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Polluters Anonymous: How Exemptions to the Freedom of Information Act Contradict American Environmental Law

INTRODUCTION

For those concerned about the state of the natural world, taking action requires access to government-held information on matters like the regulation of polluting industries and efforts to clean up the resulting environmental destruction. American environmental law has significant informational and transparency components, with myriad statutes containing provisions inspired by the social and policy concerns at hand. Such statutes often require the creation of research-

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oriented documentation like Environmental Impact Statements,[1] permits for industrial or municipal operators who release pollutants and regular reports on their ongoing activities, and voluntary reporting on industrial operations that might cause environmental damage in the event of an accident or emergency.[2]

Such documentation is usually submitted to the Environmental Protection Agency (EPA), which, in turn, is typically required to make this information transparent and available to the public upon request. Hence, many environmental law experts consider their field to be inherently informational, with a focus on full disclosure and public participation.[3] In other words, concerned people must be able to react to environmental threats, which could result in anything from a disappointing loss of natural beauty to disrupted ecosystems to widespread risks to public health. This, in turn, requires public access to everything the American government knows about such matters, so the actions of private parties, or the government agencies that regulate them, can be reviewed for malfeasance or procedural noncompliance.[4]

People who seek such government-held documents must follow a process that is regulated by the Freedom of Information Act (FOIA), which assures us that such information should be easily available to the public upon request.[5] But since it is inappropriate to make all government documents freely available, especially those on sensitive and confidential matters, FOIA includes exemptions that allow agency officials to withhold certain documents on a case-by-case basis.[6] Two of those exemptions are relevant for the environmental matters described in this Article: Exemption 3 on types of information that can be withheld per the mandates of other statutes[7] and Exemption 9 on

1 Environmental Impact Statements are required for any significant development project by the federal government or any private entity that is *regulated by* the federal government. *See infra* notes 10–11 and accompanying text.

2 This process is mandated by various American environmental statutes that will be discussed in detail *infra* throughout Section II.

3 *See, e.g.*, Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENV'T L.J. 333, 338–43 (2004); Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 N.Y.U. ENV'T L.J. 18, 35–42 (2003).

4 RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 178–90 (Univ. of Chi. Press 2004).

5 5 U.S.C. § 552 (1966).

6 5 U.S.C. § 552(b).

7 5 U.S.C. § 552(b)(3).

information about wells that are drilled on public land in search of water or fossil fuels.[8]

This Article argues that exemptions to FOIA enable secrecy that contradicts that statute's fundamental spirit of governmental openness, and the informational and public participation ideals of environmental law. The first Part of this Article introduces several important American environmental statutes that contain provisions for the collection of information on the natural world and its disclosure to interested citizens and journalists. The second Part briefly introduces FOIA and then focuses on Exemption 3, which allows government agencies to withhold documents if permitted to do so by different statutes, including some in the environmental realm. The third Part of the Article does the same for FOIA Exemption 9, which allows the withholding of information related to wells that is often of environmental interest. The withholding of documents under those two exemptions often creates contradictions with environmental laws. Finally, the concluding Part of this Article considers the legal and environmental consequences of those contradictions, as FOIA inadvertently enables the types of government secrecy that it otherwise tries to prevent, while violating the pro-openness spirit of environmental law at the higher level.

I
INFORMATIONAL REQUIREMENTS OF AMERICAN ENVIRONMENTAL LAW

American environmental law is full of statutes that mandate the creation of documents that are submitted to government regulators, with transparency provisions making certain types of information available to the public. This Part of the Article will introduce the most important informational provisions in major environmental statutes.

A. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) went into effect in 1970.[9] NEPA overhauled the environmental activities of the federal government, and most subsequent environmental laws are based upon

8 5 U.S.C. § 552(b)(9).

9 42 U.S.C. § 4321 (1970).

it, particularly in their transparency provisions.[10] NEPA oversees the environmental consequences of the regular operations of all government departments and requires documentation (usually in the form of an Environmental Impact Statement) for any projects by agencies and their regulated parties that can have an impact on the natural world.[11] The resulting processes must be transparent and the documents made available to all members of the public.[12]

Public participation and access to government-held environmental information are key components of the philosophy of NEPA.[13] When NEPA was passed, President Richard Nixon reminded federal agencies to "[d]evelop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties."[14] NEPA also mandated the formation of the Council on Environmental Quality (CEQ) that advises the president on environmental matters.[15] Upon adjusting some NEPA regulations in 1979, the CEQ stated that those regulations would "involve all those who are interested. The regulations make them part of the process. If all are part of the process, the Council believes, the process will be better. The results will be both more environmentally sensitive and less subject to disruptive conflicts and delays."[16]

In addition to its spirit of public participation, NEPA includes a specific provision on the availability and transparency of the agency-held documents that NEPA engenders. NEPA requires that federal agencies "make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment."[17] NEPA also includes a related requirement for agency officials to preemptively

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10 Several such statutes will be discussed *infra*. For the influence of NEPA on subsequent laws, see LAZARUS, *supra* note 4, at 86–87.

11 42 U.S.C. § 4332(C)(i)–(v).

12 *See* JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 275 (Found. Press/Thomson W. 2003).

13 *See* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING 37–38 (Thomas Dietz & Paul C. Stern eds., Nat'l Academies Press 2008).

14 Exec. Order No. 11,514 § 2(b), 35 Fed. Reg. 4247 (Mar. 7, 1970).

15 *See* 42 U.S.C. § 4332(B).

16 *Quoted in* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *supra* note 13, at 38–39.

17 42 U.S.C. § 4332(J).

collect the necessary information during major agency actions.[18] Yet another provision[19] requires all associated officials to follow the requirements of the Administrative Procedure Act and FOIA when compiling that information and disclosing it to the public upon request.[20] FOIA and its rules for disclosure of documents will be described in detail in the next Part of this Article.

The Supreme Court has upheld the transparency provisions within NEPA. In 1981, it held that while NEPA mandates the collection of documents, it does not have its own specific disclosure procedure, so requests for environmentally relevant agency documents will be subjected to the disclosure processes of FOIA.[21] In this case involving possible national security secrets, the U.S. Navy refused to disclose an Environmental Impact Statement that it had compiled for a plan to store nuclear weapons at a military base in an environmentally sensitive region of Hawaii.[22] The Navy justified the refusal per the national security exemption to FOIA.[23] The Supreme Court ultimately upheld this particular FOIA denial, but affirmed that in most cases the transparency provisions of NEPA are supported by the disclosure procedures of FOIA.[24] Meanwhile, circuit courts temporarily halted two interstate highway construction projects in the 1970s until the U.S. Department of Transportation agreed to disclose the associated Environmental Impact Statements to residents opposed to the projects; these were pure NEPA transparency violations and the rulings upheld this significant aspect of American environmental law.[25] These rulings

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18 42 U.S.C. § 4332(A)–(B).

19 42 U.S.C. § 4332(C).

20 The Administrative Procedure Act, 5 U.S.C. § 551 (1946), governs the internal regulatory and paperwork processes of federal agencies. The Freedom of Information Act, 5 U.S.C. § 552 (1966), is discussed extensively in Parts III and IV of this Article.

21 Weinberger v. Cath. Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981).

22 *Id.*

23 *Id.* at 143–44; *see* 5 U.S.C. § 552 (b)(1) (FOIA Exemption 1, which covers documents related to national security).

24 *Weinberger*, 454 U.S. at 146–47.

25 Arlington Coal. on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972); I-291 Why? Ass'n v. Burns, 517 F.2d 1077 (2nd Cir. 1975). In both cases, the construction projects eventually proceeded after the documents were disclosed properly, regardless of the environmental ramifications of the projects, indicating a focus on the procedures of NEPA rather than its spirit or the substance of the documents. *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 906 (2002).

were early affirmations of the informational and transparency goals of NEPA.

B. Pollution Control Statutes

The passage of NEPA in 1970 inspired several additional large and ambitious environmental statutes in the ensuing decade as America endeavored to find federal solutions for pervasive environmental challenges, especially the widespread pollution that had been caused by the industrial sector since late in the previous century.[26] The first such statute was the Clean Air Act (CAA) in 1970.[27] While the CAA is widely known for its penalties against polluters, it can also be considered an informational statute with provisions for transparency and public participation. For the present Article's purposes, the CAA requires all industrial operators that are likely to release toxins into the air (usually via smokestacks) to obtain permits for doing so.[28] Those initial permits—plus periodic reports on emissions levels, inspection records, and associated documents—are managed by the EPA and available for public review.[29] The public can use these documents to dispute the renewal of any operator's permit, with such renewals being necessary every five years.[30]

The similarly inclined Federal Water Pollution Control Act was passed in 1972;[31] that statute was revised and renamed as the Clean Water Act (CWA) in 1977.[32] The CWA also requires permits and periodic effluent reports from operators that discharge effluents into public bodies of water (rivers, lakes, shorelines, wetlands), and this time it applies not only to factories but also to farms, retail businesses, and municipalities.[33] Again, those documents are managed by the EPA, and information in the permits and reports can be used to revoke the

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26 *See* SALZMAN & THOMPSON, *supra* note 12, at 8–9.

27 42 U.S.C. § 7401 (1970).

28 42 U.S.C. § 7661.

29 *See* Doyle J. Borchers, *The Practice of Regional Regulation Under the Clean Air Act*, 3 NAT. RES. LAW. 59, 62–63 (1970). Note that state regulatory agencies also receive copies of such documents for operators in their territories.

30 *See generally* Operating Permits Program Rule Revisions, 59 Fed. Reg. 44460 (proposed Aug. 29, 1994) (to be codified at 40 C.F.R. pt. 70); Operating Permits Program and Federal Operating Permits Program, 60 Fed. Reg. 45530 (proposed Aug. 31, 1995) (to be codified at 40 C.F.R. pts. 51, 70, 71).

31 Pub. L. No. 92-500, 86 Stat. 816 (1972).

32 33 U.S.C. § 1251 (1972). The 1977 amendments are codified at Pub. L. No. 95-217, 91 Stat. 1582–86 (1977).

33 40 C.F.R. § 122.21(a)(1).

operator's license to release effluents.[34] As an added impetus, business managers or elected officials for operators who ignore the CWA's reporting requirements can face criminal charges and prison sentences.[35]

The informational requirements of the CAA and CWA have not been significantly tested in court,[36] though there have been some rulings that clarified procedural matters. In 2008, the Fifth Circuit ruled that information on all known emissions under the CAA must be reported and made available for public review, but this does not include predictive data for facilities that have not yet been built.[37] This creates the conundrum of citizens becoming aware of pollution only after the damage has already been done. Fortunately, the Eleventh Circuit has ruled that the information required under the CAA must be presented in a fashion that is convenient and comprehensible for ordinary people,[38] and that EPA documents discussing investigations of violators and sanctions against them also qualify for the CAA's disclosure provisions.[39]

Meanwhile, the informational provisions of the CWA have survived court challenges brought by polluters who had been sanctioned by the EPA. A void-for-vagueness argument against the CWA's reporting requirements, from an operator who believed the statute's terminology on prohibited pollutants was not specific enough, was rejected by the

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34 40 C.F.R. § 124.74(b)(1) (1996).

35 33 U.S.C. § 1321(b)(5).

36 Outside of their informational requirements, the CAA and CWA are among the most litigated statutes in American history, with regular court disputes arising from EPA sanctions against operators who exceed permitted pollution levels. A search of any legal database reveals hundreds of such suits in the federal courts every year. For distinct analyses on this pattern under each of the statutes, see for example Ivan Lieben, *Catch Me if You Can – The Misapplication of the Federal Statute of Limitations to Clean Air Act PSD Permit Program Violations*, 38 ENV'T L. 667, 676–80 (2008); *see generally* Marica R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025 (1990).

37 CleanCOALition v. TXU Power, 536 F.3d 469, 471, 478 (5th Cir. 2008), *cert. denied*, 555 U.S. 1049 (2008). This case concerned an effort by Texas residents to obtain reports on the predicted pollution levels of a recently approved new coal power plant, in hopes of blocking the plant before its construction commenced.

38 Sierra Club v. Ga. Power Co., 443 F.3d 1346, 1348–49 (11th Cir. 2006) (a citizen suit claiming repeated violations of the power company's permit requirements under the CAA).

39 Sierra Club v. Johnson, 541 F.3d 1257, 1262 (11th Cir. 2008) (concerning an environmental group's call for EPA action against the operators of two power plants in Georgia that expanded their facilities in violation of their previous permits).

Ninth Circuit.[40] The Fifth Circuit has ruled that a company or official who submits the required water pollution reports cannot dictate how those documents are or are not used in future EPA investigations or sanctions.[41]

In the highest ruling to address the informational requirements of pollution control statutes, the Supreme Court in 1980 partially accepted a Fifth Amendment argument from a company that believed that the CWA's requirements to report its toxic discharges amounted to unconstitutional self-incrimination for the managers of the offending facility.[42] In the high court's reasoning, the CWA was intended to clean up waterways in the public interest but not necessarily via the punishment of evildoers. Therefore, such information must be handed to the authorities, but it does not have to include the names of particular persons.[43]

The CAA and CWA both address widespread pollution challenges with many origins. The next wave of pollution control statutes got more specific. During the period of increased awareness of rampant pollution among the public and lawmakers in the early 1970s, scientists learned more about the particular challenges raised by industry-developed chemicals and synthetic substances. Such products could be relatively harmless when used in small amounts by ordinary consumers, but they could become dangerous to industrial workers who use larger amounts regularly, or if they enter the environment and end up in groundwater or are consumed by plants and animals.[44] Pesticides are often used as an example of this process,[45] while horror stories of deadly effects

40 United States v. Kennecott Copper Corp., 523 F.2d 821, 823–24 (9th Cir. 1975) (concerning a pipeline spill that caused thousands of gallons of diesel fuel to leak into a river in Arizona and CWA requirements for the operator to provide public reports on the incident as quickly as possible).

41 Chevron U.S.A. Inc. v. Yost, 919 F.2d 27, 28 (5th Cir. 1990) (concerning a claim by the company that it should not have to report on emissions that are so small as to not be relevant for the public interest).

42 United States v. Ward, 448 U.S. 242, 248–51 (1980).

43 *Id.* at 257–60. This case concerned an EPA sanction against an Oklahoma oil company after an unauthorized discharge into a nearby river. As noted in a dissent by Justice John Paul Stevens, this ruling to allow the removal of the names of managers or leaders contradicts other provisions of the CWA that call for direct criminal prosecution of egregious polluters.

44 *See* SALZMAN & THOMPSON, *supra* note 12, at 148.

45 The first such analysis of pesticides, including their effects on birds long after their intended uses by humans, was the book *Silent Spring* by Rachel Carson (1962), which became an unexpected hit among the American public and widely influenced the environmental movement that developed by the end of that decade. RACHEL CARSON, SILENT SPRING (Houghton Mifflin Company 1962).

caused by everything from landfill sludge to nuclear waste generated widespread public discussion during that decade.[46]

This resulted in the passage of two more pollution control statutes in the ensuing years, starting with the Toxic Substances Control Act (TSCA) in 1976.[47] The TSCA is a reporting-based statute requiring all manufacturers of toxic and/or synthetic chemical products to regularly report on the known or suspected effects of their products on the environment and on public health.[48] These reports must be submitted to the EPA on a regular schedule with the latest available knowledge, and manufacturers are not only required to include their own research but also any research by independent scientists of which they are aware.[49] The TSCA also requires pretesting of all such products that are still in their development stages and for the results of that testing to be reported regularly to EPA regulators.[50]

While the TSCA covers the manufacture of toxic chemicals, another new statute from that era covers their disposal at landfills and similar facilities. The Resource Conservation and Recovery Act (RCRA), also passed in 1976,[51] gives the EPA authority to regulate such chemicals "from cradle to grave." A list of substances that must not be dumped in standard landfills, due to their possible toxic effects on the environment or public health, is maintained and kept up to date by the EPA in consultation with manufacturers.[52] Facilities that are permitted to handle such waste, often with dedicated and customized recycling equipment, are required to obtain permits much like those required under the CAA and to observe their requirements.[53] Most importantly, all associated documentation, from basic product information to permits to EPA investigative documents, must be disclosed to the public upon request.[54] While these two statutes have been subjected to occasional legal challenges over the meaning of terminology like "hazardous" and "liquid," their transparency provisions have never been challenged in court, perhaps illustrating their usefulness for the

46 *See* SALZMAN & THOMPSON, *supra* note 12, at 148–58.

47 15 U.S.C. § 2601 (1976).

48 *See* Kevin Gaynor, *The Toxic Substances Control Act: A Regulatory Morass*, 30 VAND. L. REV. 1149, 1161–63 (1977).

49 15 U.S.C. § 2607(a)–(b).

50 15 U.S.C. § 2607(c)–(d).

51 42 U.S.C. § 6901 (1976).

52 40 C.F.R. §§ 261.31–261.33.

53 40 C.F.R. §§ 264, 270, 280 (various subsections therein).

54 42 U.S.C. § 6991(d)(a); *see also* § 6928(b).

public, or the unlikelihood of illegal dumping by professional disposal firms that know they could be penalized for the dumping *and* for not reporting on it.[55] Like their predecessors, these pollution control statutes continue the goals of information collection and transparency in American environmental law.

C. The Emergency Planning and Community Right to Know Act

Another statute that illustrates the spirit of transparency in American environmental law is the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986.[56] In reaction to the Bhopal disaster in India two years earlier, Congress passed EPCRA to encourage factory operators to proactively report on their releases of pollutants.[57] Operators must report the location and quantity of each toxic substance they release.[58] Standing inventories of such substances that have not even been accidentally (or purposefully) emitted must also be included.[59] All such reports must be submitted to the EPA, which then makes them fully available for public review.[60]

EPCRA has been deemed successful in informing the public of the extent of pollution released from factories simply by requiring them to periodically self-report on their emissions.[61] Companies like Monsanto and Dow Chemical are on record expressing surprise at their own emission levels after being required to compile the information and vowing to tackle the problem.[62] In about the first decade after the

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55 *See* SALZMAN & THOMPSON, *supra* note 12, at 171–72.

56 42 U.S.C. § 11001 (1986).

57 *See* Vivek Ramkumar & Elena Petkova, *Transparency and Environmental Governance*, *in* THE RIGHT TO KNOW: TRANSPARENCY IN AN OPEN WORLD, 279, 279–80 (Ann Florini ed., Colum. Univ. Press 2007). The Bhopal disaster was caused by a massive leak of a toxic gas called methyl isocyanate from a Union Carbide pesticide factory in Bhopal, India in 1984. According to official Indian government figures, about 3,500 people died within days, about 15,000 died in subsequent years from long-term illnesses, and hundreds of thousands were injured. *See, e.g.*, Hannah Ellis-Petersen, *Bhopal's Tragedy Has Not Stopped: The Urban Disaster Still Claiming Lives 35 Years On*, THE GUARDIAN (Dec. 8, 2019, 4:00 PM), https://www.theguardian.com/cities/2019/dec/08/bhopals-tragedy-has-not-stopped-the-urban-disaster-still-claiming-lives-35-years-on [https://perma.cc/UQ7L-ASMB]; *Bhopal Gas Tragedy: Supreme Court Rejects More Money for Victims*, BBC (Mar. 14, 2023), https://www.bbc.com/news/world-asia-india-64899487 [https://perma.cc/TJ8X-A3ES].

58 42 U.S.C. § 11023(g)(1)(C).

59 42 U.S.C. §§ 11022(d)(1)(A)–(B), (e)(3).

60 42 U.S.C. § 11023(k)(2).

61 *See* Ramkumar & Petkova, *supra* note 57, at 280–81.

62 *See* MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM 22–23 (Brookings Inst. Press 2002).

passage of EPCRA, releases of toxic chemicals by American factories decreased by half, largely because of the possibility of bad publicity caused by the information in the statute's mandated documents.[63] When that bad publicity becomes real and inspires citizen action, companies have been known to significantly overhaul their management of toxic emissions, as was the case at a B.F. Goodrich plant in Ohio.[64] Managers of that facility dedicated millions of dollars to the effort and successfully eliminated almost all the plant's benzene emissions, thanks to EPCRA.[65]

While there have been many lawsuits from companies claiming that their operations, products, or even their pollution mishaps should not be subjected to EPCRA,[66] its transparency provisions have inspired relatively little litigation, and the statutory language has been reviewed by only a few district courts. EPCRA enables citizens to sue companies that ignore its reporting requirements, and those citizen suits can force sanctions from the EPA.[67] This procedure was upheld by a District Court in New York State in 1991; interestingly, the accused company had eventually submitted the required EPCRA reports and had merely missed some deadlines.[68] Two years later, the same citizens' group sued another company for failing to meet EPCRA reporting requirements, and this time the defendant claimed that the statute violated Constitutional due process.[69] The same district court rejected that argument.[70] In more recent years, other district courts have affirmed that the information reported by companies must be accurate and reliable at a "reasonably localized level" (more particular than a

63 *See* Ramkumar & Petkova, *supra* note 57, at 279–80; GRAHAM, *supra* note 62, at 51–53.

64 GRAHAM, *supra* note 62, at 42.

65 *See id.*

66 *See id.*

67 42 U.S.C. § 11045.

68 Atl. States Legal Found. v. Whiting Roll-Up Door Mfg. Corp., 772 F. Supp. 745, 746 (W.D.N.Y. 1991). EPCRA enforces deadlines at 42 U.S.C. § 11046(a)(1).

69 Atl. States Legal Found. v. Buffalo Envelope, 823 F. Supp. 1065, 1076 (W.D.N.Y. 1993).

70 *Id.* In this case, the defendant argued that EPCRA violated due process because it had different reporting requirements for quantities of chemicals *used by* a facility vs. those that are ultimately *manufactured at* that facility. The court rejected this argument because Congress had fully described the reason for the different quantities in House Reports before the passage of EPCRA.

wide geographical analysis),[71] and that it must be provided to local leaders, including emergency responders.[72] These rulings affirm the stringent informational and public knowledge requirements of EPCRA, making it one of the strongest yet least tested of America's environmental laws on the matter of informational transparency.

The openness of the American laws described in this Part have many parallels with FOIA, which mandates the disclosure of government-held documents in the possession of any federal agency and on almost any conceivable topic.[73] However, FOIA includes several exemptions that allow certain types of documents to be withheld from people who request them.[74] Two of those exemptions can create contradictions with the informational spirit of environmental law. Those exemptions will be discussed in the next two Parts of this Article.

II
EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT

FOIA was passed in the spirit of governmental openness, with the assumption that any executive branch agency should hand over any document upon request, unless there is a distinct reason for not doing so.[75] This would enable journalists and citizen watchdogs to overcome governmental attempts at secrecy.[76] Lawmakers, however, never expected that all government-held documents should be freely available, so FOIA includes nine exemptions[77] that enable agency personnel to withhold documents that are considered sensitive or confidential, because some governmental matters must remain secret.[78]

There is a large body of legal research on how the nine exemptions may have been intended to enable flexibility among government

71 United States v. Cleveland-Cliffs Burns Harbor, LLC, 2022 WL 1439213, at 3 (N.D. Ind. 2022). This case concerned an effort by Indiana environmental authorities to compel the operators of a steel mill to provide more accurate information under EPCRA on whether the mill's emissions affected the nearby Indiana Dunes National Park.

72 Rural Empowerment Ass'n for Cmty. Help v. U.S. EPA, 2022 WL 444095, at 1 (D.D.C. 2022). This case involved an environmental group's objections to a regulatory decision by the EPA that exempted pollutants emitted by large factory farms from the reporting requirements of EPCRA.

73 5 U.S.C. § 552 (1966).

74 5 U.S.C. § 552(b).

75 *See generally* S. REP. NO. 89-813 (1965) (a comprehensive discussion of the projected goals of the statute).

76 *See id.* at 3, 5.

77 5 U.S.C. § 552(b)(1)–(9).

78 *See FOIA Exemptions*, FOIADVOCATES, http://www.foiadvocates.com/exemptions.html [https://perma.cc/82P4-JCX2] (last visited Dec. 30, 2023).

officials, but their statutory language is written so vaguely that the exemptions can be overinterpreted by secretive personnel. This is especially true for agency denials of requests justified by Exemption 1 (national security)[79] and Exemptions 6 and 7(C) (both dealing with the privacy of named individuals, with the latter applying to law enforcement procedures).[80]

This Article will argue that FOIA Exemption 3 also inadvertently enables government secrecy, but not because of vague statutory language. Instead, this exemption creates a procedure that can enable agency officials to overinterpret the secrecy of *different* statutes, many of which were written before the advent of FOIA and its general philosophy of openness.[81] At its core, FOIA Exemption 3 allows an agency to withhold a requested document if withholding it is already permitted by a different statute that the agency enforces.[82] This makes FOIA unable to reach documents that were made secret by laws that may have been enacted decades before its passage.[83] Additionally, laws that were passed much later, such as the USA PATRIOT Act[84] and others that reacted to the terrorist attacks of September 11, 2001, can

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79 5 U.S.C. § 552(b)(1) (1966). For research on overuse of FOIA Exemption 1, see, e.g., Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000); Susan Nevelow Mart & Tom Ginsburg, *[Dis-]informing the People's Discretion: Judicial Deference under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725 (2014); David B. McGinty, *The Statutory and Executive Development of the National Security Exemption to Disclosure under the Freedom of Information Act: Past and Future*, 32 N. KY. L. REV. 67 (2005); Martin E. Halstuk, *Holding the Spymasters Accountable After 9/11: A Proposed Model for CIA Disclosure Requirements under the Freedom of Information Act*, 27 HASTINGS COMM. & ENT. L.J. 79 (2004).

80 5 U.S.C. § 552(b)(6), (b)(7)(C) (1966). For research on agency overuse of the privacy exemptions, see, e.g., Michael Hoefges et al., *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1 (2003); Martin E. Halstuk et al., *Tipping the Scales: How the U.S. Supreme Court Eviscerated Freedom of Information in Favor of Privacy*, *in* TRANSPARENCY 2.0: DIGITAL DATA AND PRIVACY IN A WIRED WORLD 16, 20–24 (Charles N. Davis & David Cuillier eds., 2014).

81 S. REP. NO. 89-813, at 3 (1965).

82 5 U.S.C. § 552(b)(3) (1966). This exemption states that a requested document can be withheld if it is "specifically exempted from disclosure by statute . . . if that statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." Some of this statutory text was not in the original 1966 version of FOIA but was added in 1976. *See infra* notes 102–03 and accompanying text.

83 H.R. REP. NO. 89-1497, at 10 (1966).

84 U.S.A. Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

be written in ways that either implicitly or explicitly disregard the open government spirit of FOIA and make that statute powerless against secrecy in a wide range of government endeavors.[85]

It is entirely possible that FOIA can conflict with a preexisting statute (known in FOIA terminology as a "qualifying statute") that had already made a certain type of government-held document off-limits to requesters. One example among many is the Communications Act of 1934, enforced by the Federal Communications Commission, which dictates that reports generated by investigations into intercepted radio transmissions must remain secret.[86] Although this provision prevents the release of government-held documents, FOIA continued to allow such withholding because the provision qualifies for Exemption 3.[87] This particular example illustrates how Exemption 3 allows agencies to withhold documents as required by their own governing statutes within the structure of the otherwise pro-openness FOIA.[88]

Exemption 3 is unique among its fellow FOIA exemptions in that it allows the withholding of documents based not on subject matter categories like national security deliberations or law enforcement investigations, but for purely procedural reasons if something has been deemed secret by a different ("qualifying") statute.[89] Disputes over

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85 For an analysis of how this process reduces the ability of the public to obtain information on government surveillance programs, many of which were authorized in the period after the 9/11 terrorist attacks, see generally Benjamin W. Cramer, *Old Love for New Snoops: How Exemption 3 of the Freedom of Information Act Enables an Irrebuttable Presumption of Surveillance Secrecy*, 23 COMMC'N L. & POL'Y 91 (2018). It should be noted that as of 2009, via an update to FOIA called the OPEN FOIA Act, new statutes can make additional types of documents non-disclosable but must specifically mention the proper procedures required under Exemption 3 of the original FOIA. 5 U.S.C. § 552(b)(3)(B) (2009).

86 47 U.S.C. § 605 (1996). This provision was targeted at early telegraph operators, who had to read the private or sensitive messages that they transmitted and were bound by professional ethics to keep the resulting knowledge discreet and confidential. If such a message were intercepted by unauthorized parties, the telegraph operator may have to describe the text of the message to government investigators, but that sensitive information should not be disclosed to the public via document requests.

87 Reston v. FCC, 492 F. Supp. 697, 700 (D.D.C. 1980). This case involved an investigation by the FCC into the unauthorized use of amateur radio transmissions by the infamous People's Temple religious group when it was headquartered in California years earlier. That group, under the leadership of Jim Jones, is better known for later moving to Guyana in South America and committing mass suicide in 1978.

88 *See* Vickie Waitsman, *Administrative Law—Privacy Act Exemption (j) (2) Does Not Specifically Preclude Disclosure of Information Within Meaning of Exemption (3) of the Freedom of Information Act—*Greentree v. United States Customs Service, *674 F.2d 74 (D.C. Cir. 1982)*, 56 TEMP. L.Q. 127, 140 (1983).

89 *See* Gregory G. Brooker, *FOIA Exemption 3 and the CIA: An Approach to End the Confusion and Controversy*, 68 MINN. L. REV. 1231, 1236 (1984).

whether the withholding language in a qualifying statute complies with Exemption 3 are the source of most of the jurisprudence dedicated to that exemption.[90]

A. Judicial History of Exemption 3

Over the judicial history of Exemption 3, courts have largely ruled that the exemption applies to agency procedures rather than the subject matter of requested documents. In other words, if the qualifying statute includes a valid procedure for withholding a document, then it can be withheld under Exemption 3 regardless of what it is about. This has inadvertently enabled agency personnel to determine when and why to keep documents secret, given the existence of a qualifying statute that is likely to be more secretive than FOIA.[91]

Typically, in the event of a request for a document that can be withheld per the qualifying statute, the existence of that other statute effectively kills the request and there is no need for further explanation or justification. Furthermore, courts usually defer to this decision by the agency. In a seminal ruling on this matter, the U.S. Court of Appeals for the District of Columbia Circuit held that an agency can withhold documents under Exemption 3 regardless of their content; instead, "the sole issue for decision is the existence of a relevant [qualifying] statute and the inclusion of withheld material within the statute's coverage."[92] The Department of Justice, which oversees FOIA compliance at the agencies, has advised: "Most Exemption 3 [qualifying] statutes contain a broad prohibition on disclosure that operates to prohibit disclosure of specified information by a federal agency generally and universally, which in turn is accommodated through Exemption 3 as a bar to public disclosure under FOIA."[93] This has engendered a de facto presumption that an agency knows how to interpret the disclosure rules of its governing statute, and that this interpretation can be done before any contradiction with the open-government philosophy of FOIA can be

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90 *See* Cramer, *supra* note 85, at 105–08.

91 *See* Cordell A. Johnston, Greentree v. United States Customs Service*: A Misinterpretation of the Relationship Between FOIA Exemption 3 and the Privacy Act*, 63 B.U. L. REV. 507, 524 (1983).

92 Wolf v. CIA, 357 F. Supp. 2d 112, 117 (D.C. Cir. 2004) (concerning a denial by the Central Intelligence Agency of a researcher's request for documents on the assassination of a Colombian politician).

93 *See FOIA Guide, 2004 Edition: Exemption 3*, U.S. DEP'T OF JUST., https://www.justice.gov/oip/foia-guide-2004-edition-exemption-3 [https://perma.cc/LS7Z-MP9P] (last updated Dec. 3, 2021).

discussed. In turn, this presumption enables agency secrecy rather than preventing it.[94]

Any executive branch agency can use Exemption 3 to easily justify denying a public request for documents as long as that agency has qualifying statutes that address wide categories of information.[95] This enables widespread judicial deference to agency decisions that cite Exemption 3, leading to inflexible interpretations of how much secrecy the exemption allows.[96] The Department of Justice argues that Exemption 3 was intended by Congress to be a straightforward acknowledgment of preexisting statutes but also concedes that judicial rulings on how that acknowledgement should or should not justify the withholding of documents have been inconsistent.[97] The Department of Justice further admits that "[c]ourts have been somewhat divided over whether to construe the withholding criteria of the nondisclosure statute narrowly, consistent with the strong disclosure policies specifically embodied in the FOIA."[98]

Meanwhile, the Supreme Court has never heard a case in which the statutory meaning of Exemption 3 was argued specifically, leading to a hodgepodge of circuit-level interpretations that has been bemoaned by one of those same courts: "[T]he Supreme Court has never applied a rule of narrow or deferential construction [of FOIA Exemption 3] to withholding statutes."[99] Consequently, the circuit courts have issued a wide variety of interpretations, ranging from demands that the qualifying statute list specific categories of information that can be withheld[100] to complete deference to an agency's expertise as it

94 *See* Cramer, *supra* note 85, at 98–99.

95 For a lengthy list of statutes that qualify for Exemption 3, which in turn illustrates the sheer quantities of such statutes and the many agencies that can use them to justify withholding, see *Statutes Found to Qualify under Exemption 3 of the FOIA*, U.S. DEP'T OF JUST. (Dec. 2016), https://www.justice.gov/oip/page/file/623931/download (last visited Dec. 27, 2023) [https://perma.cc/N8AY-QZU8].

96 *See* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 193–96 (2013); Nathan Slegers, *De Novo Review under the Freedom of Information Act: The Case Against Judicial Deference to Agency Decisions to Withhold Information*, 43 SAN DIEGO L. REV. 209, 224–29 (2006).

97 *See* U.S. DEP'T OF JUST., *supra* note 93.

98 *Id.*

99 A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 144 (2d Cir. 1994) (concerning a company's attempt via a FOIA request to reacquire documents that it had previously submitted to the Federal Trade Commission; the request was denied per Exemption 3 thanks to a provision in the FTC's governing statute).

100 Stretch v. Weinberger, 495 F.2d 639 (3d Cir. 1974); Schechter v. Weinberger, 506 F.2d 1275 (D.C. Cir. 1974). Both these cases concerned the Social Security Act, 42 U.S.C.

interprets its own governing statutes.[101] The latter—nearly total judicial deference—is more common. This follows a trend in judicial deference toward agency denials of FOIA requests across the board,[102] though for Exemption 3 the consequences are more distinct due to conflicts between FOIA and older statutes that may not share its open-government philosophy. It could be argued that the courts are actually deferring to the intentions of Congress when writing the qualifying statutes, but even if this is the case, it still results in a de facto dismissal of the prodisclosure goals of FOIA whenever there is a dispute between competing statutes.[103]

Disputes over the legitimacy of agencies' withholding decisions under Exemption 3 were among the earliest indicators of gaps in FOIA's original statutory language. This, in turn, led to the first significant amendments to FOIA in 1976.[104] The main impetus was a controversial Supreme Court ruling in *FAA Administrator v. Robertson* the previous year.[105] In that case, the Federal Aviation Administration (FAA) used Exemption 3 to deny a FOIA request for documents on the agency's investigations into the performance of commercial airlines.[106] The decision was based on the agency's governing statute—the Federal Aviation Act of 1958—which allowed the withholding of a wide variety of investigative documents if administrators determined that they were not relevant for the public interest.[107]

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§ 1306 (1970) and found that this statute was not specific enough on matters that could be withheld via Exemption 3.

101 Sears v. Gottschalk, 502 F.2d 122 (4th Cir. 1974), *cert. denied*, 425 U.S. 904 (1976). In this case, the court did not even review the language of the qualifying statute at issue—the Patent Law, 35 U.S.C. § 122 (1970)—on whether or not it was compatible with Exemption 3 at all, and simply decided to fully defer to the agency's expertise.

102 *See* Michael H. Hughes, *CIA v. Sims: Supreme Court Deference to Agency Interpretation of FOIA Exemption 3*, 35 CATH. UNIV. L. REV. 279, 287–91 (1985). In one of the earliest cases involving a disputed FOIA denial to get to the Supreme Court, EPA v. Mink, 410 U.S. 73 (1973), the court set a precedent of deferring to an agency's decision to deny a FOIA request, and that precedent has held steady with few challenges ever since. In that dispute, members of Congress submitted a FOIA request to various executive branch agencies for documents on secretive underground nuclear testing, only for the request to be denied by the EPA per FOIA Exemption 1 (national security).

103 *See* Cramer, *supra* note 85, at 100.

104 *See* Hughes, *supra* note 102, at 294–97.

105 Fed. Aviation Admin. v. Robertson, 422 U.S. 255 (1975).

106 *Id.*

107 *Id.*; *see* 49 U.S.C. § 1504 (1958). That provision has since been removed, and document withholding decisions are now under the supervision of the FAA's superiors at the Department of Transportation. *See* Hughes, *supra* note 102, at 289 n.94.

A lower court ruled that the FAA had overinterpreted the withholding provisions of both the Federal Aviation Act and FOIA.[108] The Supreme Court reversed, holding that the congressional crafters of FOIA did not intend for it to arbitrarily overturn previous statutes that allowed for certain documents to remain secret, while the ambiguous text of Exemption 3 implied the need for judicial deference to agency decisions.[109] The high court did not contemplate the contradiction with the open-government spirit of FOIA.[110] The practical outcome of the *Robertson* case was that the FAA was permitted to exercise its own discretion in withholding documents under its governing statute;[111] ironically, this was enabled by Exemption 3 of the supposedly prodisclosure FOIA.

As a response to the *Robertson* ruling,[112] in 1976 Congress amended FOIA to reduce the chances of judicial deference to agency FOIA denials and to reiterate that the exemptions should be construed very narrowly.[113] In the amended FOIA, any statute that qualifies for Exemption 3 must describe in detail how and why certain documents should remain secret "in such a manner as to leave no discretion on the issue" and must clearly "establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld."[114] This new statutory language encouraged the judiciary to inspect the terminology of qualifying statutes more closely, but this ironically resulted in a different pattern of judicial deference, away from executive branch agency personnel and toward the legislative branch—namely Congress—as it wrote the qualifying statutes. All the while, the spirit of FOIA took a back seat to whatever Congress supposedly intended when crafting the qualifying statute that kicked off an Exemption 3 denial.[115]

In one of the first post-1976 rulings on this matter, the U.S. Court of Appeals for the District of Columbia Circuit held that Exemption 3 "is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the

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108 Robertson v. Butterfield, 498 F.2d 1031, 1036 (D.C. Cir. 1974), *affirming* Robertson v. Butterfield, No. 71-1970 (D.D.C. 1972).

109 422 U.S. at 264–67.

110 *See* Hughes, *supra* note 102, at 290–91.

111 422 U.S. at 265.

112 *See* Johnston, *supra* note 91, at 517.

113 S. REP. NO. 93-854, at 158 (1974); H.R. REP. NO. 94-880, pt. 1, at 22–23 (1976).

114 5. U.S.C. § 552(b)(3)(A)(i)–(ii) (1976).

115 *See* Cramer, *supra* note 85, at 102.

administrator [of a federal agency] may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw."[116] This creates the presumption that Exemption 3 is intended to *increase* secrecy because handing over the requested documents could be a hazard, and this interpretation has mostly held true in all subsequent Exemption 3 disputes. In no cases have judges contemplated the contradiction with the spirit of FOIA or the irony arising when one provision of FOIA was supposedly intended by Congress to reduce the document disclosures that every other part of the Act promotes.[117]

B. Environmentally Relevant Laws with Provisions That Qualify for FOIA Exemption 3

The Department of Justice publishes a list of qualifying statutes under which agencies can reject FOIA requests per Exemption 3.[118] Dozens of statutes appear in the list, every single one of which has a court ruling confirming that it can be used to withhold documents without violating the provisions of FOIA, much less its spirit of governmental openness. This Section of the Article will analyze qualifying statutes from the environmental realm; not all are literally environmental cleanup statutes like the CAA, but they cover topics for which there could be environmental consequences.

National parks are the foremost showcases for America's natural beauty, and the very act of preserving them for public use is inherently an exercise in environmental protection.[119] The federal statute that oversees the structure of such parks, the National Park Service Organic Act of 1916, mandated that the newly organized National Park Service would "conserve the scenery and the natural and historic objects and wildlife therein" and "provide for the enjoyment of the same in such

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116 Am. Jewish Cong. v. Kreps, 574 F.2d 624, 628–29 (D.C. Cir. 1978) (concerning a rejected FOIA request for documents on how the Department of Commerce handled attempts by foreign countries to boycott American products).

117 *See* Cramer, *supra* note 85, at 103.

118 *See generally* U.S. DEP'T OF JUST., *supra* note 95.

119 The National Park Service describes itself as "a world leader in protecting natural and cultural resources, preserving many of the country's greatest treasures." *See Sustainability in the National Park Service*, U.S. NAT'L PARK SERV., https://www.nps.gov/subjects/sustainability/index.htm [https://perma.cc/7UTS-W8XU] (last visited Dec. 26, 2023).

manner and by such means as will leave them unimpaired for the enjoyment of future generations."[120]

Given the increasing patronage of national parks and the need for management of issues like employee training, maintenance of natural ecosystems and habitats, concessions like gift shops and snack bars, and even resource extraction just outside a park's boundaries, Congress passed the National Parks Omnibus Management Act in 1998.[121] Those managerial concerns are often handled via contracts with private businesses, and those projects occasionally arouse controversy, especially if they are secretive about how much federal money goes to concessioners and whether those businesses have the best interests of national parks in mind.[122] In the event of requests for such documentation, courts have found this statute to qualify for FOIA Exemption 3.

In a dispute over access to government-held documents on whether the Northern Goshawk could be classified as an endangered species and whether its habitat could be found in national parks,[123] the Ninth Circuit ruled that this information could be withheld due to an express provision in the Omnibus Management Act: "Information concerning the nature and specific location of a System resource that is endangered, threatened, rare, or commercially valuable, of mineral or paleontological objects within System units, or of objects of cultural patrimony within System units, may be withheld from the public in response to a request under [FOIA]."[124]

The Department of the Interior (overseeing the multiagency FOIA request) had determined that public knowledge of Northern Goshawk nesting sites within national parks would lead to human interference with those sites, and since the bird is an endangered species, it can be considered a "rare" resource about which information can be withheld

120 16 U.S.C. § 1 (1916). Note that there were National Parks in the United States before the passage of this Act and the establishment of the National Park Service, with the first being Yellowstone in 1872, but the management of such parks as a federal government function had not yet been codified.

121 54 U.S.C. § 100101 (1998).

122 *See* Richard J. Ansson Jr. & Dalton L. Hooks Jr., *Protecting and Preserving Our National Parks in the Twenty First Century: Are Additional Reforms Needed Above and Beyond the Requirements of the 1998 National Parks Omnibus Management Act?*, 62 MONT. L. REV. 213, 220 (2001).

123 Sw. Ctr. for Biological Diversity v. U.S. Dep't of Agric., 314 F.3d 1060, 1061 (9th Cir. 2002).

124 *Id.*; 54 U.S.C. § 100107.

under the Omnibus Act.[125] This interpretation of why it matters that an animal is "rare" directly contradicts the Endangered Species Act, which mandates the gathering of publicly available information on vulnerable species in the interest of saving them from extinction.[126] This is a particularly tragic example of how FOIA Exemption 3 enables secrecy that contradicts its own philosophy of openness, as well as the spirit of environmental law.

Similarly, in a dispute over a rejected FOIA request for documents pertaining to the sale of a parcel of private land with an agreement that it be added to the adjacent Shenandoah National Park, the U.S. Court of Appeals for the District of Columbia Circuit affirmed that the Omnibus Act qualified for FOIA Exemption 3, once again due to the provision in the Omnibus Act about withholding information on "rare or commercially valuable resources."[127] Other text in this ruling indicates that the National Park Service believed that the parcel of land included Native American archeological artifacts, but the Service was never required to describe how or why it believed such artifacts were present.[128] This ruling was supported by a provision in the Archaeological Resources Protection Act of 1979,[129] which also allows withholding of such information under FOIA Exemption 3.[130] But in another curious contradiction, the Archaeological Resources Protection Act is largely based on the idea that citizens and historians should know about such artifacts to advocate for the protection that they deserve, while allowing professional researchers to investigate their historic and cultural value.[131]

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125 Sw. Ctr. for Biological Diversity v. U.S. Dep't of Agric., 170 F. Supp. 2d 931, 937 (D. Ariz. 2000).

126 The Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1973), is another environmental statute that was written in the spirit of compiling information and making it easily available to the public. In spirit, for citizens to act on behalf of an animal that is on the verge of extinction, they need access to scientific research on population levels and critical habitats that is often conducted by government agencies. *See generally* Benjamin W. Cramer, *Nearly Extinct in the Wild: the Vulnerable Transparency of the Endangered Species List*, 3 J. CIVIC INFO. 1 (2021).

127 Hornbostel v. U.S. Dep't of Interior, 305 F. Supp. 2d 21, 30 (D.C. Cir. 2003).

128 *Id.*

129 16 U.S.C. §§ 470aa–470mm (1979).

130 16 U.S.C. § 470hh.

131 *See* Roberto Iraola, *The Archaeological Resources Protection Act - Twenty Five Years Later*, 42 DUQ. L. REV. 221, 222–23 (2004). In fairness, it should be noted that Native American artifacts are often the targets of looters and insensitive collectors, and there is an interest in keeping these bad actors unaware of archeological research sites.

The latter Act also has its own Exemption 3–affirming court ruling. In a case involving a right-of-way through an Indian reservation to provide access to a parcel of private property, the private owner objected to the establishment of mining operations on the adjacent Native American lands and submitted a FOIA request for documents on the mining permits and related matters.[132] The Bureau of Indian Affairs rejected the request per the aforementioned provision in the Archaeological Resources Protection Act.[133] This time, the government agency explained that public knowledge of possible archeological sites could create a risk of harm from treasure seekers.[134] The court ruling did not contemplate the possibility that the mining operations at the heart of the dispute could also destroy those priceless artifacts, while causing environmental destruction to boot.[135]

The U.S. government also enforces a variety of statutes intended to protect the food supply. According to most governments around the world, food is fundamental to the public interest, and all food is at least partially tied to the earth in the form of plant and animal life. Therefore, an essential endeavor of American environmental law is to prevent food production from being negatively affected by the abuse of agricultural lands and the introduction of pollutants.[136] Unsurprisingly, America has federal statutes on this matter, and the apparent importance of keeping food supplies secure requires a certain amount of secrecy that qualifies for FOIA Exemption 3. One such statute is the Food Security Act of 1985, which largely focuses on price controls for crucial farm products.[137] However, this Act has a provision prohibiting the disclosure of personal information about individual farmers.[138] That

132 Starkey v. U.S. Dep't of Interior, 238 F. Supp. 2d 1188 (S.D. Cal. 2002).

133 16 U.S.C. § 470hh. Note that "Indian reservation" is still the official term for such territories in American law, and the Bureau of Indian Affairs has also retained its original name, regardless of popular rejection of the term *Indian* in recent decades.

134 *Starkey*, 238 F. Supp. 2d at 1192.

135 *See generally id.*

136 *See, e.g.*, Jason J. Czarnezki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENV'T. L. REV. 263 (2011); Carmen G. Gonzalez, *Climate Change, Food Security, and Agrobiodiversity: Toward a Just, Resilient, and Sustainable Food System*, 22 FORDHAM ENV'T L. REV. 493 (2011).

137 Pub. L. No. 99-198, 99 Stat. 1354 (1985); codified at various sections of the United States Code at U.S.C. §§ 7, 16.

138 7 U.S.C. § 2276.

provision was found to qualify for FOIA Exemption 3 by the District Court for the District of Columbia.[139]

Illustrating the era's focus on risk management and the intertwined nature of crucial infrastructure networks, Congress passed the Food, Conservation, and Energy Act of 2008[140] to ensure that farmers were protected from financial shocks while food delivery networks were shielded from disruption by those with ulterior motives.[141] This statute has a document-withholding provision that prohibits the release of information that was submitted by any farming operation about its own agricultural practices or geospatial information illustrating the location of such farms.[142]

That provision has been found to qualify for FOIA Exemption 3 by two circuit courts. In 2010, the Ninth Circuit ruled that the withholding provision could be cited to reject a FOIA request by environmentalists for the GPS coordinates of locations where the Department of Agriculture helped farmers use undisclosed experimental methods to drive away endangered wolves that had raided crops and livestock.[143] If those methods were violent, such conduct is possibly prohibited by the Endangered Species Act, in a direct contradiction of environmental law.[144]

The following year, the Eighth Circuit used the same analysis to uphold another FOIA rejection by the Department of Agriculture—this time for information sought by a state government agency in Nebraska on how farming practices in eleven counties affected the region's

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139 Strunk v. U.S. Dep't of Interior, 752 F. Supp. 2d 39, 44–45 (D.D.C. 2010) (concerning a FOIA request by a researcher who sought demographic and geographic information on all the farmers in New York State; the main reason for the rejection by the Department of the Interior was that the request was too broad, but administrators also cited the withholding provision of the Food Security Act).

140 Pub. L. No. 110-246, 122 Stat. 1651 (2008) (codified at various sections of the United States Code at U.S.C. §§ 7, 16).

141 *See* WES HARRIS ET AL., THE FOOD, CONSERVATION, AND ENERGY ACT OF 2008 SUMMARY AND POSSIBLE CONSEQUENCES (2008), https://hdl.handle.net/10724/19318 [https://perma.cc/ZRN2-C78F] (last visited Dec. 26, 2023).

142 7 U.S.C. § 8791(b)(2)(A).

143 Ctr. for Biological Diversity v. U.S. Dep't of Agric., 626 F.3d 1113, 1118 (9th Cir. 2010).

144 76 Fed. Reg. 81666 (2011). This is relevant for protection of a vulnerable animal under the Endangered Species Act, but it may not be enforced if the animal's current population is stable or if there are other public interest–related reasons to allow hunting. Wolves have been through all sides of this process for several decades; *see* Cramer, *supra* note 126, at 23–26.

rivers.[145] This is another contradiction with the spirit of environmental law, because farms are known to be some of the biggest polluters of groundwater and rivers—mostly because of the runoff of overused pesticides and fertilizers[146]—and public knowledge of which farms are responsible for a given waterway's distress is essential in advocating for cleanup.

As an illustration of how seemingly disconnected statutes can have an effect on the environment, recall that pesticides are often cited as a class of products with unintended consequences beyond the creatures they are intended to eradicate, and this process was a key inspiration for the growth of America's environmental movement.[147] One statute governing the use of pesticides by farmers has had an underappreciated impact on both the environment and on government transparency *about* the environment. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) of 1972[148] is the source of the *Defenders of Wildlife* case, a crucial precedent at the Eighth Circuit on the ability of citizens to attend agency meetings in which officials discuss if pesticides approved for agricultural use may cause damage to nearby landscapes and wildlife and whether such risks violate a plethora of other environmental statutes.[149]

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145 Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric., 643 F.3d 1142, 1147–48 (8th Cir. 2011).

146 For some introductory studies, see, e.g., Hayo M.G. van der Werf et al., *Environmental Impacts of Farm Scenarios According to Five Assessment Methods*, 118 AGRIC., ECOSYSTEMS & ENV'T 327 (2007); Philippe Girardin et al., *Indicators: Tools to Evaluate the Environmental Impacts of Farming Systems*, 13 J. SUSTAINABLE AGRIC. 5 (1999).

147 *See supra* notes 44–46 and accompanying text.

148 Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 121–136 (1972).

149 Def. of Wildlife v. Adm'r, EPA, 882 F. 2d 1294 (8th Cir. 1989). In this case, environmentalists claimed that a pesticide that had been approved for farm use would cause risks to animals (particularly birds) that interacted with livestock, and those risks were illegal under the Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act, and Endangered Species Act. This was a public participation dispute because the environmentalists (or anyone else in the general public) were not invited to meetings held by the EPA in which the pesticide was approved. The ultimate outcome of this case is that the Eighth Circuit told the agency not to make this mistake again in the future, but that had no bearing on the use of the pesticide in question. *Id.* at 1304–05.

For an analysis of the importance of this ruling in the history of environmental law, see Rachel Abramson, *The Migratory Bird Treaty Act's Limited Wingspan and Alternatives to the Statute: Protecting the Ecosystem Without Crippling Communication Tower Development*, 12 FORDHAM ENV'T L.J. 253, 262–75 (2000); Sherry L. Bosse, *Defenders of Wildlife v. EPA: Testing the Boundaries of Federal Agency Power Under the ESA*, 36 ENV'T L. 1025, 1047–48 (2006).

For the present Article's purposes, FIFRA also has its own document-withholding provision for documents describing the locations at which a restricted-use pesticide has been tested.[150] The reason for this withholding rule is not evident in the statutory text, but the provision was tested in a case that came before the Fifth Circuit. In *John Doe #1 v. Veneman*, an anonymous plaintiff attempted a "reverse-FOIA" action by petitioning the court to prevent the Department of Agriculture from honoring a FOIA request filed by an environmental group for documents related to the testing of protection collars, which were designed to poison animals, like coyotes, that attack livestock.[151] The agency cited the withholding provision of FIFRA to justify keeping the documents secret.[152] The Fifth Circuit opined that the provision was intended to control the release of documents that could reveal the personal identities of employees at the company that made the collars.[153] Therefore FIFRA qualified for FOIA Exemption 3 and the documents were withheld from the environmental group,[154] regardless of any public interest in the effects of those poisons beyond the farm. This ruling places greater value on the privacy of individuals than the public interest in obtaining government-held information, which is a growing trend that has damaged the utility of FOIA as more and more documents are withheld because someone is named therein, regardless of the subject matter or importance of the documents in question.[155]

In conclusion, FOIA Exemption 3 exacerbates the inadvertent government secrecy that has been enabled by overuse of the exemptions in general, while contradicting the pro-openness spirit inherent in the statute when it was passed by Congress. When Exemption 3 is used to justify the withholding of requested documents on environmental matters, the exemption contradicts the spirit of American environmental law as well.

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150 7 U.S.C. § 136i-1.

151 John Doe #1 v. Veneman, 380 F.3d 807 (5th Cir. 2004). Note that coyotes are considered "pests" in the agricultural sector, so products designed to repel them are regulated as "pesticides" under FIFRA.

152 *Id.* at 816–17.

153 *Id.*

154 *Id.*

155 This process has been dubbed "privacy exceptionalism" by transparency researchers. *See, e.g.*, Hoefges et al., *supra* note 80; Halstuk et al., *supra* note 80.

III
EXEMPTION 9 OF THE FREEDOM OF INFORMATION ACT

Unlike FOIA Exemption 3 as described in the last Part, Exemption 9 is focused on a particular subject area that has a direct impact on the environment, but it is likely to cause conflicts with the spirit of environmental law too.[156] In short, Exemption 9 allows the withholding of government-held information on the very specific matter of the designs and locations of wells.[157] In fact the exemption is quite terse, with its entire text consisting of "geological and geophysical information and data, including maps, concerning wells."[158] This applies only to wells on public lands, for which federal permits are required, and those permits are managed by the Bureau of Land Management under the oversight of the Department of the Interior.[159]

Exemption 9 is rarely cited in agency denials of FOIA requests, perhaps because few people request government-held documents containing geophysical location data for wells on federal land. In fact, at the time of writing, Exemption 9 was not cited in a FOIA rejection by any federal agency for at least three years.[160] This may turn out to be a historical artifact though, as the growing public controversy over fracking is likely to lead to more investigations of well design and

156 *See* Barbara B. Altera & Richard S. Pakola, *All the Information the Security of the Nation Permits: Information Law and the Dissemination of Air Force Environmental Documents*, 58 A.F. L. REV. 1, 30 (2006).

157 5 U.S.C. § 552(b)(9) (1966).

158 *Id.*

159 *See Applications for Permits to Drill*, U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/operations-and-production/permitting/applications-permits-drill [https://perma.cc/H2U7-RQSB] (last visited Dec. 26, 2023). Note that wells on private land are a matter of contract law in negotiations between the landowner and the extraction firm, and they may or may not be subjected to local or state environmental regulations depending on the location.

160 *See Annual Freedom of Information Act Report: Fiscal Year 2022*, U.S. DEP'T OF JUST. 28–29, https://www.justice.gov/oip/page/file/1570086/download [https://perma.cc/U36N-Z7DM] (last visited Dec. 26, 2023). Those pages contain a table of FOIA Exemption usage by relevant agencies, and none cited Exemption 9 in any FOIA denial during fiscal year 2022. The same results are seen in the corresponding Department of Justice reports for 2021 and 2020.

Researchers from previous decades also noted that Exemption 9 is very rarely invoked; *see, e.g.*, Anderson Evan Thomas, *Remaining Covered by the "Near Blanket" of Deference: Berman v. Central Intelligence Agency and the CIA's Continual Use of Exemption 3 to Deny FOIA Requests*, 28 MISS. COLL. L. REV. 497, 503 (2009); Altera & Pakola, *supra* note 156, at 30.

siting by citizens and journalists.[161] Fracking wells are like all other wells in that they are discussed in documents that are relevant for FOIA Exemption 9 in light of requests for documents, at least for such wells on federal lands.[162]

For present purposes, Exemption 9 covers maps that illustrate the location of a well, plus various types of scientific and technical information on its operation, but it does not cover financial information about that well.[163] Whenever a fossil fuel company drills a well that strikes a profitable pool of the product, competitors would like to know that well's location so they can drill their own nearby, perhaps tapping into the same underground source. Therefore, the location is of prime importance to the original company, in the interest of keeping proprietary information out of the hands of competitors. This is the most common reason given for withholding government-held documents under Exemption 9.[164]

However, the location of a well is of far more importance to everyone else. This piece of information is crucial for citizens and journalists who wish to review the environmental consequences of industrial drilling operations, and the wells covered by Exemption 9—at least those that extract fossil fuels—have long been known to leak into nearby groundwater.[165] So in addition to their locations, the structural integrity of such wells and the practices of the companies that operate them are crucial factors for the health of the drinking water

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161 *See, e.g.*, Tala Hadavi, *How Fracking Changed America Forever*, CNBC (Jan. 7, 2020, 7:01 AM), https://www.cnbc.com/2020/01/06/the-impact-of-fracking-on-us-consumers-and-local-communities.html [https://perma.cc/Z8AU-BRRR]; Adam Vaughan, *Fracking – The Reality, the Risks and What the Future Holds*, THE GUARDIAN (Feb. 26, 2018, 1:00 AM), https://www.theguardian.com/news/2018/feb/26/fracking-the-reality-the-risks-and-what-the-future-holds [https://perma.cc/7HTB-9QM8].

162 "Fracking" is the colloquial term for hydraulic fracturing, a technique used by fossil fuel companies to extract a fluid (usually but not always natural gas) that is embedded in underground rock formations. In simplistic terms, a well shaft is drilled toward the rock formation, and fluid is injected down the well at great pressure to crack open the rock. The newly freed natural gas then floats back up the column of fluid that freed it. *See, e.g.*, Carl T. Montgomery & Michael B. Smith, *Hydraulic Fracturing: History of an Enduring Technology*, 62 J. PETROL. TECH. 26, 26–27 (2010).

163 This determination was made via a policy decision by the Securities and Exchange Commission. *See* Freedom of Information Act 157, 46 SEC Docket 1309 (July 30, 1990), at 1309–11.

164 *See* Patrick Martin, *Disclosure and Use of Proprietary Data*, 15 NAT. RES. LAW. 799, 804 (1983).

165 *See, e.g.*, Sally Entrekin et al., *Rapid Expansion of Natural Gas Development Poses a Threat to Surface Waters*, *in* 9 FRONTIERS ECOLOGY & ENV'T 105 (Matthew McBroom ed., Apple Academic Press 2011).

supply for all the people of the surrounding region, and for even more people downstream.[166] And even worse, modern fossil fuel drilling techniques like fracking *use* significant amounts of water, which is taken away from other natural or human uses and usually emerges from the process in a contaminated state.[167]

Exemption 9 has been described as both very narrow and as a precise statement on Congress's concerns about nondisclosure,[168] which is perhaps at odds with the rest of FOIA. The exemption is largely based on complaints from the fossil fuel industry during early committee deliberations on the design of FOIA and was possibly a gift to the power players who could derail the new statute.[169] Given the exemption's incongruously specific subject matter, a leading government transparency expert claimed that Exemption 9 is the "most suspect" of the FOIA exemptions because it gives special treatment to a particular industry's trade secrets, while trade secrets in all other industries are already covered elsewhere in the Act.[170] This exemption also differs from the rest of FOIA because, due to the nature of the industry, it is relevant for only a few particular executive branch agencies like the Department of the Interior and the EPA.[171]

The fossil fuel industry claimed that geological maps illustrating the locations of its oil and gas wells were crucial to competitiveness and profitability, largely because bootleggers could abuse publicly available maps to tap a well that a company had already explored and

166 *See* Timothy T. Eaton, *Science-Based Decision-Making on Complex Issues: Marcellus Shale Gas Hydrofracking and New York City Water Supply*, 461–62 SCI. OF THE TOTAL ENV'T 158, 160–61 (2013); Wendy Koch, *Study: Faulty Gas Wells, Not Fracking, Pollute Water*, USA TODAY (Sept. 15, 2014, 4:15 PM), https://www.usatoday.com/story/money/business/2014/09/15/faulty-gas-well-pollutewater/15631955/ [https://perma.cc/9A6W-5344] (last visited Dec. 26, 2023).

167 *See* Suzanne Goldenberg, *Fracking Is Depleting Water Supplies in America's Driest Areas, Report Shows*, THE GUARDIAN (Feb. 5, 2014), https://www.theguardian.com/environment/2014/feb/05/fracking-water-america-drought-oil-gas [https://perma.cc/32BE-L69N]; Mark Koba, *Fracking or Drinking Water? That May Become the Choice*, CNBC (Sept. 12, 2014, 11:35 AM), https://www.cnbc.com/id/101989915# [https://perma.cc/X7WG-7NFX] (last visited Dec. 26, 2023).

168 *See* Martin, *supra* note 164, at 804.

169 *See* Christopher Gozdor et al., *Where the Streets Have No Name: The Collision of Environmental Law and Information Policy in the Age of Terrorism*, 33 ENV'T L. REP. 10978, 10991 (2003). FOIA depended upon the signature of then-President Lyndon B. Johnson, a native of Texas who had strong ties with, and enjoyed political support from, that state's powerful fossil fuel industry.

170 *See* JAMES T. O'REILLY, 1 FED. INFO. DISCLOSURE 256 (West Group 3rd ed. 2000).

171 *See* Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMMLAW CONSPECTUS 427, 443 (2008).

drilled at its own expense. The problem was that maps would not be covered as "trade secrets" under what ultimately became FOIA Exemption 4. In other words, the location of a well is "proprietary" just like a product or process.[172] This matter received relatively little attention during the hearings before the Act was passed, but the industry's concerns were described in one congressional report: "Witnesses contended that disclosure of seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration."[173] The year after FOIA was enacted, the Senate reiterated that geophysical information on wells should be kept confidential in most cases.[174] In the post-9/11 era, a district court ruled that Exemption 9 could also justify the withholding of documents related to wells that could be of interest to terrorists seeking to cause public harm by disrupting water or fossil fuel supplies.[175]

Early court rulings on the meaning of Exemption 9 thought otherwise and often affirmed the exemption as prodisclosure, allowing withholding only in limited cases. For instance, in a Fifth Circuit ruling in 1976,[176] the court declared that Exemption 9 should be included in a pronouncement from the Supreme Court just months before that "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[177] The Fifth Circuit reiterated a year later that, just because well information is the general

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172 *See* Martin, *supra* note 164, at 804. Exemption 4 was written on behalf of the business sector and allows the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (1966).

173 H. REP. NO. 89-1497, at 11 (1966). This interpretation of the exemption's purpose was affirmed by a federal court, particularly the desire to thwart "speculators" trying to tap into someone else's existing oil well by requesting maps from federal agencies. Black Hills Alliance v. U.S. Forest Service, 603 F. Supp. 117, 122 (D.S.D. 1984).

174 H. REP. NO. 89-1497, at 9 (1966).

175 Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1321–22 (D. Utah 2003) (concerning a rejected FOIA request from an environmental group for documents about the interior designs of dams, which were believed in the post 9/11 period to be attractive targets for terrorists).

176 Pennzoil Co. v. Fed. Power Comm'n, 534 F.2d 627, 629–30 (5th Cir. 1976). This case concerned industry disagreement with a policy statement by the Federal Power Commission that certain types of information about the locations and operations of offshore natural gas wells would presumably be made available to the public unless a company could argue otherwise on a case-by-case basis. The Federal Power Commission regulated hydroelectric power projects on land or waterways owned by the federal government; this agency was disbanded in 1977 and its functions were transferred to the Federal Energy Regulatory Commission.

177 Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976).

topic of Exemption 9, that does not prevent the federal government from collecting such information from operators and disclosing it to the public whenever appropriate.[178] The court further ruled that per the transparency philosophy of FOIA, the government can assume that the resulting documents are available to the public unless a specific FOIA request can be rejected for a specific reason.[179]

In 1978, a Florida district court ruled that FOIA does not automatically allow the withholding of data that an agency describes as "proprietary" elsewhere in its own regulations or policy documents, if disclosure is in the public interest.[180] While Exemption 9 was not pertinent to that case, the ruling has been acknowledged as a precedent for disputes over the supposedly proprietary information on wells that is included in that exemption.[181] The Supreme Court later affirmed that FOIA is intended to allow the public interest in disclosure to supersede a private company's concerns about proprietary information.[182] The outcome of these rulings is that agencies are prevented from disclosing proprietary information in only an "arbitrary and capricious" manner, and that accusation must be proven by the party that objects to disclosure.[183]

Most of the jurisprudence pertaining specifically to the statutory language of Exemption 9 concerns the meaning of "well," and such arguments are usually monopolized by the fossil fuel industry's profit-driven conception of the term. However, it is important to note that wells are also used for drinking water, scientific research, and monitoring pollution, so this enhances the environmental relevance of

178 Superior Oil Co. v. Fed. Energy Regul. Comm'n, 563 F.2d 191, 204 (5th Cir. 1977).

179 *Id.* This case concerned an attempt by regulated companies to avoid compulsory submissions of well-related information to the Federal Power Commission, under the reasoning that such information was eligible for later withholding under Exemption 9. Note that this dispute originated under the Federal Power Commission, but by the time the dispute reached the circuit court that agency had been subsumed into the Federal Energy Regulatory Commission. *See Pennzoil Co.*, 534 F.2d at 629–30.

180 Drs. Hosp. of Sarasota, Inc. v. Califano, 455 F. Supp. 476, 480 (M.D. Fla. 1978) (concerning a "reverse FOIA" attempt by a group of doctors to prevent a government agency from fulfilling a citizen's FOIA request for information on Medicare payments).

181 *See* Martin, *supra* note 164, at 808.

182 Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979) (concerning a "reverse FOIA" action by a company trying to prevent the Departments of Labor and Defense from fulfilling a FOIA request for information on federal contractors).

183 *See* Martin, *supra* note 164, at 808. The prohibition against "arbitrary and capricious" agency action is found in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Exemption 9.[184] The interpretation of "well" in Exemption 9 can have significant environmental consequences.

Choosing an interpretation that would not last, in 1984 the District Court of South Dakota narrowly construed Exemption 9 as applicable to "well information of a technical or scientific nature" and to *not* include nonscientific data like the depth of a well, its general location, or how many exploratory holes an extraction firm had drilled while searching for the ultimate well site.[185] That narrow definition of "well" under Exemption 9 fell apart at the turn of the millennium, as the fossil fuel industry successfully argued that other aspects of well operations could be included in the definition of that term under the exemption. In the process, water supplies became more secretive.

In one decision that attempted to narrow down what a "well" is, Exemption 9 was confined to liquids by a District Court in New York in 2014 in a dispute over government-held documents on coal mining exploration.[186] But that small act of clarification did not prevent a rapid expansion of the secretive liquids coming out of a well, for which information can be withheld under the exemption. The most precious liquid of all, water, gradually fell under the exemption's swoop.

In 2002, a district court in California ruled that documents describing "ground water inventories, well yield in gallons per minute, and the thickness of the decomposed granite aquifer" could be withheld under Exemption 9.[187] Three years later, a different district court in California ruled that the term "well" in Exemption 9 could be

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184 *See* Altera & Pakola, *supra* note 156, at 30.

185 Black Hills All. v. U.S. Forest Serv., 603 F. Supp. 117, 122 (D.S.D. 1984). In this dispute, an environmental group submitted a FOIA request for documents on the quantity and locations of exploratory holes a mining company had drilled while searching for viable well sites. The U.S. Forest Service denied the request per Exemption 9. The District Court overturned the rejection, ruling that exploratory drill holes were not "wells" per the language of the exemption.

186 Nat. Res. Def. Council v. U.S. Dep't of Interior, 36 F. Supp. 3d 384, 415–16 (S.D.N.Y. 2014) ("Wells are not used to extract solid matter such as coal; they are used to extract liquids or gases.").

187 Starkey v. U.S. Dep't of Interior, 238 F. Supp. 2d 1188 (S.D. Cal. 2002). This case was introduced at *supra* note 132 and accompanying text.

Decomposed granite is granite that has been weathered by erosion into a gravel-like consistency. When present underground, this substance can hold large amounts of water and is often the support structure for aquifers, which in turn are vast pools of groundwater that can supply water wells. Measurements of the decomposed granite near a well can indicate the stability of the water supply. *See* Jiu Jimmy Jiao & Zhonghua Tang, *An Analytical Solution of Groundwater Response to Tidal Fluctuation in a Leaky Confined Aquifer*, 35 WATER RES. RSCH. 747, 750 (1999).

interpreted more expansively because there was no evidence that Congress intended any distinction between wells drilled to obtain fossil fuels and wells drilled to obtain water.[188] In the most recent ruling on the definition of what can be withheld under Exemption 9, in 2019 the District Court for the District of Columbia ruled that a "borehole"—a narrow shaft drilled during water exploration that may inadvertently become a narrow water supply in its own right—qualifies as a "well" under the exemption.[189] Thus, information on such boreholes, including maps of their locations, can be withheld.[190] Determining whether a borehole qualified for Exemption 9 required an unintentionally humorous analysis by the court of whether the word "hole" was synonymous with "well."[191] In a passage that even the presiding judge described as "a bit dry," the court decided that the two terms were indeed synonymous, thanks to a dictionary definition confirming that a borehole is drilled in the ground to locate water or oil, and so apparently is a well.[192]

This limited but illustrative judicial history of FOIA Exemption 9 illustrates how vague statutory language can be manipulated by parties that desire secrecy, thus contradicting the spirit of the statute that has been subjected to such an analysis. On the matter of information about liquids that can be withheld under the exemption, recall that the exemption may have been a gift to the industry that profits from liquid fossil fuels[193] and had since been perverted into an enabler of secrecy toward other liquids coming out of the ground, especially water, for which the public interest in accurate information massively outweighs the interests of corporations that want to keep the locations of their wells secret.

The general drift from secretive oil to secretive water is at the heart of the most recent court dispute surrounding Exemption 9, and the

188 Nat. Res. Def. Council v. Dep't of Def., 388 F. Supp. 2d 1086, 1107–08 (C.D. Cal. 2005). This case concerned a partially fulfilled and partially rejected FOIA request from the environmental group for thousands of agency documents on the manufacturing of a chemical called perchlorate. Some of the documents included information on whether that chemical has contaminated drinking water wells, hence the use of Exemption 9 to partially reject the request.

189 Story of Stuff Project v. U.S. Forest Serv., 366 F. Supp. 3d 66, 81–82 (D.D.C. 2019).

190 *Id.* This case concerned an environmental group's FOIA request for documents on groundwater supplies that had been used by the Nestlé corporation for its bottled water products. The company had acquired rights to a creek and its watershed on public lands in California's San Bernardino National Forest.

191 *Id.*

192 *Id.* at 81.

193 *See supra* notes 169–70 and accompanying text.

result is a potentially troubling precedent on whether the public can find accurate information on threats to the water upon which life depends. A 2017 ruling from the U.S. Court of Appeals for the District of Columbia Circuit perhaps best illustrates this disconnect between Exemption 9 and the spirit of environmental law.[194] In the *AquAlliance* case, the eponymous environmental group filed a FOIA request for information on the location and depth of drinking water wells in central California.[195] The group was interested in protecting the Sacramento River and its surrounding ecosystem from the excessive transfer of local water for use by faraway cities and farms.[196] The group was particularly concerned about the depth of such wells because a well of a certain depth could disrupt the movement of groundwater across the area. The group also sought information about well construction methods to assess the resulting environmental impacts.[197]

The Bureau of Reclamation rejected the FOIA request per several exemptions, including Exemption 9.[198] AquAlliance argued that the text of that exemption applies only to location-oriented data, and not to information on construction methods and depth that the group sought.[199] Citing congressional reports on the meaning of Exemption 9 when FOIA was being debated, the group also argued that the exemption applies only to fossil fuel wells and not to other kinds of wells, including those for water.[200] The court ruled that the exemption's focus on "geological and geophysical information" gives no indication that it should apply *only* to a well's location, and that it can also apply to depth and other characteristics.[201] Strangely, the court reasoned that the entire text of Exemption 9 ("geological and geophysical

194 AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101 (D.C. Cir. 2017).

195 *Id.*

196 *See* Taylor Wetzel, AquAlliance v. United States Bureau of Reclamation*: The Impact of Withholding Information from the Public*, 44 ECOLOGY L.Q. 565, 568 (2017). California administers a complex program in which the state is divided into numerous districts with distinct water supply goals, and a district with excess water can sell it to other districts. The water is transferred among districts via an elaborate network of long-distance pipelines, canals, and reservoirs. Despite being a California program, most of the infrastructure is under the jurisdiction of the Bureau of Reclamation because the network was built with federal funds, and that bureau approves or rejects water transfer requests among the various districts. 856 F.3d at 103.

197 *See* Wetzel, *supra* note 196, at 571.

198 856 F.3d at 104.

199 *Id.*

200 *Id.* at 105.

201 *Id.*

information and data, including maps, concerning wells"[202]) contains "nothing ambiguous" while simultaneously expanding upon what that same passage means.[203] The court rejected AquAlliance's argument that the exemption applies only to oil and gas wells, because the word "well" in the statutory text could apply to any such structures, including those for water.[204] Here the court committed the logical fallacy of trying to prove a negative by concluding that Congress intended no "adjectival limitation" on what a well could be, apparently because there are no adjectives in the statutory text.[205] Regardless of the twisted logic, the court upheld the Bureau of Reclamation's rejection of the FOIA request, ruling that the depth of a well could be included in Exemption 9.[206] In doing so, the court decided upon a more inclusive definition of "well" that contradicts the narrower interpretations of that term in federal court rulings of the 1970s–80s.[207]

The *AquAlliance* ruling, while clarifying some underdefined terms in the text of Exemption 9, contradicts the spirit of environmental law because the public needs such information to investigate whether government officials are adequately protecting the natural world or at least observing regulations on that endeavor. Without access to such information about water wells, in this case, the public must accept the Environmental Impact Statements and related documents issued by federal agencies without question and will not be able to check their accuracy. This is possibly a violation of the transparency and public participation requirements of the National Environmental Policy Act.[208] Meanwhile, failing to provide information with which the public can assess the accuracy of such documents condemns them to costly legal challenges against agency procedures long after the environmental damage has been done.[209]

IV
CONTRADICTORY PHILOSOPHIES

This Article has described the informational requirements of key American environmental statutes, followed by a discussion of FOIA

202 5 U.S.C. § 552(b)(9) (1966).

203 856 F.3d at 105.

204 *Id.*

205 *Id.*

206 *Id.* at 106.

207 *See supra* notes 185–86 and accompanying text.

208 *See supra* notes 13–18 and accompanying text.

209 *See* Wetzel, *supra* note 196, at 571–72.

and how two of its exemptions raise the most contradictions with environmental law. It can be argued that FOIA Exemption 3, which allows government-held documents to be withheld from requesters if such an action is permitted under a different statute, violates FOIA's larger prodisclosure philosophy. Furthermore, courts have enabled the provisions of various statutes in the realm of National Parks, archeological artifacts, pesticide use, and food security to qualify for FOIA Exemption 3, thus enabling a wide range of environmentally relevant information to be withheld. This contradicts the informational and protransparency philosophies of American environmental statutes, starting with the National Environmental Policy Act.[210]

Given the existence of more secretive qualifying statutes under Exemption 3 and a pattern of judicial deference to agency FOIA rejections, the spirit of environmental law—on both the government's protection of the natural world and documents about such efforts—has succumbed to procedural minutiae as agencies find ways to withhold documents while courts address arguably less important terminological uncertainties and regulatory conflicts.[211] It has been contended elsewhere that FOIA Exemption 3 ironically increases government secrecy from inside a statute that otherwise promotes openness and transparency, due to its deference to other statutes that do not share that philosophy.[212] The present Article argues the same on the more specific matter of environmental information, as FOIA Exemption 3 enables very specific nondisclosure provisions within other statutes. For example, the Food Security Act of 1985 allows the withholding of an entire document that contains the name of an individual farmer,[213] thus depriving citizens and journalists from wider information on how that farmer's practices may affect the region's environment.[214] When an agency cites Exemption 3 when rejecting a request for such documents, that exemption enables government secrecy that contradicts both the open-government philosophy of the rest of FOIA and the public knowledge philosophy of most of American environmental law.

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210 *See* Ramkumar & Petkova, *supra* note 57, at 305.

211 *See* Joseph L. Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239, 239–40 (1973); Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 433–34 (1981).

212 *See* Cramer, *supra* note 85, at 120.

213 *See supra* notes 137–38 and accompanying text.

214 For more on the environmental effects of farming, *see supra* note 146 and accompanying text.

Meanwhile, the much more specific FOIA Exemption 9 has a direct impact on the environment by allowing the withholding of information related to the seemingly mundane topic of wells. Drilling wells is standard procedure in the extraction of liquids from underground, and the drilling itself is already fairly destructive for the local environment.[215] If the well is used for drinking water, that water is removed from natural uses by plants and animals and is likely to disrupt the flow of groundwater that is needed for other human and natural uses in the region.[216] If the well is used to obtain fossil fuels like oil and natural gas, there is a significant risk of contamination of local water supplies and the surrounding environment.[217]

FOIA Exemption 9 allows the withholding of government-held documents on the locations and other characteristics of such wells, largely to assuage industry concerns about unfair competition that may or may not be legitimate.[218] Regardless, this proindustry secrecy contradicts the spirit of environmental law because the public needs such information to assess environmental damage by industry and the effectiveness of government regulatory efforts. This contradicts not just the informational provisions of major environmental statutes like the National Environmental Policy Act, but it may also cover up knowledge of operations that are illegal under additional statutes.

For example, if the pollution in a river is suspected of being caused by nearby fossil fuel wells, citizen watchdogs may not be able to call for the investigation of likely wells if information on their locations, depth, and other mechanical characteristics cannot be obtained from

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215 Depending on the location, drilling a large hole in the ground may damage tree roots, destroy the burrows of animals that live underground, disrupt the flow of groundwater, and possibly even cause minor earthquakes if the area is seismically unstable. Also, the soil, rocks, and other detritus removed from the hole must be dumped somewhere nearby. *See, e.g.*, *7 Ways Oil and Gas Drilling Is Bad for the Environment*, THE WILDERNESS SOC'Y (July 9, 2021), https://www.wilderness.org/articles/blog/7-ways-oil-and-gas-drilling-bad-environment [https://perma.cc/SQT5-4VY2] (last visited Dec. 26, 2023); *Environmental Impacts of Natural Gas*, UNION OF CONCERNED SCIENTISTS (June 19, 2014), https://www.ucsusa.org/resources/environmental-impacts-natural-gas [https://perma.cc/PWA2-QNW3] (last visited Dec. 26, 2023); Rong-Gong Lin II et al., *Man-Made Earthquakes Increasing in Central and Eastern U.S., Study Finds*, L.A. TIMES (Apr. 23, 2015, 6:00 AM), https://www.latimes.com/visuals/graphics/la-me-quake-frack-20150423-htmlstory.html [https://perma.cc/7Y4J-HW37] (last visited Dec. 26, 2023).

216 *See, e.g.*, Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENV'T L. 919 (1998); Ujjayant Chakravorty et al., *Inefficient Water Pricing and Incentives for Conservation*, 15 AM. ECON. J. APPLIED ECON. 319 (2023).

217 *See supra* note 193 and accompanying text.

218 *See supra* notes 173–74 and accompanying text.

federal agency regulators. This is precisely the type of government-held documentation that can be withheld by an agency per FOIA Exemption 9. The CWA, however, requires all industrial operators that discharge pollutants into public waterways to regularly report on such emissions or face possible criminal charges.[219] In another hypothetical example, if the design of a fossil fuel well causes it to leak and contaminate nearby water supplies, watchdogs may not be able to obtain information on that design because such documentation can be withheld per FOIA Exemption 9. But this, in turn, would directly violate the Safe Drinking Water Act of 1974, which regulates the protection of human drinking water supplies.[220] The contradiction between the secrecy of the fossil fuel industry's use of wells and the Safe Drinking Water Act has been noted by the Court of Appeals for the Eleventh Circuit[221] but with no guidance on how to resolve that contradiction.

CONCLUSION

When a court notes contradictions among different statutes and their opposing philosophies, this illustrates the need to resolve such contradictions, either by judges in future rulings or by the legislature. Less deference to secrecy-enabling statutes that qualify for FOIA Exemption 3—with such deference itself being a recent phenomenon that has drifted from earlier interpretations—would enable more acknowledgment of FOIA's original spirit of governmental openness. This, in turn, could lessen the possibility of doctrinal conflicts between the prodisclosure philosophy of the major American environmental laws and specific antidisclosure provisions in lesser-known statutes that kick in only because FOIA Exemption 3 allows secretive agency officials to cite them when denying document requests. FOIA Exemption 9 is also due for a new interpretation that acknowledges the openness of the rest of the statute instead of enabling the secrecy—on the deceptively mundane matter of wells—that the statute is trying to prevent.

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219 33 U.S.C. § 1321(b)(5). *See also supra* note 32 and accompanying text.

220 Pub. L. No. 93-523, 88 Stat. 1660 (1974), codified at various sections of the United States Code at U.S.C. §§ 21, 42.

221 Legal Env't Assistance Found. v. EPA, 118 F.3d 1467, 1478 (11th Cir. 1997) (concerning the EPA's approval of a fossil fuel drilling project in Alabama based on its possible impact on local drinking water supplies).

While such statutory contradictions are common, and trying to resolve them is the perennial challenge of administrative law, it is unfortunate when substance succumbs to procedure. The various statutes described in this Article all have their own valid and useful provisions on the withholding or disclosure of information, but American environmental law is built upon the much more intense philosophy of protecting the natural world for future and current generations. Current processes in American government transparency have enabled procedural contradictions to damage that higher ideal.