ENVIRONMENTAL LAW — AGENCY DISCRETION AVERSION — SIXTH CIRCUIT HOLDS THAT AGENCIES ARE NOT BOUND BY THE ESA OR NEPA WHEN REVIEWING OIL SPILL RESPONSE PLANS. — *National Wildlife Federation v. Secretary of the U.S. Department of Transportation*, 960 F.3d 872 (6th Cir. 2020).

On March 24, 1989, the *Exxon Valdez* oil tanker struck a reef west of Alaska, spilling millions of gallons of oil and wreaking catastrophic environmental damage.[1] In response,[2] Congress amended the Clean Water Act[3] (CWA) with the Oil Pollution Act of 1990.[4] Among other mandates, the 1990 amendments require oil pipeline operators to submit oil spill response plans to certain administrative agencies.[5] Recently, in *National Wildlife Federation v. Secretary of the U.S. Department of Transportation*,[6] the Sixth Circuit held that agencies are not bound by either the Endangered Species Act[7] (ESA) or the National Environmental Policy Act[8] (NEPA) when evaluating and approving these response plans.[9] To arrive at this conclusion, the court agreed with the relevant agency's determination that it lacked discretion to reject response plans based on the ESA or NEPA.[10] This case exemplifies and exacerbates concerns about agency discretion aversion, a phenomenon in which agencies deliberately eschew discretion in order to avoid certain statutory obligations.[11] In addition to enabling agencies to game regulatory requirements, muddle judicial oversight, and subvert the purposes of the ESA and NEPA, the Sixth Circuit's decision is likely to undermine the Oil Pollution Act itself.

For over sixty years, Enbridge Energy, an energy transportation company, has operated a major pipeline called Line 5, which carries oil across the Great Lakes region.[12] Pursuant to the CWA, Enbridge submitted two oil spill response plans for Line 5 in the past five years.[13]

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[1] *See, e.g.*, Jeffery D. Morgan, *The Oil Pollution Act of 1990: A Look at Its Impact on the Oil Industry*, 6 FORDHAM ENV'T L.J. 1, 4 (1994).

[2] *See, e.g.*, *id.* at 1 (noting that the "environmental frenzy" following the *Exxon Valdez* spill allowed Congress to "break nearly two decades of legislative gridlock").

[3] 33 U.S.C. §§ 1251–1387.

[4] Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of 33 U.S.C.).

[5] *See* 33 U.S.C. § 1321. These response plans must outline mechanisms for removing discharges, training personnel, and performing various other actions in the case of an accidental spill. *See id.* § 1321(j)(5)(D)(i)–(vi).

[6] 960 F.3d 872 (6th Cir. 2020).

[7] 16 U.S.C. §§ 1531–1544.

[8] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

[9] *See Nat'l Wildlife Fed'n*, 960 F.3d at 874.

[10] *See id.* at 874–76.

[11] *See generally* J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 WM. & MARY L. REV. 97 (2016).

[12] *See Nat'l Wildlife Fed'n*, 960 F.3d at 874.

[13] *Id.* at 875.

The Pipeline and Hazardous Materials Safety Administration (PHMSA) approved the response plans in 2015 and 2017, respectively.[14] PHMSA did not, however, perform two other actions arguably required by environmental statutes: first, it did not consult with other environmental agencies, per section 7 of the ESA, on the potential dangers posed by its approval to endangered species or their habitats; and second, it did not prepare an environmental impact statement, per NEPA, to evaluate its approval's environmental impact and any less damaging alternatives.[15]

The National Wildlife Federation (NWF) sued PHMSA,[16] claiming, among other things,[17] that because the agency failed to meet its obligations under the ESA and NEPA, its approval of the response plans was unlawful.[18] The parties agreed that whether PHMSA was required to conform with the ESA and NEPA turned on whether the CWA affords PHMSA "discretion" to influence response plans based on environmental concerns.[19] The parties' emphasis on agency discretion stemmed in particular from two Supreme Court cases — *National Ass'n of Home Builders v. Defenders of Wildlife*[20] and *Department of Transportation v. Public Citizen*[21] — that establish that an agency need not comply with ESA and NEPA requirements if such compliance could have no impact on the agency's action.[22] PHMSA argued that approvals of response plans are nondiscretionary due to the CWA's instruction that the agency "shall" approve any response plan that meets six enumerated criteria.[23] NWF disagreed, contending that approvals are discretionary because

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[14] Nat'l Wildlife Fed'n v. Sec'y of the Dep't of Transp., 374 F. Supp. 3d 634, 644 (E.D. Mich. 2019).

[15] *Id.* at 655. Nor did PHMSA prepare an environmental assessment to determine whether preparation of an environmental impact statement was warranted. *Id.* at 656 n.22.

[16] In a prior version of the case, NWF claimed that PHMSA's response plan review process had violated the CWA "for some two decades." *Id.* at 642. The case was dismissed on standing grounds, and this "narrower" challenge followed. *Id.*

[17] NWF made two other claims. First, it challenged PHMSA's classification of Line 5 as a single "onshore facility" under the CWA. *Id.* at 645–46. The district court rejected this claim and also found that the response plans had adequate content regarding discharges and equipment. *Id.* at 646–51. Second, NWF contended that PHMSA acted arbitrarily and capriciously by failing to explain its decisions to approve the response plans. *Id.* at 651. The district court agreed, noting that the agency gave only cursory explanations of why the response plans were adequate, *id.* at 652–55; the court therefore remanded the approvals to PHMSA for a "full explanation of its reasons," *id.* at 655. Neither of these rulings was appealed. *Nat'l Wildlife Fed'n*, 960 F.3d at 880.

[18] *See Nat'l Wildlife Fed'n*, 374 F. Supp. 3d at 642.

[19] *Id.* at 655.

[20] 551 U.S. 644 (2007).

[21] 541 U.S. 752 (2004).

[22] *See Home Builders*, 551 U.S. at 666 (cabining the application of the ESA's consultation requirement to "actions in which there is discretionary Federal involvement or control" (quoting 50 C.F.R. § 402.03)); *Public Citizen*, 541 U.S. at 770 (holding that where an "agency has no ability to prevent a certain [environmental] effect due to its limited statutory authority over the relevant actions," the agency is not required to prepare an environmental impact statement under NEPA).

[23] *See Nat'l Wildlife Fed'n*, 374 F. Supp. 3d at 655, 658–59 (quoting 33 U.S.C. § 1321(j)(5)(E)(iii)).

the criteria require the agency to make various environmental judgments, such as deciding whether the response plans contain adequate information on oil spill removal resources.[24]

The U.S. District Court for the Eastern District of Michigan found in favor of NWF, writing that the CWA "unambiguously affords PHMSA the discretion necessary to require compliance with NEPA and the ESA."[25] While conceding that PHMSA cannot reject a response plan that meets the six criteria, the court emphasized that the agency retains discretion in evaluating whether the criteria are "met in the first place."[26] And, the court continued, this evaluation requires the agency to exercise "considerable environmental judgment";[27] in particular, the CWA requires PHMSA to determine whether response plans outline adequate mechanisms to remove worst-case discharges "to the maximum extent practicable."[28] The court concluded that because the CWA's text unambiguously gives PHMSA discretion to take into account environmental concerns before approving response plans,[29] the agency's assertion to the contrary was unreasonable and entitled to no deference under the *Chevron*[30] doctrine.[31] The government appealed.[32]

The Sixth Circuit reversed.[33] Writing for the panel, Judge Thapar[34] first held that PHMSA was not bound by the ESA's consultation requirement because its approval of the response plans was nondiscretionary.[35] The Supreme Court's decision in *Home Builders*, according to the panel, demonstrates that an agency lacks discretion when faced with a statute providing that the agency "shall" take a specified action if enumerated criteria are met.[36] Thus, the court concluded, PHMSA was required to approve the response plans once the "triggering event[]" — that

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[24] *See id.* at 655. The criteria also require consistency with national and regional response plans; identification of the individual in charge of removal actions; strategies and equipment for cleanup and mitigation efforts; descriptions of personnel training; and periodic updates and resubmissions. *See* 33 U.S.C. § 1321(j)(5)(D).

[25] *Nat'l Wildlife Fed'n*, 374 F. Supp. 3d at 657.

[26] *Id.* at 659. The court aligned itself with the dissent in a similar case in the Ninth Circuit. *See id.*; Alaska Wilderness League v. Jewell, 811 F.3d 1111 (9th Cir. 2015) (Gould, J., dissenting from the denial of rehearing en banc).

[27] *Nat'l Wildlife Fed'n*, 374 F. Supp. 3d at 660.

[28] *Id.* at 658 (quoting 33 U.S.C. § 1321(j)(5)(A)(i), (D)(iii)).

[29] The court distinguished the case from *Public Citizen* and *Home Builders*, writing that unlike in those cases — where the agencies in question had no discretion to consider environmental matters — it "cannot be reasonably in dispute that PHMSA has the discretion . . . to take into account environmental concerns." *Id.* at 663; *see id.* at 662–63.

[30] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[31] *See Nat'l Wildlife Fed'n*, 374 F. Supp. 3d at 663.

[32] *See Nat'l Wildlife Fed'n*, 960 F.3d at 872.

[33] *Id.* at 874.

[34] Judge Thapar was joined by Judge Larsen.

[35] *See Nat'l Wildlife Fed'n*, 960 F.3d at 875–76.

[36] *See id.* at 875.

is, the satisfaction of the CWA's six criteria — occurred.[37] The panel rejected NWF's argument that the necessity of PHMSA's exercising environmental judgment conferred discretion on the agency, writing that "[d]iscretion and judgment are not the same thing."[38]

Next, the panel held that the nondiscretionary nature of PHMSA's approvals meant that the agency also was not obligated to prepare an environmental impact statement under NEPA.[39] Relying on the Supreme Court's decision in *Public Citizen*, the panel noted that it would be pointless to require an agency to prepare an environmental impact statement for an action that it "lacks discretion to prevent."[40] In sum, because the "statutory text [was] clear" that PHMSA had no discretion, the court deemed *Chevron* inapplicable and held that PHMSA had no obligations under either the ESA or NEPA as a matter of law.[41]

Judge Merritt dissented.[42] Like the district court, he determined that PHMSA had "significant discretion or latitude in considering and applying the criteria" set forth by the CWA.[43] In finding PHMSA to be bound by the ESA's consultation requirement, Judge Merritt emphasized the CWA's broad mandate that a response plan include sufficient removal strategies to "prevent, minimize, or mitigate damage to the public health or welfare, including . . . fish, shellfish, [and] wildlife."[44] Furthermore, the substantial discretion enjoyed by PHMSA, according to Judge Merritt, rendered inapposite the majority's comparison to the simple "triggering event" described in *Home Builders*.[45] Similarly, PHMSA's discretion meant that the agency was required to conform with NEPA's requirements.[46] Unlike the agency in *Public Citizen*, PHMSA here would benefit from preparing an environmental impact statement, because doing so would help it discern whether Enbridge had the "necessary means to prevent, minimize, or mitigate environmental damage."[47]

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[37] *Id.* at 876.

[38] *Id.* at 874. The panel also wrote that the CWA's references to wildlife and endangered species were not sufficiently pervasive to be deemed as treating the protection of endangered species as "an end in itself," which would necessitate ESA consultation. *Id.* at 877 (quoting Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 671 (2007)); *see id.* at 877–79.

[39] *See id.* at 879–80.

[40] *Id.* at 879 (quoting Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756 (2004)).

[41] *Id.* at 880. The panel expressed doubt that the "*Chevron* framework applies here at all" because PHMSA's approvals were not regulations or formal adjudications; nevertheless, because the CWA's text was clear, "deference is beside the point." *Id.*

[42] *Id.* (Merritt, J., dissenting).

[43] *Id.* at 881.

[44] *Id.* at 882 (quoting 33 U.S.C. § 1321(a)(8)).

[45] *See id.* Judge Merritt distinguished the "amorphous, moving target" provided by the "maximum extent practicable" language of the CWA from the "specific and finite" criteria at issue in *Home Builders*. *Id.*

[46] *See id.* at 883.

[47] *Id.*

The Sixth Circuit's decision both reflects and compounds the consequences of "agency discretion aversion," a phenomenon in which an agency purposely disavows that it has discretion in conducting particular actions.[48] It demonstrates that even when judges review agency discretion de novo, agency discretion aversion can lead to agency gaming behavior; judicial inconsistency; and the undercutting of the purposes motivating statutes, including not only the ESA and NEPA, but also the primary statute governing the agency action — here, the CWA. The Sixth Circuit has condoned and potentially calcified PHMSA's evasion of discretion and, in doing so, has threatened the interlocking structure of American environmental laws.

In their article *Agencies Running from Agency Discretion*, Professor J.B. Ruhl and attorney Kyle Robisch note that the approach of agency discretion aversion has increasingly been used by agencies that, like PHMSA, wish to "wiggle out of ESA and NEPA assessment requirements by claiming nondiscretion."[49] Ruhl and Robisch discuss three damaging consequences of agency discretion aversion in the context of the ESA and NEPA: first, agencies "game" their nondiscretion positions to have discretion only when they want it;[50] second, courts struggle to uniformly evaluate whether agencies' discretion aversion positions are justified;[51] and third, discretion aversion undermines the purposes of the ESA and NEPA.[52]

The Sixth Circuit, though, did not defer to PHMSA's interpretation that it lacked discretion. Instead, it performed an analysis of PHMSA's discretion from scratch, looking only to the statutory text — not to the agency's interpretation.[53] In theory, by not granting *Chevron* deference to an agency's eschewal of environmental discretion, this approach might ameliorate the downsides of agency discretion aversion. But in practice, this case demonstrates that de novo review of a nondiscretion claim may in fact exacerbate the consequences described by Ruhl and Robisch.

First, the Sixth Circuit's approach still allows the agency to "game" the system by claiming discretion only when desirable. The CWA's provisions governing oil spill response plan approvals are what Ruhl and Robisch call "if find/then shall" provisions: *if* an agency *finds* that certain requirements (here, the six enumerated criteria) are met, *then* it *shall* take a certain action (here, approval of the response plans).[54] This

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[48] *See generally* Ruhl & Robisch, *supra* note 11.

[49] *Id.* at 104.

[50] *Id.* at 106.

[51] *See id.* at 106–07.

[52] *See id.* at 107.

[53] *See Nat'l Wildlife Fed'n*, 960 F.3d at 879–80.

[54] Ruhl & Robisch, *supra* note 11, at 132. This approach differed from the one used by the Ninth Circuit in a similar case, *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015).

structure, as interpreted by *Home Builders*, allows the agency to use the "shall" command as a "firewall behind which it can . . . use the 'if find' process to exercise all or most of the discretion it cares to exert."[55] The Sixth Circuit's approach has seemingly aggravated this problem. By holding that the CWA's text unambiguously removes discretion from the agency reviewing response plans, the court treats the CWA's "if find/then shall" provision as an absolute barrier to ESA and NEPA applicability. This approach allowed PHMSA to exercise significant discretion in the "if find" stage while still avoiding ESA and NEPA obligations; for example, PHMSA necessarily leveraged its environmental expertise to determine whether the response plans contained adequate mechanisms to remove oil pollution to the "maximum extent practicable,"[56] taking into account "the public health or welfare, including . . . fish, shellfish, wildlife, and public and private property."[57]

Second, the court's method creates no reason for optimism as to the consistency of future judicial decisions about agency discretion. As Ruhl and Robisch note, because courts have difficulty "evaluating agency nondiscretion claims,"[58] the outcomes in agency discretion aversion cases "defy any coherent synthesis."[59] Here, the fact that both the majority and the dissent reasoned solely based on the CWA's text, and did not discuss whether to defer to PHMSA's interpretation, could in theory simplify the process: after all, this approach confines the judicial role to statutory analysis, rather than requiring judges to gauge the reasonableness of the agency's stance.[60] And if the panel is correct, the text itself is clear and the agency has no choice but to disavow discretion.[61] But the panel's interpretation of the CWA was the exact opposite of that of

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There, the court decided that the CWA's text was ambiguous and thus deferred to the agency's claim that it lacked discretion in approving oil spill response plans. *See id.* at 1220–21.

55 Ruhl & Robisch, *supra* note 11, at 146; *cf.* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 529–31 (2006) (noting that when the textual basis for an agency's action is highly plausible, the agency is more likely to veer toward procedural informality).

56 33 U.S.C. § 1321(j)(5)(D)(iii).

57 *Id.* § 1321(a)(8). Notably, if the agency does decide it has discretion and chooses to comply with NEPA, regulated entities may lack standing to challenge this decision. *See, e.g.*, Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993). This fact contributes to the agency's ability to game its position.

58 Ruhl & Robisch, *supra* note 11, at 152.

59 *Id.* at 107.

60 For a discussion of the recent trend of using textualism to constrain judicial discretion and strive for simplification and predictability, see Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 222–24, 226–30 (2015).

61 *See* Ruhl & Robisch, *supra* note 11, at 105 ("[W]e are not proposing that agencies should overreach in their claims of discretion. If an agency's discretion over a matter is unambiguously bounded, limited, or does not exist at all, the agency should say so.").

the dissent and the district court,[62] demonstrating that even when judges analyze agency discretion de novo, outcomes will still be unpredictable.[63]

Finally, the Sixth Circuit's decision enables agencies to "chip away at the underlying purposes" of the ESA and NEPA through discretion aversion.[64] One of the primary goals of both NEPA and the ESA is to inform the public and other government agencies of impending environmental impacts,[65] and as Ruhl and Robisch point out, successful agency discretion aversion "completely cut[s] off that flow of information."[66] The Sixth Circuit's decision here, by categorically denying that agencies need to comply with the ESA and NEPA when scrutinizing response plans, further restricts the influence of those landmark statutes. Indeed, by enshrining its interpretation as the unambiguous textual result of the CWA, the court forecloses opportunities for future administrations to take the contrary position and claim discretion.[67] This result seems like an odd one considering the sweeping language of the ESA and NEPA[68] and extensive precedent confirming their breadth.[69]

Furthermore, this case demonstrates a consequence unexplored by Ruhl and Robisch. It shows that agency discretion aversion can also undermine the fundamental purposes of the statute *containing* the "if find/then shall" provision — in this case, the CWA. The provisions at issue were added to the CWA by the Oil Pollution Act of 1990, which

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[62] *Compare* Nat'l Wildlife Fed'n v. Sec'y of the Dep't of Transp., 374 F. Supp. 3d 634, 657 (E.D. Mich. 2019) (finding that the CWA's text unambiguously *gives* PHMSA discretion), *and Nat'l Wildlife Fed'n*, 960 F.3d at 881 (Merritt, J., dissenting) (same), *with id.* at 875–76 (majority opinion) (finding that the CWA's text unambiguously *deprives* PHMSA of discretion).

[63] The judges' divergent views in this case mirror similar judicial disagreement in *Home Builders* and *Jewell*. In *Home Builders*, a divided Ninth Circuit panel rejected the agency's discretion aversion; the court then denied a petition for en banc rehearing over two dissents, and then the Supreme Court reversed with a 5–4 vote. Ruhl & Robisch, *supra* note 11, at 150. And in *Jewell*, a divided Ninth Circuit panel accepted the agency's nondiscretion claim, and then the court denied en banc rehearing over a fiery dissent by Judge Gould. *See id.* at 151 & n.291.

[64] *Id.* at 107.

[65] *See, e.g.*, Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)); *see also* Ruhl & Robisch, *supra* note 11, at 152–55.

[66] Ruhl & Robisch, *supra* note 11, at 153.

[67] *Cf.* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal [of its positions].").

[68] *See* 16 U.S.C. § 1531(c)(1) ("[A]ll Federal departments and agencies *shall* seek to conserve endangered species and threatened species . . . ." (emphasis added)); 42 U.S.C. § 4332(C) (requiring an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment").

[69] *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 (1978) (noting that the ESA's language "admits of no exception"); Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (determining that NEPA's procedural provisions "establish a strict standard of compliance").

was passed in direct response to the 1989 *Exxon Valdez* oil spill.[70] Congress's clear purpose in passing the Oil Pollution Act was to protect wildlife and natural habitats from future oil spills,[71] and the Act's legislative history reflects this intent,[72] as well as the intent to give environmental agencies substantial discretion.[73] Removing ESA and NEPA protections from the response plan approval process thus appears antithetical to the Act's purpose, particularly in this case, given Enbridge's own history of oil spills.[74] The Sixth Circuit deliberately did not consider this information,[75] even though *Public Citizen* — the very case the court relied upon to hold NEPA inapplicable[76] — specifically instructs courts to consider congressional intent when determining whether an agency must conduct an environmental impact statement.[77]

Under the Sixth Circuit's approach, no agency has the discretion to consider information from ESA consultation, or from an environmental impact statement under NEPA, when deciding whether to approve oil spill response plans. Without these environmental safeguards, agencies like PHMSA may in some respects be "captured by the oil pipeline business,"[78] which was "not . . . envisioned by Congress when it passed the 1990 CWA amendments."[79] If courts are unable to ameliorate the detriments of agency discretion aversion, agencies themselves must recognize the significant discretion they often wield, thereby allowing environmental statutes to exist in harmony with one another, rather than in conflict.

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[70] *See, e.g.*, Morgan, *supra* note 1, at 1; J.B. Ruhl & Michael J. Jewell, *Oil Pollution Act of 1990: Opening a New Era in Federal and Texas Regulation of Oil Spill Prevention, Containment and Cleanup, and Liability*, 32 S. TEX. L. REV. 475, 478–79 (1991).

[71] *See, e.g.*, Morgan, *supra* note 1, at 4.

[72] *See, e.g.*, H.R. REP. NO. 101-653, at 145 (1990) (Conf. Rep.) (aiming to promote the health of "fish, shellfish, [and] wildlife"); *id.* at 150 (encouraging "significant increase[s] in commercial removal resources" when necessary); S. REP. NO. 101-94, at 2 (1989) (noting that "minimiz[ing] damage to fisheries, wildlife and other natural resources" was a primary goal of the Act); Brief for the National Wildlife Federation in Response to Opening Briefs by Federal Appellants & Enbridge at 27, *Nat'l Wildlife Fed'n*, 960 F.3d 872 (6th Cir. 2020) (No. 19-1609).

[73] *See* H.R. REP. NO. 101-653, at 134, 140, 144 (Conf. Rep.) (explicitly granting discretion on how to perform various tasks). *But see, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (noting that legislative history can be "murky, ambiguous, and contradictory").

[74] *See Nat'l Wildlife Fed'n*, 960 F.3d at 880–81 (Merritt, J., dissenting) ("[F]rom 1999 to 2016 there were at least 269 oil spills or leaks from [Enbridge], . . . resulting in over three million gallons spilled."). Michigan Governor Gretchen Whitmer has sought to shut down Line 5 due to the "unreasonable risk" it poses to the Great Lakes region. Beth LeBlanc, *Whitmer Moves to Shut Down Enbridge's Line 5*, DETROIT NEWS (Nov. 13, 2020, 6:00 PM), https://www.detroitnews.com/story/news/local/michigan/2020/11/13/whitmer-moves-shut-down-enbridges-line-5/6279755002 [https://perma.cc/LAG3-3JVB].

[75] *See Nat'l Wildlife Fed'n*, 960 F.3d at 879 ("[C]ourts don't consider this type of 'extra-textual evidence' when the statutory text is clear . . . ." (quoting NLRB v. SW Gen., Inc., 137 S. Ct. 929, 942 (2017))).

[76] *See supra* note 40 and accompanying text.

[77] *See* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004) (noting that "courts must look to the underlying policies or legislative intent" in order to evaluate whether NEPA applies (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 n.7 (1983))).

[78] *Nat'l Wildlife Fed'n*, 960 F.3d at 883 (Merritt, J., dissenting).

[79] Alaska Wilderness League v. Jewell, 811 F.3d 1111, 1119 (9th Cir. 2015) (Gould, J., dissenting from the denial of rehearing en banc).