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FROM THE NORTHERN PLAINS TO THE CAROLINA COAST: AN ENVIRONMENTAL PERSPECTIVE ON NATIONWIDE INJUNCTIONS

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INTRODUCTION

The nationwide injunction debate has reached a "cacophonous" pitch.[1] Scholars have published numerous articles debating whether, and under what circumstances, it is appropriate for federal courts to prohibit the enforcement of laws and policies nationwide.[2] Supreme Court justices have questioned the lower federal courts' authority to issue nationwide relief.[3] Members of Congress have introduced legislation that would

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[1] I borrowed the term "cacophonous" from Judge Milan D. Smith, Jr., of the United States Court of Appeals for the Ninth Circuit, whose recent law review article describes the nationwide injunction debate as the "already cacophonous nationwide injunction conversation." *See* Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2014 (2020).

[2] *See, e.g.*, Smith, *supra* note 1; Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487 (2016) [hereinafter Morley I]; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019) [hereinafter Morley II]; Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020); Michael T. Morley, *Disaggregating the History of Nationwide Injunctions: A Response to Professor Sohoni*, 72 ALA. L. REV. 239 (2020) [hereinafter Morley III]; Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017); Chelsea Mitchell, *Nationwide Injunctions in Environmental Law:* South Carolina Coastal Conservation League v. Pruitt, 46 ECOLOGY L.Q. 695 (2019).

[3] Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (questioning whether federal district courts have the authority to issue nationwide injunctions); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (mem.) (Gorsuch, J., concurring in the grant of stay) (Thomas, J., joining in the concurrence) (raising "equitable and constitutional questions" regarding nationwide injunctions).

regulate federal district courts' injunctive powers.[4] Under the Trump administration, the U.S. Department of Justice opposed nationwide injunctions both in court and in the broader public conversation.[5] Now, in the first year of President Joe Biden's administration, the future of nationwide injunctions remains uncertain.[6]

At the same time, nationwide injunctions have become commonplace in environmental law. Over the last two decades, federal courts have frequently granted nationwide relief in cases arising under various environmental statutes, regulations, and government programs.[7] Because it is prudent to evaluate judicial policy debates in the context of real-life cases across different areas of the law,[8] environmental law provides one of many important contexts for examining nationwide injunctions. For example, recent environmental cases help illustrate the circumstances in which federal courts determine that nationwide relief is justified and the rationales courts rely on in making their determinations.

This Note offers a perspective on nationwide injunctions informed by a selection of environmental cases from roughly the last two decades. In doing so, it attempts to draw broader conclusions about when, if ever, federal courts should prohibit the enforcement of environmental policies nationwide. This Note proceeds as follows: Part I defines "nationwide injunction," discusses the recent history of nationwide injunctions against the federal executive branch, and describes the absence of a clear legal standard governing nationwide relief. Part II examines six environmental cases in which plaintiffs have sought, or federal courts have ordered, nationwide relief. Part III suggests that, in the context of environmental law, nationwide injunctions are justified when necessary to provide complete relief to plaintiffs and, as such, should remain an available remedy to the

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[4] *See, e.g.*, Nationwide Injunction Abuse Prevention Act of 2019, H.R. 4292, 116th Cong. (2019).

[5] *See* OFFICE ATT'Y GEN. MEM., LITIGATION GUIDELINES FOR CASES PRESENTING THE POSSIBILITY OF NATIONWIDE INJUNCTIONS 1 (Sept. 13, 2018) [hereinafter LITIGATION GUIDELINES FOR CASES PRESENTING THE POSSIBILITY OF NATIONWIDE INJUNCTIONS]; *see also* Press Release, U.S. Dep't of Just., Attorney General Sessions Delivers Remarks at the Federalist Society's Student Symposium (March 10, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-federalist-society-s-student-symposium [https://perma.cc/4PLF-4F2Z]; Kimberly Strawbridge Robinson, *Justice Department Targets Nationwide Injunctions Trump Blasted*, BLOOMBERG L. (June 3, 2019, 4:56 AM), https://news.bloomberglaw.com/us-law-week/justice-department-targets-nationwide-injunctions-trump-blasted [https://perma.cc/V843-JD3U].

[6] *See* discussion *infra* Section I.B.

[7] *See, e.g.*, cases discussed *infra* Part II.

[8] *Cf.* Frost, *supra* note 2, at 1071–72 (noting that "it is helpful to ground the debate over the propriety and constitutionality of nationwide injunctions in the facts of actual cases . . . .").

federal courts. However, Part III also argues that several of the rationales offered to support nationwide injunctions beyond providing complete relief should be retired.

I. BACKGROUND

A. Defining 'Nationwide Injunction'

An injunction is a "drastic and extraordinary"[9] equitable remedy—a court order prohibiting, requiring, or otherwise controlling a defendant's conduct.[10] An injunction can be issued at any stage in litigation—early on, in the form of a temporary restraining order or a preliminary injunction, or after adjudication, in the form of a permanent injunction. An injunction may also be enforced through civil or criminal contempt proceedings, fines, or even imprisonment.[11]

The term "nationwide injunction" refers to an injunction that is particularly broad in scope. A nationwide injunction is a court order, in a nonclass action lawsuit, controlling a defendant's conduct, not only with respect to the parties before the court, but also with respect to everyone else.[12] Thus, the term "nationwide" is actually somewhat misleading. The distinguishing characteristic of a nationwide injunction is not its geographic scope per se, but rather that it controls a defendant's conduct with respect to nonparties.[13] An injunction is a "nationwide injunction," not because it reaches from coast to coast (although it certainly may), but because it reaches beyond the parties to the case in which it was issued and applies to everyone, everywhere.[14]

Nationwide injunctions are especially controversial when they are issued by federal courts to prohibit the executive branch from enforcing laws and policies.[15] Consider, for example, an executive order by the President of the United States. If a federal court hears a challenge to the executive order and determines that it is illegal on the merits, the court then must decide the appropriate form and scope of relief.[16] If the court

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[9] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.").
[10] 19 FED. PROC., L. ED. § 47:1, Westlaw (2020).
[11] *Id.*
[12] *See* Morley I, *supra* note 2, at 498–99; Bray, *supra* note 2, at 418; Frost, *supra* note 2, at 1070–71; Smith, *supra* note 1, at 2014.
[13] Frost, *supra* note 2, at 1070–71.
[14] Smith, *supra* note 1, at 2014, 2024–25.
[15] *See, e.g.*, Bray, *supra* note 2, at 418–20. *See generally* sources cited *supra* note 2.
[16] Morley I, *supra* note 2, at 498.

issues an injunction, it prohibits the executive branch from enforcing the order. If the injunction's scope is limited to the parties in the case, then it prohibits the executive branch from enforcing the policy against *that plaintiff* or *those plaintiffs*. If, however, the court enjoins the order nationwide, then it prohibits the executive branch from enforcing the order with respect to *everyone, everywhere*.[17] In other words, the court (that is, a single federal court in one region of the country) effectively overrides the executive branch's policymaking function for the entire nation.[18]

B. The Recent History of Nationwide Injunctions

Scholars disagree about when, exactly, courts began issuing nationwide injunctions.[19] There is widespread agreement, however, that in recent decades federal courts have issued nationwide injunctions against the executive branch with increasing—and, to many, alarming—frequency.[20] As Judge Gregg Costa of the Fifth Circuit Court of Appeals describes: nationwide injunctions have "increasingly become the recipe for legal challenges to federal policies."[21]

The trend may have begun (or at least accelerated) during the second term of the George W. Bush administration.[22] Part of the Bush administration's environmental agenda included opening up public lands to greater development.[23] Environmental organizations challenged many of the administration's public lands policies in federal district courts in California, and those courts issued nationwide injunctions halting the administration's rollback of logging regulations and forestry protections.[24]

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[17] *See* Bray, *supra* note 2, at 418–20.

[18] *See* Smith, *supra* note 1, at 2020 ("The rise of the nationwide injunction begs the question: Is the underlying trend more that the judiciary is aggrandizing itself with power to declare national policy that should belong to the executive?").

[19] *Compare, e.g.*, Bray, *supra* note 2, at 425 *and* Morley III, *supra* note 2, at 4, *with* Frost, *supra* note 2, at 1080–81, *and* Sohoni, *supra* note 2, at 924.

[20] *Compare, e.g.*, Bray, *supra* note 2, at 419, *with* Frost, *supra* note 2, at 1065 (agreeing on this point). *See also* Smith, *supra* note 1, at 2013–14 (observing that "I have never before seen nationwide injunctions handed down with the frequency that I see now").

[21] Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV: BLOG (Jan. 25, 2018), https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/ [https://perma.cc/42HA-PUW3].

[22] *See* Berger, *supra* note 2, at 1078–79.

[23] *See, e.g.*, Keith Coffman, *Obama Administration Reverses Bush Wilderness Policy*, REUTERS (Dec. 23, 2010, 10:32 PM), https://www.reuters.com/article/us-usa-wilderness/obama-administration-reverses-bush-wilderness-policy-idUSTRE6BN0BJ20101224 [https://perma.cc/D26R-23L5].

[24] *See, e.g.*, Citizens for Better Forestry v. U.S. Dep't of Agric., No. C 04-4512 PJH, 2007

The nationwide injunction trend continued during the Obama administration.[25] For example, a federal district court in Texas issued a nationwide injunction blocking key aspects of the administration's Deferred Action for Parents of Americans ("DAPA") and Deferred Action for Childhood Arrivals ("DACA") immigration policies.[26] Another nationwide injunction from a district court in Texas barred the administration's Education Department from adopting interpretations of Title VII and Title IX related to bathroom and locker room access for transgender students in public schools.[27]

During the Trump administration, federal courts continued issuing nationwide injunctions with equal, if not greater, zeal.[28] Nationwide injunctions halted multiple iterations of the administration's travel ban on foreign nationals from predominantly Muslim countries.[29] Nationwide injunctions also prevented the administration's efforts to place immigration-related conditions on federal grant programs and its policy of withholding federal funds from "sanctuary cities."[30] As high-profile aspects of the Trump administration's agenda were stymied by nationwide injunctions, the administration's Justice Department began opposing "overbroad injunctive relief" in any litigation against the executive branch.[31] Its solicitor general also urged the Supreme Court to forbid the lower federal courts from ordering nationwide relief.[32]

WL 1970096, at *19 (N.D. Cal. July 3, 2007) (enjoining Forest Service regulations); California *ex rel.* Lockyer v. U.S. Dep't of Agric., 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006) (enjoining repeal of the "Roadless Rule"), *aff'd*, 575 F.3d 999 (9th Cir. 2009); Earth Island Institute v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *1–3 (E.D. Cal. Sept. 20, 2005) (enjoining Forest Service regulations).

[25] *See* Frost, *supra* note 2, at 1067.

[26] Texas v. United States, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

[27] Texas v. United States, 201 F. Supp. 3d 810, 835–36 (N.D. Tex. 2016).

[28] *See* Frost, *supra* note 2, at 1067.

[29] *See, e.g.*, Hawaii v. Trump, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017), *aff'd in part*, *vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 632–33 (D. Md. 2017); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 565–66 (D. Md. 2017), *aff'd in part*, 857 F.3d 554 (4th Cir. 2017), *vacated*, 138 S. Ct. 353 (2017); Hawaii v. Trump 245 F. Supp. 3d 1227, 1237–39 (D. Haw. 2017), *aff'd in part*, 859 F.3d 741 (9th Cir. 2017), *vacated*, 138 S. Ct. 377 (2017).

[30] City of Chicago v. Sessions, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017).

[31] LITIGATION GUIDELINES FOR CASES PRESENTING THE POSSIBILITY OF NATIONWIDE INJUNCTIONS, *supra* note 5, at 1.

[32] Petition for Writ of Certiorari I, Trump v. Hawaii, 138 S. Ct. 2392 (No. 17-965) (2018) (requesting that the Court determine "[w]hether the global injunction is impermissibly overbroad").

In its first year, the Biden administration has been no less frustrated by nationwide injunctions.[33] One month into the administration's term, a federal district court in Texas handed down multiple nationwide orders prohibiting the administration's 100-day deportation freeze from taking effect.[34] Within six months, district courts in Florida and Wisconsin ordered a nationwide halt to the administration's loan-forgiveness program aimed at redressing historic racism in farming.[35] Within days, another district court in Louisiana issued a nationwide preliminary injunction blocking the administration's moratorium on oil and gas leases on public lands and offshore waters.[36] Absent a major change in judicial policy, either in the form of a Supreme Court ruling or congressional legislation, there is every reason to think that nationwide injunctions will continue to override executive branch policymaking in the coming years of the Biden administration and beyond.

C. Absence of a Clear Legal Standard

At present, no existing law squarely regulates nationwide injunctions as they are defined in this Note and in the broader debate.[37] In general, though, the standard governing the scope of injunctions comes from the 1979 Supreme Court case *Califano v. Yamasaki*.[38] *Califano* is often cited for two propositions: first, that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"; and, second, that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."[39] As Judge Milan D. Smith, Jr., of the Ninth Circuit Court of Appeals has observed, these two propositions are actually "somewhat in tension, as the 'violation established' may exceed the scope of the violation that must be enjoined to afford the plaintiff 'complete relief.'"[40]

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[33] *See* Mark Joseph Stern, *Conservative Judges Keep Doing This Thing They Say They Hate*, SLATE (June 16, 2021, 5:55 PM), https://slate.com/news-and-politics/2021/06/conservative-judges-nationwide-injunction-biden.html [https://perma.cc/SN5L-QKR8].
[34] Texas v. United States, No. 6:21-cv-00003, 2021 WL 247877, at *8 (S.D. Tex. Jan. 26, 2021); Texas v. United States, No. 6:21-cv-00003, 2021 WL 2096669, at *52 (S.D. Tex. Feb. 23, 2021).
[35] Faust v. Vilsack, No. 21-C-548, 2021 WL 2409729, at *5 (E.D. Wis. June 10, 2021); Wynn v. Vilsack, No. 3:21-cv-514-MMH-JRK, 2021 WL 2580678, at *18 (M.D. Fla. June 23, 2021).
[36] Louisiana v. Biden, No. 2:21-cv-00778, 2021 WL 2446010, at *22 (W.D. La. June 15, 2021).
[37] Smith, *supra* note 1, at 2017.
[38] *Id.* at 2017–18; Califano v. Yamasaki et al., 442 U.S. 682, 702 (1979).
[39] *Califano*, 442 U.S. at 702.
[40] Smith, *supra* note 1, at 2018.

This much is apparent: the absence of a clear legal standard governing nationwide injunctions has led federal courts to rely on an array of different rationales as the bases for their nationwide orders.[41] For example, some federal courts have justified nationwide injunctions based on the presumed need to remediate a nationwide violation.[42] Consistent with *Califano*'s second proposition, this rationale focuses on the extent of the "violation established," not to be confused with the nature of the injuries suffered by the plaintiff or plaintiffs. Thus, in *City of Chicago v. Sessions*, a federal district court in Illinois granted a nationwide injunction against the U.S. Attorney General because there was "no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction."[43]

Other federal courts have granted nationwide relief in the interest of preserving uniform federal policy for the entire country.[44] In *East Bay Sanctuary Covenant v. Trump*, for example, the Ninth Circuit Court of Appeals approved of a nationwide injunction to ensure a "uniform federal policy" and to avoid having important parts of federal law be dependent on local forums rather than a "uniform federal definition."[45] Similarly, in *Regents of the University of California v. U.S. Department of Homeland Security*, the Ninth Circuit upheld a nationwide injunction because "an injunction that applies [the] policy to some individuals while rescinding it as to others is inimical to the principle of uniformity."[46]

Relatedly, federal courts have also justified nationwide injunctions on the grounds that narrower injunctions risk confusion and uncertainty, whereas nationwide orders are more administratively feasible.[47] This rationale has found further support among prominent scholars. For example, in her defense of nationwide injunctions, Professor Amanda Frost

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[41] *Cf.* Smith, *supra* note 1, at 2018 (observing that "[e]xisting law is generally quite permissive regarding the issuance of nationwide injunctions which is to say that there is no law that squarely regulates them . . . as a category" and that "the 'complete relief' proposition appears to be used as often to widen the scope of relief as to narrow it.").

[42] *See, e.g.*, Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994, 998–99 (E.D. Cal. 2005). This case is further discussed *infra* Section II.B.

[43] City of Chicago v. Sessions, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017).

[44] *See, e.g.*, *In re* EPA v. U.S. Army Corps of Eng'r's et al., 803 F.3d 804, 808–09 (6th Cir. 2015), *vacated on other grounds sub nom. In re* Dep't of Def., 713 F. App'x 489, 490 (6th Cir. 2018). This case is further discussed *infra* Section II.D.

[45] East Bay Sanctuary v. Trump, 950 F.3d 1242, 1283 (9th Cir. 2020).

[46] Regents of the Univ. of Ca. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 511–12 (9th Cir. 2018), *reversed in part*, *vacated in part*, 140 S. Ct. 1891 (2020).

[47] *See, e.g.*, *In re EPA*, 803 F.3d at 808; discussion *infra* Section II.D.

writes that "in some cases nationwide injunctions can be justified on the ground that they are the least disruptive remedy for the third parties affected by them" and because they help "avoid the cost and confusion of piecemeal injunctions."[48]

Finally, the legal uncertainty surrounding nationwide injunctions has important consequences for appellate review. Federal courts of appeals review district courts' injunctive orders deferentially for "abuse of discretion."[49] Thus, in the absence of a clear legal standard governing nationwide relief, appellate courts are hamstrung in their ability to reevaluate lower courts' nationwide orders.[50]

II. THE ENVIRONMENTAL CASES

Courts have considerable leeway to fashion injunctive relief based on the facts of the cases before them.[51] As such, injunctions—including nationwide injunctions against the executive branch—may vary considerably in substance and implication from one case to another.[52] Environmental law provides an important context for examining nationwide injunctions, including the circumstances in which courts order them and the rationales on which courts base their orders. Thus, in Part II, this Note examines six environmental cases and discusses their implications for the broader nationwide injunction debate.

A. Northwest Environmental Advocates v. EPA

In *Northwest Environmental Advocates v. EPA*,[53] environmental organizations sued the EPA in the Northern District of California. The plaintiffs challenged a regulation exempting cargo ships from having to obtain permits under the Clean Water Act ("CWA") to discharge ballast water.[54] A half-dozen states from across the East Coast and the Midwest joined the lawsuit as plaintiff-intervenors.[55] As a result, the organizational

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[48] Frost, *supra* note 2, at 1098–99.
[49] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2962 (3d ed., 1999). *See also* Smith, *supra* note 1, at 2018.
[50] Smith, *supra* note 1, at 2018.
[51] 19 FED. PROC., L. ED. § 47:2, Westlaw (2020).
[52] *See id.*
[53] Nw. Env't Advoc.'s v. U.S. EPA, No. C 03-05760 SI, 2005 WL 756614, at *1 (N.D. Cal. Mar. 30, 2005).
[54] *Id.*
[55] Nw. Env't Advoc.'s v. EPA, No. C 03-05760 SI, 2006 WL 2669042, at *1 (N.D. Cal. Sept. 18, 2006).

and state-plaintiffs together represented environmental interests across the continental United States.

Ballast water is taken on and discharged by ships to compensate for changes in weight as cargo is loaded or offloaded.[56] At the time, the amount of ballast water discharged into national waters exceeded twenty-one billion gallons per year.[57] This resulted in over ten thousand plant and animal species being transported daily in ships' ballast water tanks and deposited into marine ecosystems where they inflicted damage as invasive species.[58] The court observed that "invasive species are a major contributing cause of declines for almost half the endangered species in the United States."[59] Further, economic losses from invasive species were "more than double the annual economic damage caused by all natural disasters in the United States."[60]

Ultimately, the district court held in favor of the plaintiffs,[61] vacating the EPA regulation and issuing a nationwide injunction.[62] It seems apparent why the court granted nationwide relief in this case. Here, the plaintiffs' injuries were not confined to a single geographic region, but rather were distributed nationwide.[63] This was because the plaintiffs themselves were situated on both the East and West coasts and in the Midwest. It was also because, once invasive species are discharged into bodies of water, they are likely to disperse far and wide. Thus, the very nature of the plaintiffs' injuries necessitated nationwide relief. Any narrower relief—for injuries caused by widely dispersed invasive species harming ecosystems throughout the country—would amount to no relief at all.[64]

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[56] Nw. Env't Advoc.'s, 2005 WL 756614, at *1.
[57] *Id.*
[58] *Id.* at *2.
[59] Nw. Env't Advoc.'s, 2006 WL 2669042, at *4.
[60] *Id.*
[61] *Id.* at *14.
[62] *Id.* at *15.
[63] Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 10, 18–20 Nw. Env't Advoc.'s v. EPA, No. C 03-05760 SI, 2006 WL 2669042, at *1 (N.D. Cal. Sept. 18, 2006), 2003 WL 23795666.
[64] *Cf.* Frost, *supra* note 2, at 1094 (concluding that, in *Northwest Environmental Advocates*, "the environmental harm from discharge of ballast waters could not be easily contained geographically, and thus prohibiting ballast water discharge in some regions of the United States but not others would not have alleviated the plaintiffs' injury."). In her defense of nationwide injunctions, Prof. Frost cites Northwest Environmental Advocates as an example of where, in the environmental context, the "complete relief" standard justifies nationwide relief. *Id.* at 1093.

B. Earth Island Institute v. Pengilly

Contrast *Northwest Environmental Advocates* with *Earth Island Institute v. Pengilly*,[65] another environmental case decided the same year in the neighboring Eastern District of California. In *Pengilly*, environmental organizations sued the U.S. Forest Service, the federal agency that oversees national forests.[66] At the time, the Forest Service had approved the Burnt Ridge Project, a salvage timber sale on fire-damaged land in California's Sequoia National Forest.[67] The plaintiffs challenged Forest Service regulations exempting smaller projects like Burnt Ridge from the usual public notice, comment, and appeals process required for larger projects.[68] The plaintiffs sought injunctive relief to prevent the Forest Service from conducting the timber sale.[69]

The parties eventually settled the dispute as it related to the Burnt Ridge Project.[70] However, the lawsuit proceeded to address the plaintiffs' facial challenge to the Forest Service regulations.[71] Ultimately, the court invalidated the regulations and enjoined their enforcement nationwide.[72] The court offered the following rationale:

> Although this action originally challenged the Burnt Ridge Project in California, the case evolved from challenging a specific project in a specific forest to challenging regulations, applicable nationwide . . . . The appropriate remedy, therefore, is to prevent such injury from occurring again by the operation of the invalidated regulations, be it in the Eastern District of California, another district within the Ninth Circuit, or anywhere else in the nation.[73]

The court focused on the nationwide extent of the invalidated regulations, despite the fact that the controversy giving rise to the lawsuit had already been settled.[74] The plaintiffs' injuries, as they related to the

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[65] Earth Island Inst. v. Pengilly, 376 F. Supp. 2d 994, 994 (E.D. Cal. 2005).
[66] *Id.* at 998–99.
[67] *Id.* at 999.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466, at *1 (E.D. Cal. Sept. 20, 2005).
[72] *Id.* at *3.
[73] *Id.* at *2.
[74] *Id.* at *1–2.

Burnt Ridge Project, had been redressed (or, presumably at least, they had been alleviated to an extent acceptable to the plaintiffs, as evidenced by the settlement). The plaintiffs' remaining injuries resulting from the Forest Service regulations were that some of their members might be unable to comment on and appeal other Forest Service projects in the future.[75] Clearly, then, these remaining injuries could have been redressed by a narrower injunction, one that simply prohibited enforcement as between the parties or within the jurisdiction.

C. Geertson Farms, Inc. v. Johanns

In *Geertson Farms, Inc. v. Johanns*,[76] conventional alfalfa farmers sued the U.S. Department of Agriculture, challenging the agency's decision to deregulate a strain of genetically modified alfalfa without first preparing an environmental impact statement ("EIS"). The genetically modified "Roundup Ready" alfalfa was developed by Monsanto Company, which also produced herbicides used throughout the agricultural industry.[77] Roundup Ready alfalfa was engineered to resist Monsanto's herbicides, resulting in large yields of weed-free crops.[78] The plaintiffs, however, feared that gene transmission from the genetically modified alfalfa would contaminate their conventional crops.[79]

The district court held for the plaintiffs, ruling that the Department of Agriculture had violated the National Environmental Policy Act by deregulating Roundup Ready alfalfa without preparing an EIS.[80] But the appropriate form and scope of relief presented a difficult question for the court. This was because nonconventional farmers across the United States had already planted Roundup Ready alfalfa—and in some cases had already begun harvesting their genetically modified crops—in reliance on the agency's deregulatory decision.[81]

To address this issue, the court allowed additional parties to intervene in the remedial phase of the lawsuit and present evidence on how potential remedies would affect them.[82] The intervening parties

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[75] *Id.* at *3.
[76] Geertson Farms Inc. et al. v. Johanns et al., No. C 06-01075 CRB, 2007 WL 776146, at *1 (N.D. Cal. Mar. 12, 2007), *aff'd*, 541 F.3d 938 (9th Cir. 2008) *and* 570 F.3d 1130 (9th Cir. 2009) (en banc), *rev'd*, Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).
[77] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 167 (2010) (Stevens, J., dissenting).
[78] *Id.*
[79] *Geerston Farms*, 2007 WL 776146, at *1.
[80] *Id.*
[81] *Id.*
[82] *Id.* at *2. *See also Monsanto Co.*, 561 U.S. at 168–70.

included Monsanto, Forage Genetics (another company involved in developing Roundup Ready alfalfa), and three farmers who had planted, among other things, the genetically modified alfalfa.[83]

The court eventually vacated the Department of Agriculture's deregulatory decision and ordered the agency to prepare an EIS.[84] It then issued an injunction prohibiting farmers across the country from planting Roundup Ready alfalfa.[85] As for the farmers who had already planted and begun harvesting Roundup Ready alfalfa, the court imposed various restrictions on the harvesting, handling, and transportation of their crops.[86] These included limits on pollination, requirements for cleaning farm equipment, and procedures for identifying and segregating crops.[87]

Geertson Farms is similar to *Northwest Environmental Advocates* in the following respect: it is hard to imagine how a narrower injunction would have afforded the plaintiffs any relief at all. In *Geertson Farms*, a court order restraining the defendant's conduct with respect to the parties in the case, but not everyone else, would have required enjoining the Department of Agriculture's deregulatory decision with respect to the conventional alfalfa farmers, but *not all other farmers* across the country. Such a remedy would be meaningless to the conventional farmers because the deregulatory decision only injured them in so far as it allowed *other* farmers to plant and harvest genetically modified crops.[88] Put another way, the Department of Agriculture did not take any direct action toward the conventional farmers; it was the agency's action toward *other* farmers that injured the plaintiffs.[89]

Geertson Farms is significant to the nationwide injunction debate in an additional respect. The court's order not only restrained the defendant's conduct with respect to nonparties, it also restrained the conduct of the nonparties themselves.[90] The court enjoined farmers across the United States from planting Roundup Ready alfalfa, even though the only nonconventional farmers represented in the case were three individual

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[83] Geertson Farms, Inc. v. Johanns, No. C 06-01075 CRB, 2007 WL 1302981, at *2 (N.D. Cal. May 3, 2007).
[84] *Id.* at *8–9.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *See* Geertson Farms Inc. et al. v. Johanns et al., 2007 WL 776146, at *1 (N.D. Cal. Mar. 12, 2007).
[89] *See id.*
[90] *See Geertson Farms*, 2007 WL 1302981, at *9.

farmers who had intervened during the remedial proceedings.[91] In short, the scope of the injunction in this case was even broader than a "run-of-the-mill" *nationwide* injunction.

D. Litigation over the Clean Water Act's Definition of 'Waters of the United States'

The Clean Water Act is the principal federal statute governing water pollution in the United States.[92] It establishes a regime for regulating discharges of pollutants into the nation's "navigable waters."[93] However, the statute defines "navigable waters" in vague terms as "the waters of the United States, including the territorial seas" ("WOTUS").[94] This open-ended definition has led to extensive litigation over the CWA's jurisdictional reach.[95]

In 2015, the EPA and U.S. Army Corps of Engineers promulgated the "WOTUS Rule" with the goal of establishing a "simpler, clearer, and more consistent" application of CWA regulations nationwide.[96] The Rule, however, expanded the federal interpretation of WOTUS, bringing intermittently saturated wetlands, vernal pools, and prairie potholes within the CWA's jurisdiction.[97] Plaintiffs including states, industry groups, and private parties challenged the WOTUS Rule in district courts throughout the country.[98] Several courts issued preliminary injunctions barring enforcement of the Rule, but limited the scope of the injunctions to the states where the parties were situated.[99] The result was that, by the end

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[91] The three nonconventional farmers were "a Roundup Ready alfalfa seed farmer under contract with Forage Genetics; a California farmer who, among other crops, has planted 40 acres of Roundup Ready alfalfa for forage; and a dairy farmer with 300 acres planted with Roundup Ready alfalfa." *See id.* at *2.

[92] Claudia Copeland, CONG. RSCH. SERV., CLEAN WATER ACT: A SUMMARY OF THE LAW 1 (2016).

[93] *Id.* In *Northwest Environmental Advocates*, for example, the pollutant regulated under the CWA was ballast water discharged from cargo ships.

[94] 33 U.S.C. § 1362(7) (2019). *See also* Mitchell, *supra* note 2, at 698; Frost, *supra* note 2, at 1079–80.

[95] Mitchell, *supra* note 2, at 698; Frost, *supra* note 2, at 1079–80.

[96] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053, 37,059 (June 29, 2015).

[97] Mitchell, *supra* note 2, at 698; *see also* Phillip Brasher, *WOTUS Rule Sets Up Senate Fight*, AGRI-PULSE (May 28, 2015, 4:47 PM), https://www.agri-pulse.com/articles/5448-wotus-rule-sets-up-senate-fight [https://perma.cc/6DYX-WYYP].

[98] Mitchell, *supra* note 2, at 698; *see also* Brasher, *supra* note 97.

[99] *See generally* N.D. v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015) (preliminarily enjoining the WOTUS Rule, but limiting the injunction to the state-parties in the case).

of 2015, a patchwork of injunctions prohibited enforcement of the WOTUS Rule in thirteen states, while the Rule remained in effect in the other thirty-seven.[100]

In *In re EPA*, the Sixth Circuit Court of Appeals ordered a nationwide stay of the WOTUS Rule to reduce the "uncertainty" resulting from the injunctions and resolve the inconsistent application of CWA regulations across the country.[101] Notably, the court found "no compelling showing that any of the petitioners [would] suffer immediate irreparable harm . . . if a stay is not issued."[102] Nevertheless, the court determined that a nationwide stay was warranted to "temporarily silence[] the whirlwind of confusion," "establish[] a national policy," and "restore uniformity of regulation under the familiar, if imperfect pre-Rule regime."[103]

Shortly after the Sixth Circuit's decision, power changed hands in the executive branch and the new administration brought with it a different set of environmental policies. The EPA and Army Corps promulgated a new rule—the "Suspension Rule"—which delayed the WOTUS Rule for two years and provided that, in the interim, the federal interpretation of WOTUS would revert to its pre-WOTUS Rule status.[104]

In *South Carolina Coastal Conservation League v. Pruitt*,[105] environmental organizations that supported the WOTUS Rule sued the EPA and Army Corps to block the new Suspension Rule. On the merits, the district court held for the plaintiffs and invalidated the rule.[106] The court then enjoined the Suspension Rule nationwide, reasoning that the plaintiffs had suffered injuries "in multiple jurisdictions across the country"[107] and the invalidated rule "affect[ed] downstream waters not just in South Carolina or even within the Fourth Circuit but throughout the United States."[108] In fact, the plaintiffs established harms in as many as sixteen states from Wyoming to Virginia and California to New York.[109] The court concluded: "a nationwide injunction is 'necessary to provide

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[100] CONG. RSCH. SERV., "WATERS OF THE UNITED STATES" (WOTUS): CURRENT STATUS OF THE 2015 CLEAN WATER RULE 7–8 (Dec. 12, 2018).
[101] *In re* EPA v. U.S. Army Corps of Eng'r's et al., 803 F.3d 804, 808 (6th Cir. 2015).
[102] *Id.*
[103] *Id.*
[104] Mitchell, *supra* note 2, at 698.
[105] South Carolina Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 961 (D. S.C. 2018).
[106] *Id.* at 960.
[107] *Id.* at 968.
[108] *Id.* at 969.
[109] *Id.*

complete relief' [because] the Suspension Rule's effect is felt across the United States."[110]

Contrast the Sixth Circuit's rationale supporting a nationwide stay in *In re EPA* with the district court's rationale supporting a nationwide injunction in *South Carolina Coastal*. In both cases, courts invalidated a rule changing the federal interpretation of WOTUS. However, while the Sixth Circuit ordered a nationwide stay to reduce confusion and uncertainty, establish a national policy, and ensure uniform regulation, the South Carolina district court focused on the scope of relief necessary to completely redress the plaintiffs' wide-ranging injuries.[111]

These are very different standards for determining the appropriate scope of relief. In cases where, as in *In re EPA*, there is "no compelling showing" that the plaintiffs would suffer "immediate irreparable harm,"[112] a federal court's decision to overrule an executive branch agency is hardly a reliable way to achieve more predictable and uniform regulation. For example, when the Sixth Circuit ordered its nationwide stay, district courts had already enjoined the WOTUS Rule in thirteen states.[113] Meanwhile, the WOTUS Rule was the "status quo" in the other thirty-seven states.[114] What is to say that the more uniform regulatory regime was the status quo as it existed in the thirteen states without the WOTUS Rule, rather than the thirty-seven states with the WOTUS Rule? Moreover, what is to say that changing the status quo for nearly 4/5ths of all states would result in more predictable regulation than simply allowing a patchwork of injunctions to remain in effect across roughly 1/5th of states?

On the other hand, the "complete relief" standard for determining the appropriate scope of relief focuses on the nature of the harms to plaintiffs, regardless of considerations like predictability, uniformity of regulation, or even administrative feasibility. Nor is a complete relief standard concerned with whether a policy is nationwide or narrower in scope, except in so far as the scope of the policy dictates the scope of the plaintiffs' injuries.[115] Rather, the question in a complete relief inquiry is

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[110] *Id.*
[111] *Compare In re* EPA v. U.S. Army Corps of Eng'rs et al., 803 F.3d 804, 808 (6th Cir. 2015) *with* South Carolina Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 969 (D. S.C. 2018).
[112] *Id.* at 963.
[113] CONG. RSCH. SERV., *supra* note 100, at 7.
[114] *Id.*
[115] *See generally* Smith, *supra* note 1, at 2024–26.

whether the scope of the remedy will afford the plaintiffs the relief to which they are entitled.

E. Northern Plains Resource Council v. U.S. Army Corps of Engineers

Under the Clean Water Act, the U.S. Army Corps of Engineers issues permits for construction activities that discharge dredge or fill material into jurisdictional waters.[116] In addition to permitting individual construction projects, the Army Corps also issues nationwide permits ("NWPs") for categories of activities that are "similar in nature" and "will have only minimal cumulative adverse effect on the environment."[117] Generally, if an individual project meets the conditions of an NWP, it can proceed without further permitting.[118]

The Army Corps periodically reissues NWPs.[119] In 2017, the Army Corps reissued Nationwide Permit 12 ("NWP 12"), which covered construction activities related to the installation, maintenance, and removal of utility lines.[120] Importantly, the Army Corps' definition of "utility lines" included electric, telephone, internet, radio, and television lines as well as oil and gas pipelines.[121] One of the pipeline project that received authorization under NWP 12 was the 1,200-mile section of the Keystone Pipeline System known as "Keystone XL."[122]

In 2019, environmental organizations opposed to the construction of Keystone XL sued the Army Corps in federal district court in Montana.[123] The plaintiffs alleged that the Army Corps' 2017 reissuance of NWP 12 violated the Endangered Species Act ("ESA") because the Army Corps failed to undertake ESA-required interagency consultations before reissuing the permit.[124] The district court agreed with the plaintiffs,

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[116] N. Plains Res. Council v. U.S. Army Corps of Eng'rs, 454 F. Supp. 3d 985, 987 (D. Mont. 2020).
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *N. Plains Res. Council*, 454 F. Supp. 3d at 987. *See also About Keystone XL*, KEYSTONE XL PIPELINE (TC ENERGY), https://web.archive.org/web/20210505031916/https://www.keystonexl.com/kxl-101/ [https://perma.cc/9GZX-2THN] (last visited Jan. 12, 2022).
[123] *N. Plains Res. Council*, 454 F. Supp. 3d, at 985–87.
[124] *Id.*

vacated NWP 12, and issued a nationwide injunction barring the Army Corps from authorizing any new construction activities under NWP 12.[125]

The scope of the court's remedy, however, created far-reaching problems. Not only was the Army Corps barred from authorizing construction of Keystone XL under NWP 12, it was also barred from authorizing all other projects under NWP 12 as well.[126] This meant that the Army Corps could not authorize installation of new utility lines, or even maintenance of existing lines, regardless of whether they were electrical, broadband, fiber optic, or oil and gas pipelines.[127]

Both the defendants and plaintiffs moved for the court to narrow its order.[128] The plaintiffs themselves proposed an injunction that only barred construction of Keystone XL.[129] The court, however, rejected this proposal, reasoning that "[n]o evidence exists [that Keystone XL] necessarily poses a greater risk under the ESA than the construction of other new oil and gas pipelines."[130] Ultimately the court did narrow its order, but maintained a nationwide injunction barring the Army Corps from authorizing all new oil and gas pipelines under NWP 12, not just Keystone XL.[131]

In *Northern Plains*, the plaintiffs do not appear to have believed that a nationwide injunction was necessary to redress their injuries. After all, the plaintiffs brought suit challenging Keystone XL specifically, not NWP 12 as it related to non-pipeline projects, or even as it related to other oil and gas pipelines.[132] In effect, the plaintiffs even proposed narrowing the court's remedy from a nationwide injunction to one that would apply only to the parties in the case.[133] Even the court's narrower order would be certain to disrupt numerous other oil and gas pipeline projects,[134] despite those projects never being challenged before the court.

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[125] *Id.*
[126] N. Plains Res. Council v. U.S. Army Corps of Eng'rs et al., 460 F. Supp. 3d 1030, 1040 (9th Cir. 2020).
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 1043.
[131] *Id.* The Supreme Court later stayed the district court's order with respect to all NWP 12 projects other than Keystone XL, effectively giving the plaintiffs the narrowed remedy they proposed, rather than the narrower—but still nationwide—injunction the district court ordered. *See* U.S. Army Corps of Eng'rs v. N. Plains Res. Council, 141 S. Ct. 190, 190 (2020).
[132] *See N. Plains Res. Council*, 460 F. Supp. 3d at 1036, 1039–40.
[133] *Id.*
[134] *Id.* at 1040.

III. NATIONWIDE INJUNCTIONS: JUSTIFIED WHEN NECESSARY TO PROVIDE COMPLETE RELIEF

Ultimately, this Note argues that, in the context of environmental law, nationwide injunctions should remain an available remedy to the federal courts. In the environmental context, nationwide injunctions are clearly necessary, at times, to provide complete relief to plaintiffs.[135] This was the case in *Northwest Environmental Advocates* where the plaintiffs' injuries stemmed from the discharge of ballast water depositing invasive species into ecosystems throughout the United States.[136] In that case, enjoining enforcement of the regulation with respect to the plaintiffs, but no one else, would not have redressed the plaintiffs' injuries.[137] The same could be true in any case dealing with environmental harms that are readily and widely dispersed, for example through the water or air. For example, in *Geertson Farms*, gene transmission and contamination could occur when the genetically modified alfalfa seeds were carried by the wind, fields were pollinated, or farm equipment was reused.[138]

Environmental policies govern natural resources that are not confined to a single state or jurisdiction.[139] Violations of environmental policies—or environmental policies that are themselves invalid—are likely to cause harms that are distributed nationwide or across regions. These harms could be water, air, or ground pollution; damage to ecosystems, wildlife, and endangered species; genetic contamination; threats to public health; the list could go on. In any such case—for example, as in *South Carolina Coastal*, where the plaintiffs suffered nationwide harms from the invalidated Suspension Rule changing the interpretation of WOTUS—nationwide relief may be necessary and appropriate.[140]

Beyond the "complete relief" justification, however, the absence of a clear legal standard governing nationwide relief results in questionable rationales supporting broad injunctive orders.[141] In *Pengilly*, for example, the district court focused on the nationwide extent of the violation, rather

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[135] *See* discussion *supra* Sections II.A, II.C, II.D.
[136] Nw. Env't Advoc.'s v. U.S. EPA, No. C 03-05760 SI, 2005 WL 756614, at *1 (N.D. Cal. Mar. 30, 2005).
[137] *See* discussion *supra* Section II.A. *Cf.* Frost, *supra* note 2, at 1094 ("[P]rohibiting ballast water discharge in some regions of the United States but not others would not have alleviated the plaintiffs' injury.").
[138] *See* discussion *supra* Section II.C.
[139] *See* Smith, *supra* note 1, at 2024–26.
[140] *See* discussion *supra* Section II.D.
[141] *Cf.* Smith, *supra* note 1, at 2018 (suggesting that "the 'complete relief' proposition appears to be used as often to widen the scope of relief as to narrow it.").

than the nature of the plaintiffs' injuries.[142] This was despite the fact that the controversy giving rise to the lawsuit had already been settled.[143] In *In re EPA*, the appeals court stayed the WOTUS Rule to ensure predictability and uniformity of regulation, even though it did not appear that the petitioners would suffer irreparable injury without such an order.[144] Finally, in *Northern Plains*, the district court rejected a non-nationwide injunction, despite the plaintiffs themselves proposing a remedy that would have applied only to the parties in the case.[145]

It states the obvious to say that individual cases in environmental law do not encompass every implication of every rationale offered to support nationwide relief. Nevertheless, the cases examined in this Note point to the conclusion that some bases for nationwide injunctions rest on shakier foundations, at least compared to a "complete relief" standard.[146] Specifically, this Note offers support for the retirement of justifications based on: (1) the nationwide extent of a violation; (2) the promotion of a uniform national policy; and (3) the need to ensure regulatory predictability and administrative feasibility. These justifications, ultimately, pertain to policy determinations and therefore should be left to the policymaking functions of the federal executive branch. They do not, on their own, pertain to the nature or scope of plaintiffs' injuries, which courts are well-suited to redress.

CONCLUSION

However, the nationwide injunction debate is ultimately resolved, the consequences for environmental law will be far-reaching. This will be true both for plaintiffs seeking relief for environmental injuries and for the federal agencies charged with protecting and managing the nation's natural resources. This Note has examined six environmental law cases over the last two decades and attempted to glean insights into the broader nationwide injunction debate. It has argued that, in the context of environmental law, nationwide injunctions should remain an available remedy to the federal courts. It has also suggested that the availability of nationwide relief should be determined by what is necessary to provide complete relief to plaintiffs. Finally, it has suggested that certain other rationales beyond providing complete relief to plaintiffs should not serve as basis for issuing nationwide injunctions.

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[142] *See supra* notes 72–73 and accompanying text.
[143] *Pengilly*, 376 F. Supp. 2d 994, 999 (E. D. Cal. 2005).
[144] *See In re* EPA v. U.S. Army Corps of Eng'rs et al., 803 F.3d 804, 808 (6th Cir. 2015).
[145] N. Plains Res. Council v. U.S. Army Corps of Eng'rs, 460 F. Supp. 3d 1030, 1036 (9th Cir. 2020).
[146] *See supra* notes 133–34 and accompanying text.