04-2020-2300 (EPA Region 4 Mar. 27, 2020) (emergency admin. order) [hereinafter Jackson Order], https://www.epa.gov/system/files/documents/2021-07/march-27-2020-emergency-order_jackson-final-signed.pdf [https://perma.cc/9AHQ-S556].

[230] Complaint at 8, 23–24, United States v. City of Jackson, No. 22-cv-00686, 2026 WL 1538139 (S.D. Miss. June 1, 2026) [hereinafter Jackson Complaint].

[231] Jackson Order, supra note 229, at 6–9.

[232] Makani Themba, A Year Later, the Water Crisis in Jackson Has Gone from Acute to Chronic, The Nation (Sep. 7, 2023), https://www.thenation.com/article/environment/jackson-water-crisis-accountability/ [https://perma.cc/UC6L-6NMA]; Jackson Complaint, supra note 230, at 23–24.

[233] Alex Rozier, Federal Judge Hears Residents' Input on JXN Water's Work Thus Far, Miss. Today (July 14, 2023), https://mississippitoday.org/2023/07/14/federal-judge-hears-residents-input-on-jxn-waters-work-thus-far/ [https://perma.cc/2SJ2-M2K2].

[234] Jackson Complaint, supra note 230, at 1.

[235] Interim Stipulated Order at 7, *City of Jackson*, 2026 WL 1538139 (No. 22-cv-00686).

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communication.[236] The federal district judge provoked similar rebuke for allegedly making it difficult for community members to participate in the few public meetings that were held in the case.[237] This prompted Jackson residents, in July 2023, to send a letter and emergency petition to the EPA pleading for more transparency and community involvement.[238] They followed up two months later with a motion to intervene in the EPA's lawsuit against the City.[239] Only in March 2024 did the court grant intervention for the community groups to become parties to the litigation.[240]

This episode in Jackson illustrates the broader tension that any assessment of affirmative emergency powers from an environmental justice perspective must confront. Government-based litigation can be at odds with principles of self-determination.[241] At the same time, affirmative emergency powers also tackle discrete environmental harms and advance aspirations for clean and sustainable communities.

ii. Democratic-Norms-Based Counterpoints

The use of emergency authorities in environmental statutes to redress imminent harm should be evaluated in light of the democratic and rule-of-law objections to broader emergency powers that are well detailed in the scholarly literature.[242] Those justified critiques contend that executive emergency powers can circumvent legal standards and democratic processes, entrench emergency governance, foment suppression of

[236] Id.; Themba, supra note 232; Lylla Younes, A Water Crisis in Mississippi Turns Into a Fight Against Privatization, Grist (Apr. 26, 2024), https://grist.org/equity/a-water-crisis-in-mississippi-turns-into-a-fight-against-privatization/ [https://perma.cc/VK98-UJW7].

[237] Charlie Drape, Why Judge Wingate Was Upset About EPA, DOJ's Public Meetings on Jackson's Water System, Miss. Clarion Ledger (Oct. 13, 2024, at 04:45 CT), https://www.clarionledger.com/story/news/local/2024/10/13/mississippi-federal-judge-upset-with-epa-doj-public-meeting-on-jackson-ms-water-system/75628130007/; Themba, supra note 232.

[238] Letter from Miss. Poor People's Campaign & People's Advoc. Inst., to EPA, Region 4 (July 11, 2023), https://ccrjustice.org/sites/default/files/attach/2023/08/PAI-MS-PPC-Community-Statement-7-11-23.pdf [https://perma.cc/QGU7-36DR]; Younes, supra note 236.

[239] Memorandum of Law in Support of Mississippi Poor People's Campaign & the People's Advocacy Institute's Unopposed Motion for Leave to Intervene in Safe Drinking Water Act Case at 3, *City of Jackson*, 2026 WL 1538139 (No. 22-cv-00686).

[240] Order Granting Unopposed Motion for Leave to Intervene of Mississippi Poor People's Campaign & the People's Advocacy Institute in Safe Drinking Water Act Case at 2, *City of Jackson*, 2026 WL 1538139 (No. 22-cv-00686).

[241] See Colangelo, supra note 13, at 356–58.

[242] See supra Introduction and text accompanying note 31.

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individual rights, justify executive overreach, and aggravate nondelegation concerns about concentrated executive authority.[243]

Affirmative emergency powers in environmental contexts, however, do not implicate these concerns as intensely as other forms of emergency powers. First, most affirmative emergency powers provisions in environmental statutes are time-limited, thereby tempering reservations about emergency normalization. For example, there is a sixty-day limit for Section 303 orders under the CAA unless the government files a civil judicial suit.[244] Some states explicitly require the rescission or reduction of orders once the emergency condition ends.[245] Many states, including Connecticut, Idaho, Missouri, Montana, Rhode Island, Tennessee, West Virginia, Wisconsin, and more, require post-order hearings within a short timeframe, typically twenty-four to forty-eight hours.[246] These provisions offer limited due process following the issuance of the emergency order and generally require that following the hearing, a final determination be made to preserve, eliminate, modify, or extend the order.

[243] See, e.g., supra note 31 and accompanying text; Kathleen Claussen, Trade's Security Exceptionalism, 72 Stan. L. Rev. 1097, 1102–04 (2020); Christopher Kutz, Torture, Necessity and Existential Politics, 95 Calif. L. Rev. 235, 236–37, 267–68 (2007); Martha Minow, The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman's *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, 75 Fordham L. Rev. 593, 599–600 (2006); Bruce Ackerman, Essay, The Emergency Constitution, 113 Yale L.J. 1029, 1029–31 (2004). See generally Saikrishna Bangalore Prakash, The Imbecilic Executive, 99 Va. L. Rev. 1361, 1370 (2013) (tracing the origins and mapping theories of presidential emergency powers); Kim Lane Scheppele, Small Emergencies, 40 Ga. L. Rev. 835, 835–37 (2006) (discussing normalizations of emergencies in a way that shifts the constitutional order over time).

[244] 42 U.S.C. § 7603.

[245] E.g., Mo. Ann. Stat. § 643.090(1) (West 2026) (allowing prohibition or restriction orders only "during such periods of time necessary to alleviate or lessen the effects of the emergency condition"); N.H. Rev. Stat. Ann. § 125-C:9 (2026) ("The commissioner shall rescind or abate such order as soon as the emergency ceases to exist.").

[246] E.g., Conn. Gen. Stat. § 22a-181 (2025) (forty-eight hours); Idaho Code § 39-112 (2026) (twenty-four hours); Mo. Ann. Stat. § 643.600, art. 5.8(b) (West 2026) (forty-eight hours); Mont. Code Ann. § 75-2-402(1) (2025) (twenty-four hours); 23 R.I. Gen. Laws § 23-23-16 (2026) (twenty-four hours); Tenn. Code Ann. § 68-201-109 (2026) (twenty-four hours); W. Va. Code § 22-5-8 (2026) (twenty-four hours); Wis. Stat. § 285.85(1) (2025) (twenty-four hours); see also Tex. Water Code Ann. § 5.504 (West 2025) (a hearing is required "as soon as practicable"); N.D. Cent. Code § 23.1-06-13 (2026) (interested persons may apply for a hearing which must occur within ten days); Va. Code Ann. § 10.1-1309(B) (2026) (a hearing is required within ten days).

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Second, federal and state deployments of affirmative emergency powers can be tested by private parties and the judiciary.[247] Recipients of emergency orders and defendants in lawsuits have contested whether a circumstance presents an "imminent and substantial endangerment" and whether the relief requested by the government is commensurate with or warranted by the threatened conditions. For example, Denka opposed the Section 303 CAA civil action filed by DOJ on behalf of the EPA discussed in Part II, challenging whether the alleged harms were "imminent."[248] Merits briefing never concluded because DOJ withdrew the suit in 2025.[249] However, in its summary judgment motion, Denka characterized the suit as about "reducing *lifetime* chloroprene cancer risk," and thus argued that "under the facts alleged by the EPA, there is no imminent and substantial endangerment as a matter of law."[250] Even prior to *Loper Bright* and *Learning Resources*, courts probed agencies' evidence of imminence and substantial endangerment and the necessity of mitigating actions requested by the government—officials' requests have indeed been rejected by courts where the agency provided insufficient rationale, for example, to support a demanded cleanup

[247] Recipients of affirmative emergency orders have also challenged an order but ultimately used the litigation as leverage to negotiate with an agency. For example, in 2019, the Illinois EPA issued an order for a medical sterilization company to seal containers of ethylene oxide on site pursuant to emergency authority in an environmental statute. Ethylene oxide is a "known . . . human carcinogen," associated with leukemia and breast cancer, as well as "[b]ronchitis, pulmonary edema, and emphysema." Agency for Toxic Substances & Disease Registry, U.S. Dep't of Health & Hum. Servs., Toxicological Profile for Ethylene Oxide 5–7, 52–53 (2022) [hereinafter Toxicological Profile for Ethylene Oxide] (emphasis omitted). The company challenged the order and entered into negotiations to come into compliance with the relevant requirements. See Consent Order at 2–3, People ex rel. Raoul v. Sterigenics U.S., LLC, No. 2018CH001329 (Ill. Cir. Ct. July 16, 2019), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/community-relations/sites/sterigenics/documents/sterigenics-18ch1329-proposed-consent-order-filed-7-19-2019.pdf [https://perma.cc/DPQ8-7CZ3]. The communities near the Sterigenics plant had organized against and complained about the company's emissions for years. See About Us, Stop Sterigenics, https://www.stopsterigenics.com/about-us [https://perma.cc/R8WE-ZZWU] (last visited Sep. 12, 2026).

[248] Memorandum in Support of Denka Performance Elastomer LLC's Motion for Summary Judgment at 1–2, United States v. Denka Performance Elastomer LLC, No. 23-cv-00735 (E.D. La. Dec. 29, 2023); see supra Subsection II.A.3.

[249] Press Release, U.S. Dep't of Just., Justice Department Dismisses Suit Against Denka, Delivering on President Trump's Mandate to End Radical DEI Programs (Mar. 7, 2025), https://justice.gov/opa/pr/justice-department-dismisses-suit-against-denka-delivering-president-trumps-mandate-end [https://perma.cc/ER7W-MQ73].

[250] Memorandum in Support of Denka Performance Elastomer LLC's Motion for Summary Judgment, supra note 248 (emphasis added) (arguing that Congress designed a different provision of the CAA to address lifetime cancer risk).

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standard.[251] The precise statutory triggers for invocation of affirmative emergency powers, detailed in Section I.A, likely fuel this more meaningful judicial review. For instance, the requisite findings of endangerment to "welfare," narrowly defined to mean threats to "livelihood" (as in the CWA),[252] stand in contrast to the President's broad, unqualified ability to declare a "national emergency" under the NEA.[253]

Third, some affirmative emergency powers can only be invoked following agreement or consent by multiple actors, thereby alleviating some concerns over abuse of discretion vested in a single executive. Several state and federal provisions require a finding of an emergency by dual authorities such as a lead environmental official *and* a governor; others vest the authority to *declare* an emergency in one official and the power to *act* on that declaration in another.[254] Shared or fragmented authorities, though potentially slower to invoke, can mitigate the risks of pretextual claims of an emergency.

Fourth, certain affirmative emergency powers provisions in environmental statutes contain language which qualifies the ability to act even when officials find an imminent and substantial endangerment exists. Some provisions mandate consultation with state and local authorities to confirm information and/or authorize intervention only if state and local authorities have not acted to protect the public from the emergency at hand.[255] These constraints arise in both federal and state statutes. For example, multiple state versions of the CWA and SDWA affirmative emergency provisions authorize action only if responsible

[251] See, e.g., W.R. Grace & Co. v. EPA, 261 F.3d 330, 340 (3d Cir. 2001) (determining the EPA's SDWA orders exceeded its emergency authority because the EPA "failed to provide . . . a rational basis for its determination that a cleanup standard of 1.2 mg/l is necessary to protect the health of persons who may use [the] public drinking water system"). See generally Or.-Cal. Trails Ass'n v. Hogan, No. 26-cv-00862, slip op. at 26 (D. Colo. June 8, 2026) (rejecting the government's reliance on emergency procedures where the Fish and Wildlife Service had not first determined that the project was "an essential and immediate response" to the declared national energy emergency, as required by the applicable National Historic Preservation Act regulation).

[252] 33 U.S.C. § 1364(a).

[253] 50 U.S.C. § 1621(a). For a detailed explanation of the NEA and national security-related intersections with environmental law, see Mark Patrick Nevitt, On Environmental Law, Climate Change, & National Security Law, 44 Harv. Env't L. Rev. 321, 352–57 (2020); see also Laura K. Donohue, The Perilous Dialogue, 97 Calif. L. Rev. 357, 370–73 (2009) (cataloging overbroad "national security" initiatives which "tend to have a sort of omnibus security character").

[254] See supra notes 70, 88–93 and accompanying text for examples across jurisdictions.

[255] E.g., 42 U.S.C. § 300i.

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parties have failed to address the endangerment[256] or if, as in Texas, "an emergency . . . cannot practicably be resolved in another way."[257]

Perhaps no emergency authority is immune to charges of shielding agency action from public input, potential for abuse, and bypassing certain facets of deliberative processes by design.[258] But the use of affirmative emergency powers described herein largely avoids the most severe normative concerns with executive emergency authorities. Their time-limited duration, specific statutory triggers, shared authority structures, and consultation requirements—combined with the likelihood of a less deferential standard of review post-*Loper Bright*—alleviate the common and well-founded critiques of invoking emergency powers.

iii. Reformist Critiques

Others may forward a different set of concerns with this Article's evaluation of the utility and propriety of affirmative emergency powers to facilitate environmental aims—that these proposals do not go far enough. More consistent use of affirmative emergency powers arguably perpetuates a reactive, case-by-case approach to governance that fails to address the underlying structural and systemic causes of environmental harm, particularly in marginalized communities.[259] Writing in the context of disaster response, multiple scholars have argued that environmental governance must evolve beyond crisis management to prioritizing precaution and reducing vulnerabilities among marginalized communities.[260] It is true that in the realm of environmental protection,

[256] See supra notes 92–93, 110 and accompanying text.

[257] E.g., Tex. Water Code Ann. § 5.506 (West 2025).

[258] The scholarly literature does not uniformly support extensive processes within administrative decision-making. See Nicholas Bagley, The Procedure Fetish, 118 Mich. L. Rev. 345, 400 (2019) (challenging the view that "strict procedural rules are both essential to agency legitimacy and necessary to guarantee public accountability" and advocating for "a more granular perspective on the effects that particular procedures have on the task of governance").

[259] See generally Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 44–56 (2017) (documenting how federal, state, and local governments' laws and policies—such as zoning, public housing, and siting decisions—entrenched residential segregation); Foster, supra note 180, at 137–38 (cautioning that legal remedies often operate episodically by requiring specific causal links for discrimination claims, thus failing to transform underlying systemic conditions that disproportionately burden marginalized communities).

[260] Scholars including Rob Verchick and Abigail André have offered these critiques at the intersection of environmental law and disaster law. See, e.g., Rob Verchick, The Octopus in the Parking Garage: A Call for Climate Resilience 13–14 (2023) (arguing for climate

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we have, in the metaphorical and literal sense, too often waited for a storm to erupt before building the levee. Rather than fostering long-term resilience, reliance on post hoc remedies like emergency interventions can arguably obscure a government's failure to invest in anticipatory approaches to environmental protection.[261]

These views are eminently valid. And yet, this Article has a different aim. It does not aspire to propose transformative changes—not because systemic reform is not a worthy goal, but because it instead seeks to highlight powers that can be used now across jurisdictions to address many more environmental harms than they traditionally have been, while avoiding growing doctrinal barriers that may delay large-scale environmental action. Communities on the frontlines of imminent and substantial endangerments cannot always wait for a lengthy regulatory scheme—or even less likely, a legislative fix—to mitigate urgent harms.[262] In line with those who might advocate for more systemic

resilience in communities and national and local policies); Abigail E. André, Modern Disaster Fragmentation, 93 Fordham L. Rev. 557, 559–65 (2024) (describing federal disaster-relief statutes and agencies as a fragmented system that produces inadequate assistance for marginalized communities and advocating for institutional redesign towards proactive resilience).

[261] Very few affirmative emergency powers provisions require advanced planning to prevent or mitigate emergencies. But see supra note 116 and accompanying text (discussing proactive plan creation requirements in the Tennessee and Puerto Rico equivalents of the SDWA).

[262] Regulatory processes cannot always react quickly to changes in scientific or health information. While I advocate here that emergency actions could protect people short-term, I also acknowledge that their use in multiple locations or at multiple times should trigger more durable agency action. The protracted regulatory development of more stringent standards for ethylene oxide ("EtO") demonstrates the length and volatility of regulatory responses to evolving scientific information. In 2016, after years of scientific evaluation, the EPA determined EtO to be more dangerous than previously understood and reclassified it as "carcinogenic to humans." Nat'l Ctr. for Env't Assessment, EPA, Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide: Executive Summary 2–3 (2016), https://cfpub.epa.gov/ncea/iris/iris_documents/documents/subst/1025_summary.pdf [https://perma.cc/6PFW-HJPT]. In 2019, the EPA issued an advance notice of proposed rulemaking and followed mandatory administrative procedures to ultimately promulgate the Final Air Toxics Rule for ETO Sterilization Facilities in 2024. 89 Fed. Reg. 24090 (Apr. 5, 2024); Ethylene Oxide Emissions Standards for Sterilization Facilities: National Emission Standards for Hazardous Air Pollutants (NESHAP), EPA (May 1, 2026), https://www.epa.gov/stationary-sources-air-pollution/ethylene-oxide-emissions-standards-sterilization-facilities [https://perma.cc/8UDS-KQSZ]. "In March 2025, the Trump administration invited industry to seek exemptions from the rule and in July granted exemptions to 41 facilities." Ethylene Oxide (EtO) Emissions Standards for Commercial Sterilizers, Harv. L. Sch. Env't & Energy L. Program (Mar. 17, 2026), https://eelp.law.harvard.edu/tracker/ethylene-oxide-eto-emissions-standards-for-commercial-sterilizers/ [https://perma.cc/B57K-GCDZ]. In 2026, the EPA then issued a Proposed Reconsideration for EtO Sterilization Facilities. 91 Fed. Reg. 12700 (Mar. 17, 2026).

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change, however, I envision affirmative emergency powers as a stopgap, and not a substitute, for structural reform.[263] In other words, they remain valuable safeguards, but would be problematic if they hardened into a substitute for proactive regulation, planning, or institutional redesign, as I explore further through my implementation recommendations in Section III.A.

The project of redesigning environmental governance toward more proactive and comprehensive protection demands multifaceted strategies, including those that allow regulators to address unforeseen circumstances and emergency conditions. Today's legal and institutional disruption creates openings for innovation and revisiting existing authorities as a component of those strategies. The next Part takes up that invitation by reimagining the utility of affirmative emergency powers.

III. AFFIRMATIVE EMERGENCY POWERS REVITALIZED AND REFORMED

This Article has explored how rarely used and thinly theorized emergency provisions in federal and state environmental laws can be deployed to mitigate urgent environmental threats. This Part offers a prescriptive framework for officials to appropriately and more frequently identify contexts of endangerment in which to invoke their affirmative emergency powers. It then provides a set of proposals to elevate affected communities' concerns and foster norms of consistency and transparency in the process.

A. Identifying Contexts for More Frequent Use of Affirmative Emergency Powers

There are at least three contexts officials could focus on for more frequent deployment of emergency powers to mitigate threats to health and welfare: environmental conditions likely to be exacerbated by climate change, emerging threats, and geographic areas experiencing severe cumulative pollution burdens. Each is a circumstance in which conventional enforcement tools have proven structurally ill-suited to

[263] Environmental enforcement tools are not designed to identify and address every infraction, but rather to foster compliance through deterring and punishing violations and, as appropriate, forcing remediation of environmental harms. See, e.g., Markell & Glicksman, supra note 13, at 5–9; Max Minzner, Why Agencies Punish, 53 Wm. & Mary L. Rev. 853, 877–80 (2012).

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prevent serious harm or where regulatory regimes leave critical gaps in environmental protection.

1. Climate Change-Driven Hazards

Affirmative emergency powers can address meteorological and infrastructure harms that are likely to intensify with climate disruption. "Climate change foments destructive events such as fires, hurricanes, and extreme rainfall, and their increasing intensity and frequency. Attendant consequences include heat- and air pollution-related illnesses, injuries and deaths from fires and storms, and the spread of mosquito-borne diseases."[264] Officials should consider invoking affirmative emergency powers where an actor is causing or contributing to an imminent and substantial endangerment related to climate stressors, such as higher ambient temperatures and more frequent and severe heat waves; wildfires; hurricanes, floods, and storm surges; droughts; sea level rise; and infrastructure stress or failure.[265]

For example, certain health harms from pollution, such as adverse birth outcomes and impaired lung function, are exacerbated by intense heat and heat waves.[266] While experts predict the southern United States will see the most intense increases in ambient temperature and heat waves,[267] other states are not immune to extremes.[268] Officials in states like Oregon,

[264] Colangelo, supra note 170, at 1263–64, 1264 n.40 (footnotes omitted) (chronicling multiple peer-reviewed studies demonstrating how climate change contributes to more frequent and severe extreme weather events and the associated health consequences).

[265] See, e.g., id.; Noah S. Diffenbaugh, Verification of Extreme Event Attribution: Using Out-of-Sample Observations to Assess Changes in Probabilities of Unprecedented Events, 6 Sci. Advances, Mar. 18, 2020, at 1, 5; Greg Holland & Cindy L. Bruyère, Recent Intense Hurricane Response to Global Climate Change, 42 Climate Dynamics 617, 617, 621–22 (2014).

[266] See, e.g., Bruce Bekkar, Susan Pacheco, Rupa Basu & Nathaniel DeNicola, Association of Air Pollution and Heat Exposure with Preterm Birth, Low Birth Weight, and Stillbirth in the US: A Systematic Review, 3 JAMA Network Open, June 18, 2020, at 1, 7; Britta Rackow, Hans-Helmut König, Maurice Wall & Claudia Konnopka, The Interaction Between Air Pollution, Weather Conditions, and Health Risks: A Systematic Review, 996 Sci. Total Env't, July 31, 2025, at 1, 13–14 (synthesizing volumes of peer-reviewed research and finding that "[h]igh temperatures and air pollution (O_3, PM_{10}, $PM_{2.5}$, NO_2) synergistically amplify mortality risk"); Mary B. Rice et al., Association of Outdoor Temperature with Lung Function in a Temperate Climate, 53 Eur. Respiratory J., 2019, at 1, 2, 6.

[267] Kate Marvel et al., Chapter 2: Climate Trends, *in* Fifth National Climate Assessment, at 2-1, 2-24 (Allison R. Crimmins et al. eds., 2023), https://toolkit.climate.gov/sites/default/files/2025-07/NCA5_Ch2_Climate-Trends.pdf [https://perma.cc/LV4V-ZMXA].

[268] See 2021 Northwest Heat Dome: Causes, Impacts and Future Outlook, U.S. Dep't of Agric.: Climate Hubs, https://www.climatehubs.usda.gov/hubs/northwest/topic/2021-northw

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Idaho, and Washington, whose residents suffered significant heat-driven morbidity and mortality in the 2021 heat dome, might deploy affirmative emergency powers[269] to require polluting facilities in vulnerable areas to temporarily reduce emissions, increase monitoring, or issue public notices during heat waves. State officials are likely in the strongest position to craft detailed orders that account for particularly heat-vulnerable areas (i.e., those with urban heat island effects or with populations lacking heat adaptation strategies like air conditioning) that are downwind of pollution sources.[270] Officials in states experiencing impaired air quality from wildfires or urban fires might issue similar orders to industrial sources emitting ozone precursors or particulate matter that compound smoke and particulate matter-based health impacts, such as acute and long-term cardiovascular and respiratory damage.[271] Western "[w]ildfire smoke can be transported thousands of miles, causing significant environmental, public health, and socioeconomic impacts across the country,"[272] implicating the potential for state officials to take temporary, protective action in multiple jurisdictions.

est-heat-dome-causes-impacts-and-future-outlook [https://perma.cc/WGX3-EDRG] (last visited Sep. 12, 2026).

[269] See Or. Rev. Stat. § 468.115 (2025); Idaho Code § 39-112 (2026); Wash. Rev. Code § 70A.15.6020 (2026).

[270] State officials could also balance these considerations with any social services provided by the polluting actor, such as power generation. See generally Robert L. Glicksman, Coal-Fired Power Plants, Greenhouse Gases, and State Statutory Substantial Endangerment Provisions: Climate Change Comes to Kansas, 56 Kan. L. Rev. 517, 517–18, 556–59 (2008) (discussing a Kansas agency's denial of an application for a coal-fired power plant based on a substantial endangerment provision in the Kansas code).

[271] See generally Rahele Barjeste Vaezi, Michael R. Martin & Farnaz Hosseinpour, Impacts of Wildfire Smoke Aerosols on Radiation, Clouds, Precipitation, Climate, and Air Quality, 26 Atmospheric Env't, Apr. 1, 2025, at 1, 5–6 (discussing the spread of smoke emissions from wildfires and associated respiratory health impacts); Marco Turco et al., Anthropogenic Climate Change Impacts Exacerbate Summer Forest Fires in California, 120 PNAS, June 12, 2023, at 1, 5, https://www.pnas.org/doi/epdf/10.1073/pnas.2213815120 [https://perma.cc/Q94M-XAU2] (estimating increase in burn area attributable to anthropogenic climate change over multiple decades).

[272] Steven Ostoja et al., Focus on Western Wildfires, *in* Fifth National Climate Assessment, at F2-1, F2-5 (Allison R. Crimmins et al. eds., 2023), https://toolkit.climate.gov/sites/default/files/2025-07/NCA5_F2_Western-Wildfires.pdf [https://perma.cc/7K98-9H5E] ("Wildfire smoke . . . contains fine particulate matter ($PM_{2.5}$), ozone precursors, and other toxic components (KM 14.2). Although the annual average level of $PM_{2.5}$ has declined over recent decades due to air quality policies, the frequency and severity of smoke events in the western US make wildfire the largest contributor to $PM_{2.5}$ in this region . . . ." (footnote omitted)).

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Climate change can also fuel more frequent and severe storms and hurricanes, extreme rainfall, and associated flooding.[273] Agency personnel in states like New Jersey, where the threat of increased flooding overlaps with polluting facilities,[274] should be prepared to issue orders to petrochemical facilities or industrial waste lagoons that could contribute to endangerments stemming from chemical releases to floodwaters, or overtopping and leaching of contaminants.[275] Such orders might include interim mitigation measures such as stabilizing tanks, secondary containment strategies, pump-down of waste, or enhanced monitoring.[276] Intense rainfall and flooding similarly threaten the stability of critical infrastructure such as wastewater treatment and more.[277] Officials might consider emergency orders to respond to these possible failures through temporary overflow mitigation, emergency disinfection and monitoring, and public notices.

[273] See, e.g., Seth Westra et al., Future Changes to the Intensity and Frequency of Short-Duration Extreme Rainfall, 52 Revs. Geophysics 522, 522–24, 530 (2014).

[274] See Industrial Facilities and Flood Hazards, N.J. Climate Change Res. Ctr., https://njclimateresourcecenter.rutgers.edu/resources/industrial-facilities-and-flood-hazards/ [https://perma.cc/SPH7-2KRX] (last visited Sep. 12, 2026) (discussing the overlap of flood-prone areas and industrial facilities in New Jersey). See generally Climate Change in New Jersey, N.J. Dep't of Env't Prot. (Jan. 2026), https://dep.nj.gov/dsr/environmental-trends/climate-change/ [https://perma.cc/Y7AZ-8VFV] (detailing vulnerability of New Jersey to more frequent heat waves, increased annual precipitation, and rising sea levels).

[275] See, e.g., N.J. Stat. Ann. §§ 58:12A-6–12A-7 (West 2025).

[276] The increase in intensity of flooding is now seen in places across the country not previously associated with high flood risk, and it remains to be seen how traditional authorities under the Stafford Act and agencies like FEMA respond to these challenges. See, e.g., Abagael Giles, Vermont Was Supposedly Safe From the Worst Climate Risks. Then Came Relentless Floods, Vt. Pub. (Aug. 31, 2024, at 05:00 ET), https://www.vermontpublic.org/local-news/2024-08-31/vermont-was-supposedly-safe-from-the-worst-climate-risks-then-came-relentless-floods [https://perma.cc/EW65-VUPB]; Westra et al., supra note 273, at 522–24; Madeline Scolio et al., Reconceptualizing Urban Flood Modeling: Toward Intersectional and Equitable Urban Flood Risk Planning, 130 Sustainable Cities & Soc'y, 2025, at 1, 1.

[277] See, e.g., EPA, Climate Adaptation and Storms & Flooding, Climate Change Adaptation Res. Ctr. (ARC-X) (Sep. 28, 2016), https://19january2017snapshot.epa.gov/arc-x/climate-adaptation-and-storms-flooding_.html? [https://perma.cc/MK3V-7LFZ] (capture dated Jan. 19, 2017) ("Heavier downpours and more frequent and intense storms can also increase flood risk to drinking water and wastewater facilities. Increased flooding can damage treatment processes or distribution and collection system infrastructure and lead to service disruptions."); Pew, Climate Change Poses Risks to Neglected Public Transportation and Water Systems 5 (2024), https://www.pew.org/en/research-and-analysis/issue-briefs/2024/09/climate-change-poses-risks-to-neglected-public-transportation-and-water-systems [https://perma.cc/9CC3-R2HG].

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Conversely, in other locations across the country, climate change-fueled droughts spur different and dire consequences.[278] Officials in increasingly drought-prone states such as Utah, Oklahoma, and Nevada could use analogs to the SDWA or CWA to order provision of alternative drinking water, issue boil-water notices, or stop water distribution depending on the particular endangerment and statutorily authorized actions.[279]

Deploying affirmative emergency powers to preemptively address or mitigate climate-amplified health risks is likely to be most successful where the relevant statutory language provides for action when an entity is "contributing to" or a "combination" of sources is causing an endangerment—a formulation found in several state and federal statutes cataloged in Section I.A. Further, the types of orders to address climate-amplified risks need not come as a surprise to any of the actors listed above. Permitting officials can actively engage entities most likely to receive orders through formal and informal processes.

As of this writing, identifying or reinvigorating levers to protect people and places from these threats has taken on new urgency. In February 2026, the EPA rescinded its bedrock 2009 "Endangerment Finding," which had concluded that greenhouse gases threaten public health and welfare and that emissions from new motor vehicles contribute to that danger.[280] Whatever the outcome of the pending litigation challenging

[278] See, e.g., NOAA Rsch., Study: Heat, Not Lack of Precipitation, Is Driving Western U.S. Droughts (Nov. 8, 2024), https://research.noaa.gov/new-study-finds-heat-not-lack-of-precipitation-is-driving-western-u-s-droughts/ [https://perma.cc/H7G7-LJQF]; Ctr. for Climate & Energy Sols., Drought and Climate Change, https://www.c2es.org/content/drought-and-climate-change/ [https://perma.cc/9QG9-LQWM] (last visited Sep. 12, 2026).

[279] See Utah Code Ann. § 19-4-104 (LexisNexis 2026); Okla. Stat. tit. 27A, § 2-6-308 (2026); Nev. Rev. Stat. § 445A.930 (2025).

[280] Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686, 7690–91, 7710–11 (Feb. 18, 2026) (to be codified at 40 C.F.R. pts. 85–86, 600, 1036–37, 1039) (rescinding the 2009 findings by asserting that the CAA does not clearly authorize the EPA to regulate greenhouse gas emissions from motor vehicles to address "global climate change" and that it instead is designed to reach air pollution threatening "health or welfare through local or regional exposure"); see also Erika Kranz, Carrie Jenks & Sara Dewey, Eliminating the Foundation: Vulnerabilities in and Implications of EPA's Endangerment Finding Rescission 2–6 (Mar. 2026), https://eelp.law.harvard.edu/wp-content/uploads/2026/03/Eliminating-the-Foundation-Vulnerabilities-in-and-Implications-of-EPAs-Endangerment-Finding-Rescission.pdf [https://perma.cc/WB6S-SD4C] (summarizing EPA's legal bases for the rescission).

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this retrenchment,[281] EPA's rescission underscores the value of affirmative emergency powers as a tool governments could invoke to respond directly to instances of imminent, climate-driven dangers.[282] To be clear, affirmative emergency powers cannot *substitute* for large-scale, sustained efforts to mitigate climate change. Emergency powers are, and should only be, episodic. But as broader mitigation authorities contract or are destabilized short-term, continuing to identify and hone options to address climate change's immediate and localized impacts becomes increasingly consequential for protecting health and welfare.

2. Emerging Threats

Abating contamination and addressing attendant health dangers from novel or not yet comprehensively regulated threats pose significant challenges across legislative and regulatory pathways for environmental governance, as described above.[283] Affirmative emergency powers can offer a targeted instrument in the larger toolkit of regulatory strategies that should be explored to address novel threats. Two salient threats include the massive proliferation in data centers to support artificial intelligence ("AI") and emerging and largely unregulated contaminants.

Few threats to human health and ecological resources have exploded into environmental consciousness like AI and, in particular, the potential impacts of data centers. Data center construction and operation to support AI exact a steep toll on natural resources and surrounding residents, raising concerns about air pollution like nitrogen dioxide and fine particulate matter (especially from backup diesel generators), effects on

[281] See generally Petition for Review, Am. Pub. Health Ass'n v. EPA, No. 26-1037 (D.C. Cir. Feb. 18, 2026) (challenging the EPA's rescission of the endangerment finding).

[282] There has also been critical and creative thinking about the utility of measures beyond the regulatory sphere for government interventions to support community safety in the face of climate-driven threats. Recent examples include strategies related to financial incentives, including through the Inflation Reduction Act and the Stafford Act, to "address[] temporary and permanent community relocation in the face of climate-related disasters . . . subject to the terms of a specific disaster declaration." Cmty.-Driven Relocation Subcomm., Nat'l Climate Task Force, Opportunities for Federal Support of Community-Driven Relocation 3–5, 16 (Dec. 2024) (describing efforts and options to foster resilience and "reduce the negative impacts of climate-driven disasters, including slow onset or chronic disasters").

[283] See supra Part II; Jonathan H. Adler & Christopher J. Walker, Delegation and Time, 105 Iowa L. Rev. 1931, 1937 (2020).

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water quality and quantity, noise, effects on areas of cultural significance, and more.[284]

Data centers tend to have components and processes, such as combustion turbines and engines, that are regulated under current federal statutory and permitting regimes, in theory.[285] But the EPA website that lists such regimes begins by calling for "America to retain dominance in technological innovation through the creation of the 2025 'America's AI Action Plan.'"[286] Subnational actors appear similarly enthusiastic about AI, and municipalities have fast-tracked or exempted data centers from permitting or other regulatory requirements over the protest of affected residents.[287] Consequently, it would require significant political will to

[284] See, e.g., Amanda Levendowski Tepski, Fairer Public Benefit in Copyright Law, 47 Cardozo L. Rev. 119, 176–79 (2025) (chronicling environmental harms of AI and data centers and observing lack of information and transparency about those harms); Leila Marie Hampton & Eric Nost, Communities Close to EPA-Regulated Data Centers Face Heightened Air Pollution, Env't Data & Governance Initiative (Oct. 28, 2025), https://envirodatagov.org/blogs/communities-close-to-epa-regulated-data-centers-face-heightened-air-pollution/ [https://perma.cc/RCM2-28ZN] (reviewing available information on 550 data centers and summarizing increased pollution burden with focus on communities within one mile); Joseph W. Kane, AI, Data Centers, and Water: A Growing Need for Regional Coordination Amid Economic Development Potential, Brookings (Nov. 20, 2025), https://www.brookings.edu/articles/ai-data-centers-and-water/ [https://perma.cc/5Y5Y-M7BG] (describing water usage, impacts of data centers, and gaps in knowledge and coordination); Paul Mozur, Adam Satariano & Emiliano Rodríguez Mega, From Mexico to Ireland, Fury Mounts Over a Global A.I. Frenzy, N.Y. Times (Oct. 20, 2025), https://www.nytimes.com/2025/10/20/technology/ai-data-center-backlash-mexico-ireland.html (summarizing "data center boom" in construction and associated depletion in natural resources quantity and quality for surrounding residents).

[285] See, e.g., Clean Air Act Resources for Data Centers, EPA, https://www.epa.gov/stationary-sources-air-pollution/clean-air-act-resources-data-centers [https://perma.cc/9FS7-SJUN] (last updated Sep. 9, 2026) (linking "*Federal Register* notices, guidance documents, and compliance requirements" related to data centers).

[286] Id.

[287] See, e.g., NAACP, Press Statement, Elon Musk's xAI Threatened with Lawsuit over Air Pollution from Memphis Data Center, Filed on Behalf of NAACP (June 17, 2025), https://naacp.org/articles/elon-musks-xai-threatened-lawsuit-over-air-pollution-memphis-data-center-filed-behalf [https://perma.cc/VG3U-EF9F]; Complaint for Declaratory & Injunctive Relief & Petition for Review at 1–4, 6–7, Jacob v. Mass. Dep't of Env't Prot., No. 2681CV01107 (Mass. Super. Ct. Apr. 27, 2026) (alleging officials "rubberstamped" a data center's "proposed air quality plan despite its clear inconsistency with state pollution control laws and environmental justice laws" over residents' challenge and describing "air pollution, industrial noise, dust, odor, traffic," and mist from cooling towers settling on homes in a DEP-designated environmental justice community); Oliver Milman, 'Irresponsible': Backlash as Utah Approves Datacenter Twice the Size of Manhattan, The Guardian (May 13, 2026, at 07:30 ET), https://www.theguardian.com/us-news/2026/may/13/utah-approves-datacenter-backlash [https://perma.cc/GMZ3-HPKK] (explaining data center site approval by the county commissioners despite thousands of objections from Utah residents and environmentalists).

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exercise the administrative discretion to pursue emergency action if a data center was causing imminent and substantial endangerment. But affirmative emergency powers under the CAA, CWA, or SDWA and state authorities in jurisdictions that have experienced particularly intensive proliferation of data centers such as Virginia[288] and Tennessee[289] all seem plausibly relevant to these burgeoning environmental harms in advance of potential comprehensive regulation.

Exposure to emerging contaminants such as "forever chemicals" also has the potential to be redressed through use of affirmative emergency powers. In recent years, scholars and practitioners have increasingly focused on the gap between risk recognition and risk management in the context of these per- and polyfluoroalkyl substances ("PFAS").[290] PFAS threaten a broad range of health harms from multiple forms of cancer to long-term reproductive and endocrine system damage.[291] These harms are better understood than those associated with data centers, yet PFAS remain subject only to nascent federal and state regulatory regimes.[292]

PFAS pollution is particularly acute in the context of drinking water, underscoring the importance of emergency powers under the SDWA and

[288] See Va. Code Ann. § 10.1-1309 (2026).

[289] Tenn. Code Ann. § 68-201-109 (2026).

[290] Accordingly, a handful of scholars have concluded that affirmative emergency powers offer a means to address emerging environmental threats at least in the context of PFAS. See, e.g., Mark P. Nevitt & Robert V. Percival, Can Environmental Law Solve the "Forever Chemical" Problem?, 57 Wake Forest L. Rev. 239, 259 (2022) (exploring legal and practical options to address PFAS); Glicksman & Adashek, supra note 25, at 379. In fact, in 2025, the Wisconsin Supreme Court upheld the state's authority to enforce a PFAS cleanup under state emergency environmental response authorities concerning spills of hazardous substances. Wis. Mfrs. & Com., Inc. v. Wis. Nat. Res. Bd., 2025 WI 26, ¶ 63, 416 Wis. 2d 561, 21 N.W.3d 718.

[291] See, e.g., Suzanne E. Fenton et al., Per- and Polyfluoroalkyl Substance Toxicity and Human Health Review: Current State of Knowledge and Strategies for Informing Future Research, 40 Env't Toxicology & Chemistry 606, 612–16 (2021).

[292] See Lawrence E. Culleen, Stacey Halliday & Katrina R. Umstead, Important Year-End Developments in PFAS State Law: Minnesota, New Mexico, and Connecticut, Arnold & Porter (Dec. 22, 2025), https://www.arnoldporter.com/en/perspectives/advisories/2025/12/developments-in-pfas-state-law-minnesota-new-mexico-connecticut [https://perma.cc/85ZR-ECJF]. See generally Env't Working Grp., For 50 Years, Polluters Knew PFAS Chemicals Were Dangerous But Hid Risks from Public (2019), https://static.ewg.org/reports/2019/pfa-timeline/3M-DuPont-Timeline_sm.pdf [https://perma.cc/E5TM-USH7] (asserting that chemical manufacturers, including 3M and DuPont, recorded findings of negative health impacts associated with PFAS beginning in the 1950s).

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the CWA, along with state equivalents.[293] Following decades of unregulated PFAS manufacture and use, every U.S. state and territory has recorded PFAS contamination in its drinking water.[294] Indeed, for communities located near PFAS-contaminated sites, experts estimate that drinking water accounts for up to seventy-five percent of PFAS exposures.[295]

Because affirmative emergency powers allow for intervention based on actual *risk*,[296] they represent a vital tool among the varied strategies that will be necessary to address harms from emerging threats. While not a panacea, these provisions provide flexibility to act without regard to permit conditions or whether a pollutant is regulated, which comports with the realities of emerging threats and contaminants.

3. Cumulative Impacts

The grave health and welfare impacts inflicted by cumulative burdens are a pernicious challenge that environmental governance has yet to resolve. Cumulative impacts include "chemical and nonchemical stressors" and their effects on the well-being of residents in a community.[297] For example, when many pollution-generating facilities operate in close proximity to each other, their combined effects can be amplified, especially for populations experiencing other stressors.[298]

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[293] See Env't Working Grp., PFAS Contamination in the U.S., EWG Maps (Mar. 5, 2026), https://www.ewg.org/interactive-maps/pfas_contamination/map/ [https://perma.cc/9WGF-ENZD].

[294] See id.; Env't Working Grp., Mapping the PFAS Contamination Crisis: New Data Show 9,728 Sites with PFAS in 50 States, the District of Columbia and Four Territories, https://www.ewg.org/interactive-maps/pfas_contamination/ [https://perma.cc/3WKF-4U2R] (last updated Mar. 5, 2026).

[295] See Elsie M. Sunderland et al., A Review of the Pathways of Human Exposure to Poly- and Perfluoroalkyl Substances (PFASs) and Present Understanding of Health Effects, 29 J. Exposure Sci. & Env't Epidemiology 131, 136 (2019).

[296] For a discussion of this feature of affirmative emergency powers, see supra Subsection II.A.1.

[297] EPA, Interim Framework for Advancing Consideration of Cumulative Impacts 2 (2024), https://www.epa.gov/system/files/documents/2024-11/epa-interim-cumulative-impacts-framework-november-2024.pdf [https://perma.cc/JMH9-AGNB].

[298] See Nat'l Env't Just. Advisory Council, Reducing Cumulative and Disproportionate Impacts and Burdens in Environmental Justice Communities 8–9 (2024), https://www.epa.gov/system/files/documents/2024-11/nejac-recommendations-for-reducing-cumulative-and-disproportionate-impacts-and-burdens-in-environmental-justice-communities.pdf [https://perma.cc/9LFX-7WUZ]; see also Jill A.E. Blakley, Introduction: Foundations, Issues and Contemporary Challenges in Cumulative Impact Assessment, *in* Handbook of Cumulative Impact Assessment 2, 5–6 (Jill A.E. Blakley & Daniel M. Franks eds., 2021) (describing how

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Addressing cumulative impacts has been overdue for U.S. environmental agencies,[299] and affirmative emergency powers can play a role in mitigating acute endangerments against this backdrop of chronic harms. First, severe cumulative impacts can arise even while facilities are *individually* in compliance with regulations—neutering the efficacy of conventional enforcement actions tied to permit violations and necessitating an enforcement tool targeting endangerment to health. Second, affirmative emergency powers provisions such as CAA Section 303 and state analogs like New Mexico's code explicitly contemplate addressing a "*combination* of sources" that "contribut[e]" to a situation of endangerment.[300] This statutory language aligns with the realities of cumulative burdens. Third, affirmative emergency powers may succeed where private lawsuits have faltered.[301] Tort claims often call for establishing causation of harm from a single polluter in communities with compounding sources of environmental hazards in workplaces, schools, and homes.[302]

Such is the case in Cancer Alley, a devastating and paradigmatic example of cumulative impacts introduced in Part II. Residents there are exposed to vast quantities of toxic chemicals in the air, soil, and water from the approximately two hundred fuel and petrochemical facilities

individually insignificant development decisions, in tandem with naturally occurring events, can amount to cumulative, catastrophic repercussions). See generally Bram Noble, Cumulative Effects Assessment, *in* Routledge Handbook of Environmental Impact Assessment 42, 43 (Kevin Hanna ed., 2022) (detailing how effects can interact and become layered, and thus should not be examined in isolation).

[299] EPA's Office of the Inspector General has urged the EPA to "[d]evelop and implement performance measures to monitor progress in identifying and addressing cumulative impacts . . . across EPA programs." EPA Off. of Inspector Gen., Report No. 23-P-0029, The EPA Needs to Further Refine and Implement Guidance to Address Cumulative Impacts and Disproportionate Health Effects Across Environmental Programs 16 (2023), https://www.epa.gov/system/files/documents/2023-08/_epaoig_20230822-23-P-0029.pdf [https://perma.cc/JX55-9YPL].

[300] 42 U.S.C. § 7603 (emphasis added); N.M. Stat. Ann. § 74-2-10 (2026) ("[I]f the secretary or the director determines that a source or *combination* of sources presents an imminent and substantial endangerment to the public health or welfare or to the environment, he may bring suit . . . to restrain immediately any person causing or *contributing* to the alleged air pollution . . . ." (emphasis added)).

[301] See, e.g., Ellis v. Evonik Corp., 604 F. Supp. 3d 356, 361, 376 (E.D. La. 2022) (rejecting theories of negligence and civil battery related to exposure to ethylene oxide from a petrochemical plant in Cancer Alley).

[302] See, e.g., Sara A. Colangelo & Abigail E. André, Environmental Justice Before U.S. Courts, *in* Environmental Law Before the Courts: A US-EU Narrative 57, 74 (Giovanni Antonelli et al. eds., 2023).

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lining the Mississippi River. Chemicals emitted by these facilities include[303] formaldehyde,[304] vinyl chloride,[305] benzene,[306] ethylene oxide,[307] and dioxins,[308] among others.

Prolonged exposure to these chemicals results in ruinous health consequences. As the haunting label "Cancer Alley" suggests, the region's majority-Black "residents face . . . the highest cancer risk in the nation from air pollution."[309] They also experience other health harms that

[303] Letter from Lilian S. Dorka, Deputy Assistant Adm'r for External C.R., EPA, to Chuck Carr Brown, Sec'y, La. Dep't of Env't Quality, and Courtney N. Phillips, Sec'y, La. Dep't of Health (Oct. 12, 2022), https://www.epa.gov/system/files/documents/2022-10/2022%2010%2012%20Final%20Letter%20LDEQ%20LDH%2001R-22-R6%2C%2002R-22-R6%2C%2004R-22-R6.pdf [https://perma.cc/J8DU-D79Y] (detailing the EPA investigation into complaints regarding facility emissions in Louisiana and finding evidence of emissions of chemicals including chloroprene and ethylene oxide from multiple facilities).

[304] Formaldehyde is associated with multiple health risks, including cancer. See, e.g., Laura E. Beane Freeman et al., Mortality from Solid Tumors Among Workers in Formaldehyde Industries: An Update of the NCI Cohort, 56 Am. J. Indus. Med. 1015, 1024 (2013) (concluding airborne formaldehyde continues to be associated with increased risk of developing cancer); see also Agency for Toxic Substances & Disease Registry, U.S. Dep't of Health & Hum. Servs., Addendum to the Toxicological Profile for Formaldehyde 46–58 (2010) (noting studies finding that formaldehyde exposure has been linked to the development of multiple types of cancer).

[305] Exposure to vinyl chloride is associated with increased risk of liver cancers, and some epidemiologic studies also report elevated risks for other sites such as breast and stomach cancer. See, e.g., Elizabeth Ward et al., Update of the Follow-Up of Mortality and Cancer Incidence Among European Workers Employed in the Vinyl Chloride Industry, 12 Epidemiology 710, 716–17 (2001); see also Agency for Toxic Substances & Disease Registry, U.S. Dep't of Health & Hum. Servs., Toxicological Profile for Vinyl Chloride 1, 3, 14, 87–88 (2024), https://www.atsdr.cdc.gov/ToxProfiles/tp20.pdf [https://perma.cc/LK24-X5NK] (detailing the risks for multiple types of cancers).

[306] Exposure to ambient, occupational, and traffic-related benzene is associated with an increased risk of leukemia. See, e.g., Ole Raaschou-Nielsen et al., Ambient Benzene at the Residence and Risk for Subtypes of Childhood Leukemia, Lymphoma and CNS Tumor, 143 Int'l J. Cancer 1367, 1372 (2018). See generally Agency for Toxic Substances & Disease Registry, U.S. Dep't of Health & Hum. Servs., Toxicological Profile for Benzene: Draft for Public Comment 2 (2024) (discussing the association of benzene with hematotoxicity, immunotoxicity, and leukemia).

[307] Toxicological Profile for Ethylene Oxide, supra note 247, at 6, 38, 52 (raising concerns that ethylene oxide exposure is tied to reproductive effects, developmental effects, and cancer).

[308] Adverse human health effects of dioxin exposure include cancer, "altered immunologic response," and multiple reproductive harms. See, e.g., Sally S. White & Linda S. Birnbaum, An Overview of the Effects of Dioxins and Dioxin-Like Compounds on Vertebrates, as Documented in Human and Ecological Epidemiology, 27 J. Env't Sci. & Health Part C 197, 206–07 (2009).

[309] Letter Submitting Complaint Under Title VI of the Civil Rights Act of 1964, from Concerned Citizens of St. John and Sierra Club, to Anhthu Hoang, Acting Deputy Dir.,

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could constitute endangerments capable of triggering affirmative emergency powers, ranging from respiratory ailments associated with or exacerbated by air pollution[310] to adverse health effects specific to pregnant people and children. These imminent and substantial harms include miscarriage, low birth weight and premature birth (which persist as leading causes of infant and early childhood death), and multiple birth defects.[311] Environmental health experts have described the association between these adverse birth outcomes and the "extreme burden of industrial pollution" in Cancer Alley and have called for a reduction in pollution exposure.[312]

Cancer Alley is just one example of a pattern repeated across the country—of burdens compounding over decades of decision-making related to industrial facility siting, zoning, and land use—and exacerbated by power and information asymmetries, redlining, lack of healthcare, and more.[313] Affirmative emergency powers are not a general remedy for these situations with longstanding, systemic roots. But cumulative burdens render communities more vulnerable to acute episodes and other imminent and substantial endangerments; and emergency powers are designed for those moments.

External C.R. Compliance Off., EPA, and Daria Neal, Deputy Chief, Fed. Coordination & Compliance Section, U.S. Dep't of Just. 9 (Jan. 20, 2022), https://www.epa.gov/system/files/documents/2022-09/01R-22-R6%20Complaint_Redacted.pdf [https://perma.cc/VJ7T-V5C3] (citing the EPA's 2014 National Air Toxics Assessment); see Kimberly A. Terrell & Gianna St. Julien, Air Pollution Is Linked to Higher Cancer Rates Among Black or Impoverished Communities in Louisiana, 17 Env't Rsch. Letters, Jan. 13, 2022, at 1, 2. As the EPA and DOJ consider applying affirmative emergency powers to situations of endangerment, officials should consider Denka's argument that such powers are improper where the endangerment relates only to lifetime cancer risk. But situations where air toxins, for example, are associated with multiple forms of imminent and substantial endangerment—one of which may be an increased risk of cancer—should still meet the requisite legal standard.

[310] See, e.g., Cristina Legot, Bruce London, Anna Rosofsky & John Shandra, Proximity to Industrial Toxins and Childhood Respiratory, Developmental, and Neurological Diseases: Environmental Ascription in East Baton Rouge Parish, Louisiana, 33 Population & Env't 333, 340–44 (2012).

[311] See, e.g., Infant Mortality, CDC (Sep. 16, 2024), https://www.cdc.gov/maternal-infant-health/infant-mortality/index.html [https://perma.cc/VL8M-7BTV]; Bekkar et al., supra note 266, at 7; Kelly K. Ferguson, Marie S. O'Neill & John D. Meeker, Environmental Contaminant Exposures and Preterm Birth: A Comprehensive Review, 16 J. Toxicology & Env't Health Part B 69, 77–78, 88 (2013).

[312] Terrell et al., supra note 172, at 1–2; accord supra notes 220–21 (providing examples of sources of tension between federal, state, and local officials).

[313] See, e.g., Rothstein, supra note 259, at 44–56; Dorceta E. Taylor, Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility 35–37, 45–46, 148 (2014).

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Accordingly, officials could deploy affirmative emergency powers when a discrete condition poses an imminent and substantial endangerment within a landscape of layered harms. These authorities might address episodes such as a spike in emissions, failures to contain discharges, drinking water system impairments, continual flaring, or others that elevate risk to the level of imminence and substantial endangerment described in Subsection II.B.1. In these situations, conventional enforcement, permitting modifications, or rulemaking typically operate too slowly to prevent imminent harm or may be structurally mismatched because permit compliance would not necessarily address or mitigate an endangerment. The EPA could one day return to its original invocation of CAA Section 303 authority against twenty-three sources of air emissions in one area[314] to help address imminent and substantial endangerments in communities experiencing dire cumulative burdens.

The preceding analysis highlights where state and federal affirmative emergency powers can operate as a gap-filler for environmental protection. Each proposal for more frequent intervention in this Subsection responds to situations in which existing legal frameworks leave people and places exposed to imminent and substantial endangerments. But each also only skims the surface of highly complex and multifaceted environmental challenges. And each context presents challenges that will demand thorough governance strategies in addition to ad hoc crisis response.[315] From a normative and litigation risk perspective, agency use of emergency authorities cannot become a crutch displacing long-term planning and the procedures to establish broadly applicable

[314] For a description of the original invocations, see Hardy et al., supra note 29, at 74–75; Rendleman, supra note 29, at 96–100. Johanna Adashek's recent blog post on historic and modern use of CAA Section 303 is also instructive. Johanna Adashek, Clean Air Act § 303 Coming into the Limelight, 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/Z7EN-9V4C].

[315] See Nell Green Nylen, Dave Owen, Jennifer Harder, Michael Kiparsky & Michael Hanemann, Managing Water Scarcity: A Framework for Fair and Effective Water Right Curtailment in California 25, 87–91, 96, 105 (2023), https://clee.berkeley.edu/wp-content/uploads/archive/2026/01/Managing-Water-Scarcity-Report-April2023.pdf [https://perma.cc/DP6N-YGGG] (arguing that drought is not an occasional or unforeseen disaster and recommending non-emergency rulemaking, stronger statutory tools, and better information systems to enable routine water scarcity management).

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standards and rules.[316] Instead, this Article suggests that they offer a timely corrective mechanism to protect people and places when current governance regimes are structurally underinclusive, lag behind emerging threats or the accretion of new knowledge, or leave acute endangerment unaddressed in the near term.

B. Mitigating Incongruities with Environmental Justice and Democratic Norms

1. Participation and Communication

While affirmative emergency powers can remediate threats in communities with environmental justice concerns, government-directed enforcement can be in tension with the self-determination ideals permeating the environmental justice movement. There are several strategies that officials could adopt to alleviate these incongruencies. First, federal and state agencies could issue implementing regulations that *require* an agency's prompt investigation of citizen complaints of conditions presenting an imminent and substantial endangerment to health, welfare, or the environment, and notification to the complainant of the action taken (enforcement or nonenforcement).

The Surface Mining Control and Reclamation Act provides an instructive template. Its "[i]nspections and monitoring" provisions provide that "[a]ny person who is or may be adversely affected by a surface mining operation may notify the Secretary [of the Interior]" and require the Secretary to, "by regulation, establish procedures for informal review of any refusal . . . to issue a citation with respect to any such alleged violation."[317] The implementing regulations provide that anyone "may request a Federal inspection" by submitting a complaint that includes information—"along with any" publicly available materials or other supporting information—that could give inspectors "reason to believe that a violation . . . exists."[318] The regulations go on to require

[316] Doing so risks running afoul of core APA provisions as interpreted in administrative law doctrine. Agencies have discretion to proceed case by case in adjudication or another enforcement mechanism. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985). But actions or policies which appear to function as a rule for future conduct or bind the agency must be promulgated through ordinary rulemaking. See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021–23 (D.C. Cir. 2000); Gen. Elec. Co. v. EPA, 290 F.3d 377, 382–83, 384–85 (D.C. Cir. 2002).

[317] 30 U.S.C. § 1267(h).

[318] 30 C.F.R. § 842.12 (2025).

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officials to notify the complainant of the agency's actions, including allowing the complainant to accompany inspections.[319] This proposal would elevate community-identified concerns into agency obligations, mandate assessments of potential threats, and promote transparency and accountability by requiring follow-up with a complainant.

Nonprofit organizations, law school clinics, or other pro bono lawyers could assist communities in drafting these imminent and substantial endangerment petitions to the relevant state or federal agency. While "[c]ommunity-led petitions requesting that the EPA exercise its emergency powers are not common . . . [,] recent evidence suggests that they are a powerful tool."[320] Officials issued emergency orders, albeit belated, in Flint, Michigan, and against the Denka plant in Louisiana following community petitions.[321] These and other examples indicate that lawyers could help affected residents identify or generate information (with community surveys for example) relevant to the legal standards and triggers for emergency orders discussed in Section I.A.[322] But with the language suggested above, the community complaint would not require legal expertise or a lawyer's hand in drafting.

Officials could also, without a legislative or regulatory change, issue or alter their guidance materials for agency headquarters and regional offices to follow in implementing affirmative emergency powers.[323]

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[319] Id.

[320] Maryum Jordan, Reflections on Fighting Environmental Racism in St. John the Baptist Parish, Louisiana, 57 Harv. C.R.-C.L. L. Rev. 439, 465 (2022).

[321] See id. at 465–70 (describing instances of federal and state agency responsiveness to petitions submitted by lawyers at larger organizations on behalf of affected communities and noting that at the time of the article's publication, the EPA had responded to the community petition about Denka but had yet to use its emergency powers).

[322] See id. at 440–41, 460–69.

[323] See generally EPA, Updated Guidance on Invoking Emergency Authority Under Section 1431 of the Safe Drinking Water Act (2018) [hereinafter Updated Guidance on Section 1431], https://www.epa.gov/sites/default/files/2019-10/documents/wsg_210_updated_guidance_on_emergency_authority_under_sdwa_section_1431_5_30_2018508.pdf [https://perma.cc/4QZN-7QGL] (updating the EPA guidance to clarify the scope and operation of the EPA's emergency authority to address actual or threatened drinking water contamination that may present an imminent and substantial endangerment to public health). These guidance documents are publicly available but do not need to proceed through notice and comment procedures. However, their substance is not infrequently informed by discussion with stakeholders and is generally rooted in practical experience of the implementing agency. Further, while individual enforcement decisions are generally not reviewable, enforcement policy statements have occasionally been subject to judicial review. See WildEarth Guardians v. U.S. Dep't of Just., 181 F. Supp. 3d 651, 657–58, 664–65 (D. Ariz. 2015) (permitting review of a DOJ litigation policy); Edison Elec. Inst. v. EPA, 996 F.2d 326, 333 (D.C. Cir.

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Throughout the investigatory, litigation preparation, and filing phases of emergency actions, there are procedural and substantive steps officials can incorporate to better account for the concerns of affected community members.

For example, *identifying* matters for potential emergency authority use—beyond those which government actors identify independently—can include officials' monitoring of citizen suits, Title VI complaints, related tort claims, and other reports of emergency situations that indicate community concern over severe pollution.[324] In the early 2020s, these types of expanded outreach efforts and consultations began to see more frequent success at the EPA.[325] Scholars and community organizers alike underscore that outreach and consultation components of emergency responses are particularly important predicates to facilitating "accountability and community oversight."[326]

To be responsive to community concerns and infuse transparency into a process that could face an opacity critique, officials should also coordinate with residents during the *development* phase of an affirmative emergency powers action. Guidance could provide that as technical experts and lawyers prepare to issue an administrative order or file suit, they should consult with impacted populations[327] to mirror their statutory

1993) (permitting review of an EPA "Enforcement Policy Statement"); Ctr. for Auto Safety, Inc. v. Nat'l Highway Traffic Safety Admin., 342 F. Supp. 2d 1, 12–13 (D.D.C. 2004) (permitting review of a general enforcement policy outlined in letters sent to regulated entities), *aff'd*, 452 F.3d 798 (D.C. Cir. 2006).

[324] Due to notice and procedural requirements, government officials are aware when citizen suits and administrative complaints are filed. See, e.g., 42 U.S.C. § 7604(b).

[325] See Off. of Env't Just., Env't & Nat. Res. Div., U.S. Dep't of Just., Comprehensive Environmental Justice Enforcement Strategy Annual Report 1, 17–21 (2023), https://www.justice.gov/d9/2023-10/comprehensive-environmental-justice-enforcement-strategy-annual-report.pdf [https://perma.cc/P7E7-P2TK] (detailing expanded efforts at resident outreach and engagement in communities with environmental justice concerns); see also Off. of Env't Just., Env't & Nat. Res. Div., U.S. Dep't of Just., Comprehensive Environmental Justice Enforcement Strategy Second Annual Report 1, 20–22 (2024), https://eelp.law.harvard.edu/wp-content/uploads/2023/10/DOJ-CEJES-Second-Annual-Report-English.pdf [https://perma.cc/RRT9-7PE7] (outlining continued and additional outreach in 2024).

[326] Sarah A. Matsumoto, Protecting Water, Sustaining Communities: Transforming Groundwater Management Entities into Sources of Power During and After Environmental Crises, 92 UMKC L. Rev. 825, 852 (2024); see also id. at 851–53 (gathering and adopting accounts from community organizers and residents affected by the Flint, Newark, and Jackson water crises and highlighting the value of social networks more broadly during environmental emergencies).

[327] See Lauren Farrell, Mel Langness & Elsa Falkenburger, Community Voice Is Expertise, Urb. Inst. (Feb. 19, 2021), https://www.urban.org/urban-wire/community-voice-expertise [htt

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requirement to "consult with appropriate State and local authorities . . . to confirm the accuracy of the information on which the action proposed to be taken is based."[328] Incorporating community expertise not only serves the values of environmental justice but is also likely to strengthen officials' claims as to the endangerment itself. Further, community experiences should guide requests for interim or permanent injunctive relief, as the provision of bottled water did in the Flint crisis.[329]

After issuing an emergency order, officials' communication should continue, with an additional aim of expectation setting and procedural clarity around enforcement processes. Officials could host public meetings to update community members on the progress of the emergency action and distribute facility-specific fact sheets or technical documents online and in person. They could also hire a part-time community liaison to help share information about the case, continue gathering community narratives, share the epidemiologic consequences of the relevant endangerment, and explain the corrective actions demanded by the government.

All of this is not to intimate that information should flow one way during the deployment of affirmative emergency powers. As discussed above, the expertise and experiences of community members can alert regulators to endangerments due to insufficiently protective permit conditions, unregulated sources, or monitoring failures. In addition, accounts from historic and modern water emergencies "show that citizens can play substantial roles in responding to health emergencies, educating and caring for their communities, and communicating clear needs and demands to elected officials."[330]

2. Transparency and Consistency

As described above, the affirmative emergency powers discussed herein do not implicate as acutely the objections to broader executive emergency authorities. From the standpoint of regulated industry and polluters, however, the use of affirmative emergency powers may nonetheless raise concerns about fairness, due process, and predictability. Emergency orders are, by design, swift and unilateral, despite the fact that

ps://perma.cc/QSF5-4MDV] (urging agencies to "[e]nsure community members['] . . . contributions substantively guide the priorities and day-to-day work").

[328] 42 U.S.C. § 7603.

[329] See, e.g., Hall, supra note 26, at 140.

[330] Matsumoto, supra note 326, at 852.

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recipients have typically had notice of their deficiencies.[331] Companies may perceive such orders as bypassing traditional processes to contest allegations, especially when the underlying factual basis for the alleged "imminent and substantial endangerment" is disputed or evolving.[332]

Legislative amendments, updates to agency guidance, and standardized permit language could further promote transparency and consistency. As an initial matter, federal officials should look to parallel state authorities to determine whether to adopt any of their additional preconditions of invoking affirmative emergency powers.[333] For example, jurisdictions such as Florida predicate emergency action for environmental protection on the concurrence and advice of a governing board.[334] Other state provisions—such as CWA analogs in Ohio, North Carolina, and New Mexico—authorize affirmative emergency action only once the responsible party or parties fail to abate the endangerment.[335] Interviews with state actors delegated with emergency authority can reveal whether, in practice, these additional procedural requirements have resulted in better informed and more consistent actions or in responsible parties quickly addressing harms without an emergency order.[336] Alternatively, federal officials may learn these mandates have instead proven prohibitive to invoking emergency authority. If the former, legislators

[331] For example, all of the entities receiving the emergency orders described throughout this Article had notice of the EPA and/or state investigation into the conditions of endangerment that they contributed to or caused. The affected communities were also vocal in sharing complaints regarding their health and welfare impacts. See Press Release, EPA, EPA Notifies Limetree Bay of Clean Air Act Violations (May 3, 2021), https://www.epa.gov/newsreleases/epa-notifies-limetree-bay-clean-air-act-violations [https://perma.cc/T6ST-VKYC]; Press Release, EPA, EPA Issues Emergency Order and Information Request to New Indy Containerboard Pulp and Paper Mill in Catawba, S.C. and Expands Community Air Monitoring (May 13, 2021), https://www.epa.gov/newsreleases/epa-issues-emergency-order-and-information-request-new-indy-containerboard-pulp-and [https://perma.cc/SB6G-4PPV]; Denka Letter, supra note 175.

[332] Depending on its substance, an emergency suit or order might interrupt operations, affect supply chains, or trigger insurance exclusions in some instances.

[333] See supra Section I.A (describing state affirmative emergency powers including required consultations prior to invoking different authorities).

[334] E.g., Fla. Stat. § 373.119(2) (2025).

[335] See supra notes 92 and 93 for examples.

[336] Federal officials might also interview state officials who oversee the small number of programs that contemplate monetary relief. For example, Tennessee's CWA analog empowers officials to recover emergency costs from responsible parties. Tenn. Code Ann. § 69-3-109(b)(2) (2026). Federal officials would benefit from learning whether that structure might have an enhanced deterrence effect and incentivize *preemptive* action on the part of polluters whose acts or omissions might cause or contribute to imminent and substantial endangerment.

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could amend federal and state authorities to mirror those preconditions and thereby diminish the chance of pretextual use of affirmative emergency powers. However, given the urgency of imminent endangerments, any amendments to statutory language should also memorialize a discrete timeframe within which the responsible entity must address the harm (e.g., forty-eight hours). Additional comparative lessons might take place on an *inter*-agency basis, from other federal actors who administer emergency programs outside of the environmental sphere. Many types of statutes contain provisions akin to the affirmative emergency powers discussed herein, addressing emergencies related to transportation, financial markets, public health, and more.[337]

Regulators should also standardize permitting provisions across statutes and across jurisdictions to specify that compliance with a permit does not preempt, immunize, or constitute a defense from an action under imminent and substantial endangerment provisions. To be clear, many permits already contain such a statement.[338] But not all—and state and federal agencies responsible for permitting could issue standard permit provisions that offer more explicit notice beyond a general caveat that a

[337] Examples of similar statutory authorizations include the Commodity Exchange Act, see 7 U.S.C. § 12a(9) (defining the term "emergency" and authorizing the Commodity Futures Trading Commission to take action in an emergency to maintain and restore order in trading), and the Department of Transportation Act, see 49 U.S.C. § 20104(a)(1) ("If . . . the Secretary of Transportation decides that an unsafe condition or practice, or a combination of unsafe conditions and practices, causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment, the Secretary immediately may order restrictions and prohibitions . . . ."); id. § 11123(a) (listing authorities triggered when the Surface Transportation Board determines equipment shortage, congestion, or cessation is causing emergency).

[338] For examples under the federal statutes discussed herein, see EPA Region 3, Permit No. PAS2D020BCLE at 2 (Windfall Oil and Gas) (May 7, 2019), https://www.epa.gov/sites/default/files/2019-05/documents/2019.05.07_pas2d020bcle_permit508.pdf [https://perma.cc/N3UG-485R] (providing that "[c]ompliance with terms of this permit does not constitute a defense to any action brought under . . . the imminent and substantial endangerment provisions in Part D of the Safe Drinking Water Act (SDWA) or any other common or statutory law for any breach of any other applicable legal duty"); cf. 29 U.S.C. § 654(a)(1) (the general-duty clause in the Occupational Safety and Health ("OSH") Act). The OSH Act provides that employers have a general duty to provide "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Id. However, implementing regulations state that "[a]n employer who is in compliance with any [specific safety] standard shall be deemed to be in compliance with [the general-duty clause], but only to the extent of the condition, practice, means, method, operation, or process covered by the standard." 29 C.F.R. § 1910.5(f) (2025); see also Chewy, Inc. v. U.S. Dep't of Lab., 69 F.4th 773, 776 (11th Cir. 2023) (describing 29 C.F.R. § 1910.5(f) and confirming the "principle that compliance with an applicable safety standard bars general-duty liability").

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"permit does not relieve the permittee from responsibility for compliance with any other applicable federal, state, or local law, rule, standard, ordinance, order, judgment, or decree."[339]

To further inform expectations and foster transparency for regulated entities, officials can continue to publicly disclose national enforcement priorities.[340] They can also attend trade association meetings to provide notice that a sector or a particular community may be subject to emergency orders. Through an active dialogue with regulated entities, officials might also convey that the use of emergency authority can offer efficiency advantages over conventional environmental enforcement processes. For example, emergency orders serve as a civil response to imminent hazards—allowing recipients to address severe hazards and likely preclude escalation to criminal prosecution. By promptly complying with an emergency order, a recipient may avoid instigating charges such as knowing endangerment under the CAA.[341]

Further, emergency orders, though undoubtedly disruptive, are time-limited and bounded interventions focused on a specific harm or risk. They can take variable forms to prevent or abate dangers less onerous than halting operations, such as funding studies to track or understand the dangers of contaminants of concern[342] or other low-cost actions with major public health benefits such as continuous emissions monitoring.[343]

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[339] E.g., N.C. Dep't of Env't & Nat. Res., Div. of Water Quality, NPDES Permit No. NC0005363 (Weatherspoon Steam Electric Plant) (Nov. 20, 2009), https://www.deq.nc.gov/npdes-permit/download [https://perma.cc/GQJ6-MKL8].

[340] The EPA publicly announces its national enforcement priorities and initiatives. See National Enforcement and Compliance Initiatives, EPA, https://www.epa.gov/enforcement/national-enforcement-and-compliance-initiatives [https://perma.cc/38RW-B3C5] (last updated Mar. 9, 2026).

[341] 42 U.S.C. § 7413(c)(5).

[342] See, e.g., Updated Guidance on Section 1431, supra note 323, at 14 (listing potential orders the EPA might issue to address drinking water threats including "public notification of hazards (e.g., door-to-door, posting, newspapers, electronic media)[;] an investigation to determine the nature and extent of the contamination in the environment[;] . . . [or] monitoring of regulated or unregulated potential or identified contaminants").

[343] For example, in the context of a 2024 rulemaking related to toxic emissions from power plants and similar facilities, the EPA estimated that a shift from quarterly "stack testing" of pollution emissions to "continuous emissions monitoring" would cost approximately $12,000 per year for a facility. EPA, Regulatory Impact Analysis for the Final National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review, No. EPA-452/R-24-005, at 3-13 (Apr. 2024), https://www.epa.gov/system/files/documents/2024-04/2024-mats-rtr-final-ria-final.pdf [https://perma.cc/JN2Z-TRQ8]. Yet the environmental protection benefit would be significant because continuous monitoring systems can alert people in real time as there are

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The statutory authorizations discussed herein provide flexibility to craft emergency orders to fit the situation. In the water context, emergency powers provisions across codes in Montana, Oregon, and Virginia provide for modification of discharges or water withdrawals,[344] while other jurisdictions like Arizona allow officials to add a body of water to a protected list on an emergency basis.[345] Still others such as Missouri and Indiana permit officials to order more frequent testing of a drinking water system or issue health advisories to alert the public to emergency conditions.[346]

As officials work to update publicly available guidance documents, they can also include hypothetical and past use cases to further promote consistency as well as transparency. Federal enforcement officials could reinforce consistency and competency by designating a point person or specific office at the EPA Headquarters and within the DOJ's Environment and Natural Resources Division to review all proposed exercises of affirmative emergency powers.[347] This practice ensures that similar situations are treated similarly nationwide, even as "referrals" for enforcement actions come from the EPA regional offices across the country and even as different trial attorneys helm emergency matters.[348]

The proposals above offer concrete and implementable protocols that, in the short term, could alleviate multiple concerns about the use of affirmative emergency powers. In an administrative law landscape marked by doctrinal constraint and regulatory inertia, revitalizing these clear, longstanding delegations offers a practical way for environmental law to match the urgency of contemporary harms while remaining anchored in principles of environmental justice and democratic governance.

emissions exceedances. Community members, first responders, government officials, and the facility itself benefit from that knowledge that is intimately tied to public health outcomes.

[344] Mont. Code Ann. § 75-5-621 (2025); Or. Rev. Stat. § 468.115 (2025); Va. Code Ann. § 62.1-268 (2026).

[345] Ariz. Rev. Stat. Ann. § 49-221(G)(7) (2026).

[346] Mo. Ann. Stat. § 640.120 (West 2026); Ind. Code § 13-18-17-4 (2026).

[347] See Cruden & Gelber, supra note 24, at 10–12 (explaining the referral process from the EPA regional offices to DOJ).

[348] Id. at 11–12.

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CONCLUSION

With the 2025 declaration of an "energy emergency" and associated efforts to relax environmental safeguards, emergency powers are again being cast as vehicles for circumventing and suspending environmental protections. Much of the legal and scholarly attention has focused on those actions, justifiably critiquing exemption-oriented emergency declarations and seeking tighter checks on broad executive authority. This Article flips that familiar script by centering a different strand of emergency law and by emphasizing the potential of affirmative emergency powers to bolster government's ability to prevent or redress sudden disasters and slow-moving crises. It concludes that the lack of attention to and underuse of affirmative emergency powers are significant oversights—and particularly in this moment demanding creative, strategic re-envisioning of the environmental law and governance systems needed to protect health and welfare.

This analysis reveals that these authorities are both more widespread and more versatile than existing scholarship recognizes. Across the CAA, CWA, SDWA, and a dense network of parallel state provisions, lawmakers have already conferred broad emergency powers that can be deployed even when polluters are formally in compliance and even if regulatory standards do not exist to protect people and places. It also identifies and grapples with the limitations and drawbacks of affirmative emergency powers. Finally, the Article proposes a framework for their more frequent, community-grounded, and transparent use in critical contexts such as climate-exacerbated and emerging threats, as well as severe cumulative burdens. In doing so, the Article illustrates how affirmative emergency powers can, ex post, help fill persistent gaps left by conventional enforcement actions and regulatory inertia.

This Article also contributes to the evolving dialogue on the future of environmental law. It approaches this time of destabilization as an opportunity to surface new views on the capacity of old authorities. Exploring the utility of authorities embedded in legal frameworks, like affirmative emergency powers, is crucial in an era that privileges clear, longstanding agency mandates. Reimagining affirmative emergency powers illuminates how environmental law can still do vital work under conditions of doctrinal constraint, and how use of existing statutes can evolve to match the urgency of today's environmental challenges.