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Bonnie Stender

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When the Exemption Becomes the Rule: Problems That *Waterkeeper v. EPA* Poses for Advocates of Reporting Requirements and Potential Solutions

Bonnie Stender*

*A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.*¹

Waterkeeper v. EPA represents a limited victory for advocates of reporting requirements. In this case, the court held that the Environmental Protection Agency could not exempt farms from air pollution reporting requirements based on the use of the de minimis doctrine, which allows for exemptions from regulations to avoid trifling matters. Prior to this case, in most environmental cases involving the de minimis doctrine, courts have upheld agency use of the doctrine unless a court finds that the statutory language is “extraordinarily rigid” and therefore does not permit this interpretative tool. Here, however, while the majority did not uphold the agency action, the decision also omitted any discussion whatsoever of whether the statutory language of either the Comprehensive Environmental Response, Compensation, and Liability Act or the Emergency Planning and Community Right-to-Know Act was so “extraordinarily rigid” as to preclude de minimis exemptions. This therefore weakens the precedential value of the decision for advocates in similar future cases, because it leaves the door open for the possible use of the de minimis doctrine to avoid regulatory responsibilities. However, advocates can overcome this precedential weakness in two ways. First, advocates can highlight the environmental justice benefits of reporting requirements to communities, the

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1. Letter from Former President James Madison to W. T. Barry, Lieutenant Governor of Ky. (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON, 1819–1836, 103 (Gaillard Hunt ed., 1910), quoted in Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 ECOLOGY L.Q. 989, 1011 n.99 (2012).

government, and businesses. This will greatly reduce the probability that a given reporting requirement will “yield a gain of trivial or no value.” Second, advocates can emphasize the fact that it is unnecessary for the Environmental Protection Agency to invoke its *de minimis* authority to shield small business owners from reporting requirements, since it can use its prosecutorial discretion to do so. Thus, advocates of reporting requirements have several tools in their “toolbox” if agencies attempt to use the *de minimis* doctrine to justify similar exemptions in the future.

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INTRODUCTION

Much of today's discussion about executive agency responsibility for environmental regulation revolves around over-regulation. Critics of the administrative state argue that environmental regulations are overly numerous and burdensome, while defenders maintain that they are necessary and beneficial. This discussion, however, overlooks the importance of *under*-regulation, and the ways in which an agency's decision to relieve regulated entities of certain burdens may have significant implications for our environment and public health.

One way in which agencies may choose to under-regulate is through application of the *de minimis* doctrine, which gives agencies the power "to create even certain categorical exceptions to a statute 'when the burdens of regulation yield a gain of trivial or no value.'"²

This doctrine played a key role in the Environmental Protection Agency's (EPA) reasoning in *Waterkeeper Alliance v. EPA (Waterkeeper)*, in which EPA attempted to justify a rule exempting animal feeding operations, colloquially known as farms, from statutorily mandated air emission reporting requirements on the grounds that the reports were unnecessary.³ The D.C. Circuit categorized this reasoning as an application of the *de minimis* doctrine.⁴ It then found, however, that this was an inappropriate application of the doctrine, and struck down EPA's rule.⁵

While seemingly a victory for proponents of reporting requirements, one aspect of the reasoning behind the *Waterkeeper* decision creates a problematic precedent for reporting requirement proponents. The majority found the *de minimis* doctrine insufficient to justify EPA's actions because the record showed that the required reports potentially provided regulatory benefits.⁶ An examination of past environmental cases involving attempted applications of the *de minimis* doctrine suggests that, usually, if a court finds that a statute's language is not "extraordinarily rigid," it holds that the agency was empowered to make *de minimis* exemptions.⁷ Conversely, courts have generally held that an agency was prohibited from making *de minimis* exemptions only after finding that the statutory language was "extraordinarily rigid."⁸ Here, however, the court struck down the rule on different grounds, not because the statutory language was "extraordinarily rigid," or in reference to the statutory language at all, but

2. *Waterkeeper All. v. EPA*, 853 F.3d 527, 530 (D.C. Cir. 2017) (quoting *Pub. Citizen v. FTC*, 869 F.2d 1541, 1556 (D.C. Cir. 1989)).

3. *Id.*

4. *Id.*

5. *Id.* at 537–38.

6. *See id.* at 537.

7. *See, e.g., Ala. Power Co. v. Costle*, 636 F.2d 323, 360–61 (D.C. Cir. 1979).

8. *See, e.g., Pub. Citizen v. Young*, 831 F.2d 1108, 1113 (D.C. Cir. 1987).

rather because the court found that the regulations in question provided more than an insignificant level of benefits.⁹

This Article explains why, as a result of this reasoning, *Waterkeeper* may be a problematic precedent for reporting requirement advocates. It further suggests two ways in which advocates may avoid this roadblock and bolster arguments against application of the *de minimis* doctrine in the future. Part I provides background on *Waterkeeper*, the *de minimis* doctrine, and the doctrine developed by *Chevron v. Natural Resources Defense Council*. Part II examines past environmental cases in which an agency attempted to justify *de minimis* exemptions, noting the pattern described above, comparing it to a similar pattern evident in environmental cases involving the *Chevron* doctrine, and explaining why this pattern reveals a precedential weakness of *Waterkeeper*. It further explores the Trump Administration's likely view of the *de minimis* doctrine as a useful tool to accomplish its goals of deregulation, and why this view compounds the problem of *Waterkeeper*'s precedential weakness for proponents of reporting requirements. Part III describes the first way in which reporting requirement proponents may bolster arguments against application of the *de minimis* doctrine in spite of *Waterkeeper*'s precedential weakness: by demonstrating the environmental justice benefits that reports provide. Part IV describes the second way that reporting requirement proponents may overcome *Waterkeeper*'s precedential weakness: by showing how EPA and other agencies engaged in environmental regulation can use prosecutorial discretion to give relief to small business owners without making categorical *de minimis* exemptions. This Article concludes that these arguments would give reporting requirement proponents a strong foundation to oppose the use of the *de minimis* doctrine in similar future cases and suggests areas for further study.

I. BACKGROUND

A. *The De Minimis Doctrine*

The *de minimis* doctrine is a principle by which courts recognize that “the law does not concern itself with trifling matters.”¹⁰ It shows “courts’ reluctance ‘to apply the literal terms of a statute to mandate pointless expenditures of effort’” and, in that way, is a “cousin” of the absurd results doctrine.¹¹ Though this authority is “inherent in most statutory schemes,” decisions about whether an agency appropriately used its *de minimis* authority “naturally will turn on the assessment of particular circumstances.”¹² When “the burdens of regulation

9. See *Waterkeeper*, 853 F.3d at 530.

10. *Ala. Power Co.*, 636 F.2d at 360. This phrase derives from the doctrine's full Latin name: *de minimis non curat lex*. *Pub. Citizen v. Young*, 831 F.2d at 1112; Jeff Nemerofsky, *What Is a “Trifle” Anyway?*, 37 GONZ. L. REV. 315, 316 (2002).

11. *Waterkeeper*, 853 F.3d at 535 (quoting *Ala. Power Co.*, 636 F.2d at 360 & n.89).

12. *Ala. Power Co.*, 636 F.2d at 360.

yield a gain of trivial or no value,” a “basis for an implication of *de minimis* authority” likely exists “[u]nless Congress has been extraordinarily rigid” in the statutory language.¹³

However, an agency’s power to make *de minimis* exemptions “is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.”¹⁴ An agency’s *de minimis* exemption “cannot stand if it is contrary to the express terms of the statute.”¹⁵ Furthermore, an agency may not invoke the *de minimis* doctrine to “create an exception where application of the literal terms would ‘provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs.’”¹⁶

B. The Chevron Doctrine

Much has been written about the *Chevron* doctrine.¹⁷ Established in the Supreme Court’s watershed 1984 *Chevron v. Natural Resources Defense Council* decision, *Chevron* review consists of a two-part test to determine whether an agency’s interpretation of a statute is permissible.¹⁸ At Step One, the court asks whether “Congress has directly spoken to the precise question at issue.”¹⁹ If so, the court “must give effect to the unambiguously expressed intent of Congress.”²⁰ If not—if the statute is “silent or ambiguous with respect to the specific issue”—then the court moves to Step Two and asks whether the agency’s interpretation is “based on a permissible construction of the statute,” which need not be the only construction possible or the construction that the reviewing court would have chosen if deciding the case *de novo*.²¹

13. *Id.* at 360–61.

14. *Id.* at 360.

15. *Env’tl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 466 (D.C. Cir.) (per curiam), *amended per curiam* by 92 F.3d 1209 (D.C. Cir. 1996).

16. *Waterkeeper*, 853 F.3d at 535 (quoting *Ala. Power Co.*, 636 F.2d at 360–61).

17. See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

18. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

19. *Id.* at 842.

20. *Id.* at 843.

21. *Id.* at 843 & n.11. Disagreement exists among scholars and courts about the extent to which Step Two analysis overlaps with the “arbitrary and capricious” review of Administrative Procedure Act section 706(2)(A), and about which factors, in general, should be considered at Step Two. See, e.g., Kenneth A. Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611, 622 (2009) (“[T]here is good reason to conclude that [the Step Two analysis] should appropriately incorporate factors distinct from those developed in the review of an agency’s exercise of policymaking expertise in light of a technical or scientific record, the context in which ‘hard look’ review was developed.”). These factors may include, they suggest, interpretive tools like canons of construction or legislative history, which do not fall within the scope of “arbitrary and capricious” (hard look) review, but may nonetheless serve Step Two’s purpose of determining “whether agencies have permissibly exercised the interpretive authority

C. Waterkeeper v. EPA

In *Waterkeeper*, the D.C. Circuit vacated an EPA rule exempting farms from statutory emissions reporting requirements, finding that such reporting requirements had regulatory benefit, and that the exemption exceeded EPA's statutory authority and was an inappropriate use of the *de minimis* doctrine.²²

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) prescribe the duties of federal agencies when hazardous substances are released into the environment, and each contains a reporting mandate.²³ CERCLA authorizes federal authorities to "investigate and respond to actual or threatened releases of hazardous substances."²⁴ Section 103 of CERCLA requires relevant parties to immediately notify the National Response Center of any release of a hazardous substance over the "reportable quantity," a maximum level set by EPA.²⁵ The National Response Center, in turn, must notify "all appropriate Government agencies," including the Governor of any affected state and EPA.²⁶ Likewise, EPCRA requires relevant parties to notify state and local authorities whenever covered pollutants, called "extremely hazardous substances," are released.²⁷

Ammonia and hydrogen sulfide are two of the hazardous substances emitted by decomposing animal waste.²⁸ EPA classified both as "hazardous substances" under CERCLA and "extremely hazardous substances" under EPCRA, and commercial farms' daily emissions of each substance consistently exceeded EPA's minimum reportable quantity.²⁹ Such emissions, in fact, "can be quite substantial for farms that have hundreds or thousands of animals,"³⁰ and can cause "major health problems," including respiratory ailments, nasal and eye irritation, and nausea, affecting both farm workers and surrounding communities.³¹

Despite the known hazardous nature of animal waste in 2008, EPA issued a rule (Final Rule), which exempted farms from these CERCLA and EPCRA reporting requirements for air emissions from animal waste.³²

delegated to them by reasonably employing appropriate methods for elaborating statutory meaning." Bamberger & Strauss, *supra*, at 623–24.

22. *Waterkeeper All. v. EPA*, 853 F.3d 527, 530 (D.C. Cir. 2017).

23. *Id.* at 530–31.

24. *Id.* at 531.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 530.

31. Opening Brief of Petitioners Waterkeeper Alliance et al. at 6–7, *Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (Nos. 09-1017, 09-1104 (consolidated)), 2015 WL 8162345, at *6–7.

32. *Waterkeeper*, 853 F.3d at 530.

EPA justified the exemptions by reasoning that reports about emissions from animal waste were unnecessary because “in most cases, a federal response [to take remedial action or order monitoring or investigation] is impractical and unlikely.”³³ However, after commenters on the proposed rule expressed their desire for information on releases from very large farms called concentrated animal feeding operations (CAFOs), EPA retained the reporting requirement for CAFOs under EPCRA.³⁴ Despite this concession, however, after EPA issued the Final Rule, several environmental groups challenged it, arguing that CERCLA and EPCRA do not permit EPA to grant exemptions at all, and require reports for *all* releases over the reportable quantity.³⁵ They also argued that the Final Rule was arbitrary in that it treated air releases from animal waste at farms more favorably than those from other sources or locations.³⁶

After resolving jurisdictional and standing issues, the court reviewed the Final Rule under the standard set out in *Chevron*.³⁷ Analyzing the Final Rule under *Chevron*’s first step, the court found that Congress had unambiguously “set forth a straightforward reporting requirement for any non-exempt release (over the reportable quantity).”³⁸ The court reasoned that the unrelated exemptions cited by EPA created no ambiguity because Congress paired the animal waste exemptions with a “sweeping reporting mandate” in both statutes, neither of which contain any language of delegation.³⁹

The court then considered EPA’s argument that the animal waste reports were unnecessary.⁴⁰ This argument “track[ed] the . . . logic” of the *de minimis* doctrine, by which agencies may create exceptions to a statute “when the burdens of regulation yield a gain of trivial or no value.”⁴¹ The court found that EPA could not invoke *de minimis* authority to justify the Final Rule because comments submitted during the rulemaking showed that it would not be impractical for EPA to investigate and issue abatement orders when releases from animal waste caused dangerous levels of hazardous substances.⁴² State and local authorities could use the reports to narrow investigations once they received a call reporting a potentially hazardous leak.⁴³ Therefore, contrary to EPA’s contention, the reports served a regulatory purpose and could not be exempted through EPA’s *de minimis* authority.⁴⁴ Furthermore, the court explained, the fact that the reports provided a regulatory benefit meant that, even assuming that the costs of the

33. *Id.*

34. *Id.*

35. *See id.* at 531.

36. *Id.* at 532.

37. *Id.* at 534; *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

38. *See Waterkeeper*, 853 F.3d at 535.

39. *Id.* at 534–35.

40. *See id.* at 535–36.

41. *Id.* at 530 (quoting *Pub. Citizen v. FTC*, 869 F.2d 1541, 1556 (D.C. Cir. 1989)).

42. *Id.* at 536–37.

43. *Id.*

44. *See id.* at 537.

reports outweighed the benefits, EPA's use of the *de minimis* exception would be unjustified here.⁴⁵

Judge Brown filed a concurring opinion in which she cautioned against collapsing *Chevron*'s two steps into one "reasonableness" inquiry.⁴⁶ She joined the Panel Opinion because it "does not extend to the situation in which an agency's statutory interpretation is found to be 'reasonable' without a court first determining the statutory bounds of agency authority."⁴⁷ However, she noted that an opinion claiming to follow the *Chevron* standard but that in fact dispensed with a consideration of what Congress intended would amount to "judicial abdication."⁴⁸

II. POTENTIAL PRECEDENTIAL WEAKNESS OF *WATERKEEPER*

The pattern of environmental cases involving the *de minimis* doctrine suggests that *Waterkeeper* would have had greater precedential strength if the court had determined that the language of CERCLA and EPCRA was "extraordinarily rigid."⁴⁹

A. *In Environmental Cases Where Courts Find Statutory Language to be "Extraordinarily Rigid," They Generally Hold That an Agency's Use of the De Minimis Doctrine is Impermissible*

In *Sierra Club v. EPA*, the D.C. Circuit held that EPA had exceeded *de minimis* authority by adopting a screening tool, called a "Significant Monitoring Concentration," to determine whether permit applicants could be exempted from some air quality analysis and monitoring required by the Clean Air Act (CAA) and EPA regulations.⁵⁰ In reaching this holding, the court stated that "Congress was 'extraordinarily rigid' in mandating preconstruction air quality monitoring,"⁵¹ leaving no room for such exemptions. The court reasoned that the relevant CAA section was "extraordinarily rigid" for three reasons. First, the section includes the word "shall" suggesting that it mandates specific requirements on EPA.⁵² Second, Congress provided only one exception to the monitoring requirement leading to the inference that it did not intend to allow for

45. *Id.*

46. *Id.* at 539 (Brown, J., concurring).

47. *Id.*

48. *Id.*

49. The cases discussed in this section were selected in the following way. In Westlaw, I searched within Supreme Court and Court of Appeals cases using the search term "advanced: ('de minimis' and 'environmental' and 'alabama power') & DA (aft 12-25-1984)." I excluded cases where the court determined that it was unnecessary to reach the *de minimis* question, cases that did not involve environmental issues, cases where the *de minimis* doctrine was only discussed in reference to a previous case, cases where the court's opinion is no longer good law, and cases that discussed the term "de minimis" in a context unrelated to the doctrine.

50. *Sierra Club v. EPA*, 705 F.3d 458, 460–61 (D.C. Cir. 2013).

51. *Id.* at 466.

52. *Id.* at 467.

any other exceptions.⁵³ Third, the language in the other sections is much less rigid.⁵⁴ The court also suggested that EPA's action would exceed its authority even if the statutory language were not so rigid because the "monitoring requirement is a regulatory function that provides benefits," so EPA may not make exemptions even if "in some cases, EPA deems it more costly than beneficial."⁵⁵

Similarly, in *Public Citizen v. Young*, the D.C. Circuit found that the Food and Drug Administration (FDA) impermissibly invoked the *de minimis* doctrine in listing two color additives as "safe" based on quantitative risk assessments indicating that they presented trivial cancer risks.⁵⁶ The court reasoned that language included in the Food, Drug, and Cosmetic Act prohibiting the listing of any color additive "found . . . to induce cancer in man or animal," was sufficiently "rigid" to prohibit the exemption of the color additives under a *de minimis* theory.⁵⁷ The relevant statutory section provided that "a color additive . . . shall be deemed unsafe, and shall not be listed . . . if . . . it is found by the Secretary to induce cancer in man or animal."⁵⁸ The court explained that this resulted in an "almost inescapable" reading that the Secretary must deny listing if the additive is found to "induce" cancer.⁵⁹ The court also found support for its conclusion in the existence of other sections that provide the Secretary with greater discretion,⁶⁰ in legislative history that "point[ed] powerfully against any *de minimis* exception,"⁶¹ and several factors that made Congress's decision to enact an absolute rule a reasonable policy choice. These factors included evidence indicating that Congress perceived the public to be "truly alarmed" about cancer and hoped to ease public fears about cancer by "tak[ing] extreme steps to lessen even small risks," as well as evidence showing that Congress perceived color additives as "lacking any great value."⁶²

Likewise, in *Natural Resources Defense Council v. EPA*, the Ninth Circuit held that EPA's *de minimis* power did not extend so far as to enable it to create exemptions from Clean Water Act (CWA) permitting requirements for construction activity.⁶³ In that case, the Natural Resources Defense Council petitioned for review of several aspects of EPA's CWA storm water discharge rule, including its exclusion of construction sites of less than five acres.⁶⁴ Though the court did not employ the term "extraordinarily rigid," it noted that "if

53. *Id.*

54. *Id.*

55. *Id.* at 469.

56. *Pub. Citizen v. Young*, 831 F.2d 1108, 1109 (D.C. Cir. 1987).

57. *Id.* at 1109, 1113 (citation omitted).

58. *Id.* at 1111–12 (citation omitted).

59. *Id.* at 1112.

60. *Id.*

61. *Id.* at 1113.

62. *Id.* at 1117.

63. *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992).

64. *Id.* at 1295, 1305.

construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions from permitting requirements for such activity.”⁶⁵ While ultimately, the court held that it would need more data from EPA to properly assess if the exemption would have a *de minimis* effect, the court first drew support for its holding from *Natural Resources Defense Council v. Costle*, where the D.C. Circuit held that “once Congress has delineated an area that requires permits, EPA is not free to create exemptions.”⁶⁶ In this way, the court found primary support for its rejection of EPA’s *de minimis* exemption in the rigid nature of statutory language.⁶⁷

B. In Environmental Cases Where Courts Find Statutory Language Not to Be “Extraordinarily Rigid,” They Generally Hold That an Agency’s De Minimis Exception to the Statute Is Permissible

In *Ohio v. EPA*, the D.C. Circuit held that EPA’s decision to exempt reviews of Superfund sites containing hazardous materials at *de minimis* levels was permissible, after finding that the statutory language was “not so clear as to rule out EPA’s application of a *de minimis* exception.”⁶⁸ In that case, several states and private parties challenged changes that EPA had made to the National Contingency Plan under CERCLA, including its interpretation of CERCLA’s requirement that certain remedial actions be reviewed at least every five years.⁶⁹ The court held that the five-year provision was not so rigid as to preclude a *de minimis* exemption.⁷⁰ The language of the statute required review of sites where “any hazardous substances” remained, but the court held this was ambiguous and could refer to “*even one*” hazardous substance rather than “any *amount* of any hazardous substance.”⁷¹ Further, the legislative history provided “no convincing support” for a contrary reading.⁷² The court then found that the exemption followed from a permissible interpretation of the statute because it “square[d] with the health-protective purpose of the statute” and allowed EPA to avoid the “mammoth monitoring burden” of having to review every CERCLA site every five years.⁷³

Likewise, in *Environmental Defense Fund v. EPA*, the D.C. Circuit upheld EPA’s *de minimis* exemption of non-major federal actions from an EPA rule regulating requirements governing conformity with State Implementation Plans under the CAA, after determining that Congress had not “taken a position so

65. *Id.* at 1306.

66. *Id.* (citing *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977)).

67. *Id.*

68. *Ohio v. EPA*, 997 F.2d 1520, 1534, 1536 (D.C. Cir. 1993).

69. *Id.* at 1525–26, 1530.

70. *Id.* at 1534–36.

71. *Id.*

72. *Id.* at 1535.

73. *Id.* at 1534–35.

rigid that it will not admit of a *de minimis* exemption.”⁷⁴ In this case, several environmental organizations petitioned for review of EPA’s “Transportation Conformity Rule” and “General Conformity Rule,” promulgated pursuant to section 176 of the CAA.⁷⁵ The court explained that though section 176 prohibited the federal government from engaging in “any activity” not in conformity, it was reasonable for EPA to interpret “any activity” to mean only those activities that would be likely to interfere with attainment goals of a State Implementation Plan.⁷⁶ The court then found that EPA adequately justified its *de minimis* exemption because the threshold it used was “entirely reasonable given the . . . futility and wastefulness of applying the conformity requirements to all federal actions, however minor.”⁷⁷

Similarly, in *Ober v. Whitman*, the Ninth Circuit held that EPA’s *de minimis* exemption of certain sources of airborne particulate pollution from certain CAA regulations was acceptable after finding that the CAA contained no explicit provision prohibiting exemptions of *de minimis* sources of particulate matter under ten microns in size (PM₁₀) and that the statutory language was not “uncompromisingly rigid.”⁷⁸ In that case, residents of Phoenix, Arizona petitioned for review of EPA’s federal implementation plan for the Phoenix area, in which EPA exempted certain sources of PM₁₀ from pollution controls.⁷⁹ The court reasoned that the terms “reasonably” and “impracticable” within the CAA’s requirement that an implementation plan include “‘reasonably’ available control measures to bring an area within national standards unless attainment is ‘impracticable’” gave EPA the discretion to make *de minimis* exemptions.⁸⁰ The court then found that EPA’s *de minimis* exemptions were permissible because it was reasonable for EPA to use existing PM₁₀ *de minimis* standards from the new source program, EPA was not required to analyze the public health impact of *de minimis* sources, and EPA’s consideration of attainment deadlines in deciding which sources were *de minimis* was acceptable.⁸¹

C. The Pattern of Environmental Cases Involving the Chevron Doctrine Supports the Conclusion That a Similar Pattern Exists Among Environmental Cases Involving the De Minimis Doctrine.

Generally, environmental decisions determining whether an agency’s interpretation of a statutory provision is reasonable are decided in favor of the

74. *Env’tl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 466 (D.C. Cir.) (per curiam), *amended per curiam* by 92 F.3d 1209 (D.C. Cir. 1996).

75. *Id.* at 454–55.

76. *Id.* at 466.

77. *Id.* at 467.

78. *Ober v. Whitman*, 243 F.3d 1190, 1194, 1198 (9th Cir. 2001).

79. *Id.* at 1192–93.

80. *Id.* at 1195.

81. *Id.* at 1197–98.

agency if the court reaches *Chevron* Step Two. In his study of environmental law cases decided in the United States Courts of Appeals from 2003 to 2005, Professor Jason Czarnezki found that “courts find most statutory provisions ambiguous and then affirm agency action.”⁸² This observation is supported by the way the pattern holds for application of the *Chevron* doctrine in general.⁸³

The existence of this pattern in environmental cases involving the of *Chevron* doctrine supports the conclusion that a similar pattern exists in cases involving the *de minimis* doctrine, given that the doctrines resemble each other structurally and require similar analysis. For example, each doctrine involves a preliminary step that revolves around statutory language, as well as a second step that asks whether the agency action was reasonable according to specific criteria. In the *Chevron* doctrine, Step One asks whether “Congress has directly spoken to the precise question at issue,” while Step Two asks whether the agency’s interpretation was reasonable in light of the lack of “unambiguously expressed” congressional intent.⁸⁴ Likewise, courts applying the *de minimis* doctrine ask whether “Congress has been extraordinarily rigid” in the statutory language.⁸⁵ If not, courts generally defer to agency creation of *de minimis* exemptions if the regulation “yield[s] a gain of trivial or no value.”⁸⁶

Courts have also explicitly connected the *Chevron* and *de minimis* doctrines. For example, in *Environmental Defense Fund v. EPA*, the D.C. Circuit recognized that “[t]o the extent that both *Chevron* and *Alabama Power* address agency power inherent in a statutory scheme, the same deference due to an agency’s reasonable interpretation of an ambiguous statute may also be due to an agency’s creation of a *de minimis* exemption.”⁸⁷

Thus, because the analyses involved in the *Chevron* and *de minimis* doctrines parallel one another to such a great extent, it stands to reason that both doctrines reveal a similar pattern of decisions depending on whether or not a court found the relevant statutory language to be sufficiently clear.

Though they resemble each other, these doctrines still remain distinct in judicial analysis.⁸⁸ For example, as *Waterkeeper* demonstrated, a court may

82. Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 770 (2008).

83. See *Jarita Mesa Livestock Grazing Ass’n v. U.S. Forest Serv.*, 140 F. Supp. 3d 1123, 1168 (D.N.M. 2015) (noting that *Chevron*’s second step is “all but toothless: if the agency’s decision makes it to step two, it is upheld almost without exception”); Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1388–89 (2013) (“There is some empirical evidence that once agencies make it past *Chevron* Step One . . . they are, if not guaranteed to win on Step Two, extremely likely to do so. A study by Orin Kerr finds that, under *Chevron* Step Two, agency interpretations are upheld 89% of the time.”).

84. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

85. *Ala. Power Co. v. Costle*, 636 F.2d 323, 360–61 (D.C. Cir. 1979).

86. *Id.*

87. *Env’tl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 467 (D.C. Cir.) (per curiam), *amended per curiam* by 92 F.3d 1209 (D.C. Cir. 1996).

88. The flexible nature of the relationship between the doctrines may stem from the status of “*de minimis non curat lex*” as both a distinct doctrine and a canon of construction, as well as from the “tension” between the *Chevron* doctrine and canons of construction. See, e.g., Glen Staszewski, *Avoiding Absurdity*,

decide that statutory language is unambiguous under *Chevron* Step One without deciding whether it is “extraordinarily rigid” under the *de minimis* doctrine.⁸⁹ This distinction matters because it means that a court may decide whether an agency permissibly exercised its *de minimis* authority without ever discussing the *Chevron* doctrine (as it did, for example, in *Sierra Club*⁹⁰) or decide under both doctrines (as it did, for example, in *Public Citizen*⁹¹).

D. Because the Court in Waterkeeper Did Not Hold That the Statutory Language of CERCLA and EPCRA Was “Extraordinarily Rigid,” This Pattern Suggests That Waterkeeper Represents a Potentially Problematic Precedent for Supporters of Reporting Requirements.

As demonstrated, most environmental cases involving agency invocation of the *de minimis* doctrine tend to be decided in favor of the agency if the court determines that the statutory language is not “extraordinarily rigid.” Therefore, the majority’s omission of any discussion of whether the statutory language of CERCLA and EPCRA were so “extraordinarily rigid” as to preclude *de minimis* exemptions in *Waterkeeper* weakens the precedential value of the decision for these proponents in similar future cases.

The factors that courts have considered in environmental cases involving the *de minimis* doctrine, applied to *Waterkeeper*, suggest that the D.C. Circuit could have found the language of CERCLA and EPCRA so “extraordinarily rigid” as to preclude *de minimis* exemptions.

For example, like the statutory language at issue in *Sierra Club* and *Public Citizen*, CERCLA’s section on notification requirements uses the word “shall.”⁹² The statute provides that “[a]ny person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release . . . of a hazardous substance from such vessel or facility in quantities equal to or greater

81 IND. L.J. 1001, 1059 (2006) (describing “the established principle of *de minimis non curat lex*” as a “substantive canon” (citation omitted)); *see also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 75–84 (2008) (explaining that *Chevron* did not address whether canons or agency determinations should prevail at Step Two, noting the categorical majority and minority approaches to this question among courts, and advocating instead for contextual analysis).

89. *See* *Waterkeeper All. v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017). For this reason, I view Judge Brown’s suggestion in her concurrence that the majority went too far by discussing the *de minimis* doctrine after its Step One analysis as an incorrect conflation of the two doctrines. *See id.* at 538 (Brown, J., concurring) (“As the Panel acknowledges, EPA set forth *no* statutory ambiguity authorizing its Final Rule. Under Step One, this ends the matter.”) (citation omitted). As I understand the doctrines, a court may use the *de minimis* doctrine as a tool of statutory interpretation in Step One or Step Two of the *Chevron* analysis but may also evaluate the appropriateness of its application to a particular statute in a standalone analysis.

90. *See* *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013).

91. *Pub. Citizen v. Young*, 831 F.2d 1108, 1122 (D.C. Cir. 1987) (“As we find the FDA’s construction ‘contrary to clear congressional intent,’ we need not defer to it.” (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984))); *id.* (“In sum, we hold that the Delaney Clause . . . does not contain an implicit *de minimis* exception . . . [because] Congress adopted an ‘extraordinarily rigid’ position.”).

92. *See* *Sierra Club*, 705 F.3d at 467; *Pub. Citizen v. Young*, 831 F.2d at 1111–12.

than those determined pursuant to section 9602 of this title, immediately notify the National Response Center.”⁹³ Similarly, EPCRA’s section on emergency notification of hazardous releases provides that “[i]f a release of an extremely hazardous substance . . . occurs from a facility . . . and such release requires a notification under section 103(a) of [CERCLA], the owner or operator of the facility *shall* immediately provide notice as described in subsection (b) of this section.”⁹⁴

Additionally, as was the case in *Public Citizen*, several possible explanations exist that would justify Congress’s creation of an absolute rule requiring reports of hazardous air emissions.⁹⁵ For example, in *Public Citizen*, the court found that Congress may have created an absolute rule to lessen public fear of cancer.⁹⁶ Here, Congress may have created an absolute rule to address the fears of communities surrounding animal feeding operations (AFOs) that may have arisen as a result of the “loss of consciousness and possibly death,” along with other negative health effects that ammonia and hydrogen sulfide emissions from AFOs have caused.⁹⁷ Likewise, as in *Public Citizen*, the court found that Congress may have determined that an absolute rule was warranted in light of the low value of color additives.⁹⁸ Congress here may have concluded that the low cost of compliance justified an absolute rule.⁹⁹ For example, as *Waterkeeper* explained in its Reply Brief, the annual reporting burden for most AFOs under CERCLA and EPCRA would involve only two telephone calls and a short written notice.¹⁰⁰

A second parallel to *Public Citizen* relates to the context of the relevant CERCLA and EPCRA provisions within the statutes as a whole. In *Public Citizen*, the existence of surrounding sections granting the Secretary greater discretion suggested Congress meant to limit the Secretary’s discretion in the section at issue.¹⁰¹ Similarly here, the existence of other provisions that contain

93. 42 U.S.C. § 9603 (2012) (emphasis added).

94. *Id.* § 11004 (emphasis added).

95. *See Pub. Citizen v. Young*, 831 F.2d at 1117–18.

96. *Id.* at 1117.

97. Earthjustice et al., Comment Letter on Proposed CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Animal Feeding Operations 8 (Mar. 27, 2008), <https://www.regulations.gov/document?D=EPA-HQ-SFUND-2007-0469-0758> (giving examples of AFOs’ negative health impacts on neighboring communities, including findings that prevalence of childhood asthma in Keokuk County, Iowa increased in relation to the size of nearby swine farms); *see also* Environmental Integrity Project, Comment Letter on Proposed CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Animal Feeding Operations 4–5 (Mar. 27, 2008), <https://www.regulations.gov/document?D=EPA-HQ-SFUND-2007-0469-1070> (describing three case studies of deaths caused by hazardous substances from CAFOs).

98. *Pub. Citizen v. Young*, 831 F.2d at 1117–18.

99. *Cf. id.* (holding that Congress may have enacted an absolute rule not allowing for exceptions to the listing requirement for carcinogenic color additives partially because of the “low cost of protection”).

100. Final Reply Brief for Petitioners Waterkeeper Alliance et al. at 21, *Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (Nos. 09-1017, 09-1104 (consolidated)), 2016 WL 1614413, at *21.

101. *Pub. Citizen v. Young*, 831 F.2d at 1112.

exemptions, such as the exemption of petroleum and natural gas products from the definition of a “hazardous substance” under CERCLA, suggests that Congress could have allowed exemptions in the CERCLA and EPCRA sections on reporting requirements but chose not to do so.¹⁰²

Despite these similarities, the *Waterkeeper* court omitted any discussion of the statutory rigidity of CERCLA and EPCRA, instead focusing on regulatory benefits in vacating EPA’s rule. This omission deprives the opinion of some of the precedential strength it would have otherwise had for advocates of reporting requirements, because if the court had found the CERCLA and EPCRA language to be “extraordinarily rigid,” it may have more easily found similar language in other right-to-know statutes to be “extraordinarily rigid” as well. This would have the benefit of avoiding the need for a fact-intensive analysis of whether the reports required by these other statutes provided regulatory benefits. Additionally, a finding that *de minimis* exemptions are inappropriate on the basis of the statutory language, rather than regulatory benefits, could make it less likely to be overturned on the basis of changed circumstances, considering that courts must take “particular circumstances” into account when determining whether an agency properly invoked its *de minimis* authority.¹⁰³ Therefore, the majority’s failure to address the rigidity of the statutory language in *Waterkeeper* may affect the value of the decision in future, similar cases involving other right-to-know laws and corresponding regulations.

Because many environmental right-to-know laws contain language comparable to that of the reporting requirement provisions in CERCLA and EPCRA, the *Waterkeeper* court’s failure to discuss whether the statutory language at issue was “extraordinarily rigid” represents a missed opportunity for advocates of reporting requirements. A decision against EPA based on the rigidity of the language, rather than the presence of regulatory benefits, could have served as valuable precedent if similar *de minimis* claims arise in the context of other right-to-know laws. For example, the Safe Drinking Water Act provides that owners of public water systems “shall give notice” to persons served by the system in cases of failure to comply with maximum contaminant levels or with required testing procedures.¹⁰⁴ This contrasts with permissive language in other

102. Opening Brief of Petitioners Waterkeeper Alliance et al. at 25, *Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (Nos. 09-1017, 09-1104 (consolidated)), 2015 WL 8162345, at *25; see also *Waterkeeper All. v. EPA*, 853 F.3d 527, 534–35 (D.C. Cir. 2017) (acknowledging that “the fact that Congress thought to write certain exceptions into the statutes doesn’t necessarily mean it meant to bar all others,” but finding that the existence of those surrounding exemptions, combined with a “sweeping reporting mandate” and the absence of any “language of delegation,” supported the conclusion that Congress meant to allow no exemptions here).

103. See *Ala. Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979). This possibility seems especially likely considering the similarity between the *de minimis* and *Chevron* doctrines, along with the Supreme Court’s decision in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that a court’s previous construction of a statute trumps an agency’s interpretation only if the court’s decision held that the statute was unambiguous).

104. 42 U.S.C. § 300g-3(c)(1)(A)(i) (2012) (emphasis added).

sections of the same provision, such as one section that provides that the EPA Administrator “*may* require the owner or operator of a public water system to give notice to the persons served by the system of the concentration levels of an unregulated contaminant required to be monitored under section 300j-4(a) of this title.”¹⁰⁵ Another law that may be affected by this precedent is the Beaches Environmental Assessment and Coastal Health Act, a CWA amendment that requires states to notify the public about unsafe conditions at beaches.¹⁰⁶ Another is the Occupational Health and Safety Administration’s Hazard Communication Standard, which requires employers to notify their employees about workplace chemical hazards.¹⁰⁷

The current Administration’s focus on reducing regulatory burdens exacerbates concerns that arise out of the *Waterkeeper* decision, because this attitude toward regulation increases the probability that EPA will attempt to employ the *de minimis* doctrine to make exemptions from reporting requirements under other environmental statutes.

Several of the Administration’s recent actions demonstrate its prioritization of deregulation. In February of this year, for example, President Donald Trump issued an executive order that stated “[i]t is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.”¹⁰⁸ This regulatory posture is not confined to broad statements of policy; it has also influenced concrete actions taken to reduce regulatory burdens. For example, another recently issued executive order established an “Interagency Task Force on Agriculture and Rural Prosperity” charged with “identify[ing] legislative, regulatory, and policy changes to promote in rural America agriculture, economic development, job growth, infrastructure improvements, technological innovation, energy security, and quality of life, including changes that: (i) *remove barriers* to economic prosperity and quality of life in rural America.”¹⁰⁹ This anti-regulatory attitude also extends to administrative agencies, including EPA. For example, in his first four months in office, EPA Administrator Scott Pruitt began the process to undo, delay, or block over thirty environmental rules, which is more than have been rolled back in as short a time in the agency’s history.¹¹⁰ Additionally, in April, 2017, EPA released a request for comment

105. *Id.* § 300g-3(c)(2)(F) (emphasis added).

106. See Clifford Rechtschaffen, *CPR Perspective: The Public Right to Know*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/perspright.cfm> (last visited Apr. 1, 2018).

107. *Id.*

108. Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285, 12,285 (Feb. 24, 2017); Cale Jaffe & Steph Tai, *Trump’s Disdain for Environmental Regulations Stems from His Misunderstanding*, SLATE (May 11, 2017), http://www.slate.com/articles/health_and_science/science/2017/05/trump_hates_regulations_because_he_doesn_t_understand_them.html.

109. Promoting Agriculture and Rural Prosperity in America, 82 Fed. Reg. 20,237, 20,237–38 (Apr. 25, 2017) (emphasis added).

110. Coral Davenport, *Counseled by Industry, Not Staff, E.P.A. Chief Is Off to a Blazing Start*, N.Y. TIMES (July 1, 2017), <https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html>.

“seeking input on regulations that may be appropriate for repeal, replacement, or modification.”¹¹¹

Considering *Waterkeeper*'s potential precedential weakness and the aggravating effects of the Administration's deregulatory policies, proponents of reporting requirements should get ahead of this weakness by focusing on two primary arguments to bolster their position in the current legal and political environment. Supporters of reporting requirements can employ these arguments even if courts in future cases do not find that the statutory language so “extraordinarily rigid” that it does not allow for any *de minimis* exemptions.

First, proponents can argue that the environmental justice benefits of reporting requirements to communities, the government, and businesses inevitably produce regulatory benefits, and thus reduce the probability that a given reporting requirement will “yield a gain of trivial or no value.”¹¹² Second, proponents can argue that EPA's ability to use prosecutorial discretion to shield small business owners from burdensome reporting requirements renders the use of *de minimis* exemptions unnecessary.

III. ENVIRONMENTAL JUSTICE

The first argument that proponents of reporting requirements may use to oppose the use of the *de minimis* doctrine, in light of *Waterkeeper*'s precedential weakness, is that the environmental justice benefits created by mandated reporting requirements make it unlikely that those requirements would be of “trivial or no value” or lead to “futile results.”¹¹³ In other words, these benefits make it more likely that such requirements “provide benefits, in the sense of furthering the regulatory objectives.”¹¹⁴ Environmental justice encompasses “efforts to identify and address disproportionate environmental risks and impacts experienced by low-income and minority populations.”¹¹⁵ EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the

111. Evaluation of Existing Regulations, 82 Fed. Reg. 17,793, 17,793 (Apr. 13, 2017); *see also* Davenport, *supra* note 110.

112. *Waterkeeper All. v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017) (quoting *Pub. Citizen v. FTC*, 869 F.2d 1541, 1556 (D.C. Cir. 1989)); *Ala. Power Co. v. Costle*, 636 F.2d 323, 361 (D.C. Cir. 1979).

113. *Waterkeeper*, 853 F.3d at 530 (quoting *Pub. Citizen v. FTC*, 869 F.2d at 1556); *Ala. Power Co.*, 636 F.2d at 360 n.89, 361 (citation omitted).

114. *Waterkeeper*, 853 F.3d at 530 (citing *Ala. Power Co.*, 636 F.2d at 361). Regulatory objectives may be disputed. In *Waterkeeper*, the court seemed to adopt the petitioners' broader interpretation of EPA's regulatory objectives, encompassing purposes beyond the facilitation of emergency response, such as incentivizing facilities to voluntarily reduce emissions and informing local and state governments, rather than EPA's narrower interpretation. *See* Final Reply Brief from Petitioners *Waterkeeper Alliance et al.* at 11–14, *Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (Nos. 09-1017, 09-1104 (consolidated)), 2016 WL 1614413, at *11–14. This suggests that courts in future cases could adopt a broad view of regulatory objectives to include environmental justice concerns, even if that view is contested by the environmental agency attempting to justify *de minimis* exemptions.

115. David W. Case, *The Role of Information in Environmental Justice*, 81 *Miss. L.J.* 701, 701 (2012).

development, implementation, and enforcement of environmental laws, regulations, and policies.”¹¹⁶ The environmental justice benefits from reporting requirements extend not only to impacted communities, but also to the agencies charged with enforcing reporting requirements and to businesses subject to reporting requirements.

A. Communities

Though they were not mentioned in the *Waterkeeper* opinion, the benefits of information from reporting requirements to environmental justice communities was discussed by commenters on the Proposed Rule and in briefs by parties to the *Waterkeeper* litigation. For example, in its amicus brief, the American Lung Association and American Thoracic Society noted that “AFO air pollution . . . disproportionately impacts low-income and minority communities, which tend to be situated in closer proximity to large AFOs.”¹¹⁷ The Association also emphasized the importance of information from reporting requirements to health professionals that treat these communities and other vulnerable individuals, stating that “[t]he exemption . . . denies [them] access to important information that they need to prevent, diagnose, and treat illnesses caused by exposure to AFO air pollution.”¹¹⁸ Similarly, Earthjustice submitted a comment to EPA’s Proposed Rule in which it stated that EPA had failed to fulfill its obligations under Executive Order 12,898.¹¹⁹ This Executive Order, issued by President Clinton in 1994, requires federal agencies, “[t]o the greatest extent practicable and permitted by law,” to identify and address, as appropriate, “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”¹²⁰ Earthjustice explained that EPA’s attempt to separate hazardous release notifications from their protective purpose was “absurd” and could not “justify [its] failure to assess the environmental justice impacts of its proposed rule.”¹²¹ Additionally, Earthjustice noted that these reports provided environmental justice benefits in the form of increasing the likelihood of reducing releases in the first place, notifying the public of hazardous releases, and allowing the public to track response actions.¹²²

116. *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last updated Apr. 11, 2018).

117. Brief of Amici Curiae American Lung Association and American Thoracic Society in Support of Petitioners at 3, *Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (Nos. 09-1017, 09-1104 (consolidated)), 2015 WL 8530544, at *3.

118. *Id.*

119. Earthjustice et al., *supra* note 97, at 27.

120. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994).

121. Earthjustice et al., *supra* note 97, at 27.

122. *Id.*

The benefits described above mirror the environmental justice benefits of information that scholars have identified. For example, information from reporting requirements can help address the “[s]ubstantial information asymmetries [that] typically exist between polluting industries and entities and surrounding environmental justice communities.”¹²³ This information also enables citizens to “effectively participate” in environmental regulation, to exercise their right to bring citizen suits, and to know about the environmental risks in their communities.¹²⁴ These benefits also apply in the context of other right-to-know statutes. For example, the Safe Drinking Water Act’s reporting requirements may benefit American Indian and Alaskan Native communities, who suffer from disparities in drinking water infrastructure.¹²⁵ Similarly, the National Environmental Policy Act, though it imposes no substantive obligations on federal agencies, requires (as interpreted by Executive Order 12,898) the assessment of environmental justice effects of major federal actions.¹²⁶

However, some scholars have pointed out potential detrimental effects of reporting requirements on environmental justice communities. Professor Kathryn Durham-Hammer, for example, argues that “EPCRA has widened the information gap between communities, giving affluent communities greater leverage in environmental decision-making at the expense of environmental justice communities.”¹²⁷ However, taken to its logical conclusion, this argument suggests that no reporting requirements would lead to better outcomes for environmental justice communities than some reporting requirements. Additionally, as Professor Kathryn Durham-Hammer suggests, agencies can take steps to lower the probability of affluent communities using reporting requirements to shift unwanted polluting facilities from their communities to lower-income, minority ones. For example, agencies could provide environmental justice communities better access to information through outreach and education, as well as through grants to enable communities to participate in decision-making processes by hiring experts and undergoing training.¹²⁸

123. Case, *supra* note 115, at 705.

124. *E.g., id.* at 704.

125. See Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1345 (2016) (citing studies showing these disparities).

126. *Id.* at 1342–43.

127. Kathryn E. Durham-Hammer, *Left to Wonder: Reevaluating, Reforming, and Implementing the Emergency Planning and Community Right-to-Know Act of 1986*, 29 COLUM. J. ENVTL. L. 323, 326 (2004); see also Roesler, *supra* note 1, at 1048 (noting that “[i]n order for disclosure to have significant impacts on human health and environmental protection, more information must be generated, collected, and translated into plain language accessible to most people”). Wealthier communities may have the means to hire experts to make this information accessible, without relying on the government, while environmental justice communities may not.

128. See Durham-Hammer, *supra* note 127, at 355–56.

B. Government

Information from reporting requirements also benefits government by enabling agencies to fulfill their obligations under Executive Order 12,898. One section of the Executive Order in particular demonstrates the importance of agencies' role in making information related to the environment and public health, such as information from reporting requirements, available to the public. Section 5-5, "Public Participation and Access to Information," "emphasizes the importance of promoting public participation in environmental decision making and public *access* to health or environmental information" by urging agencies to "work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily *accessible* to the public."¹²⁹

C. Industry

Providing information as required by reporting requirements also benefits regulated entities themselves. As a form of informational regulation, reporting requirements have helped spur the growth of voluntary corporate environmental reporting.¹³⁰ As noted by Professor David Case, this movement has developed through companies "affirmatively respond[ing] to market pressures by engaging in formal corporate environmental reporting," which then creates "incentives . . . for others to follow suit."¹³¹ Though reporting requirements like those contained in EPCRA are not voluntary, the same market forces that drive companies to engage in voluntary reporting may cause them to benefit from complying with reporting requirements, especially if it gives them a competitive edge over non-compliant competitors in the minds of increasingly knowledgeable communities, citizens, and consumers.

IV. PROSECUTORIAL DISCRETION

The second argument that proponents of reporting requirements may advance to counter a potential growing reliance on the *de minimis* doctrine is that it is unnecessary. Prosecutorial discretion offers a more narrowly tailored way for agencies to relieve regulatory burdens in warranted situations without creating categorical under-regulation policies through use of the *de minimis* doctrine.

129. Case, *supra* note 115, at 718 (emphasis added) (internal quotations omitted); *see also* Roesler, *supra* note 1, at 1015 n.120 (characterizing this Executive Order as an example of a government duty to inform particular individuals and communities that is not contingent on requests for information, such as those made under the Freedom of Information Act).

130. *See* David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 383, 391 (2005).

131. *Id.* at 391.

EPA expressed its concern about regulatory burdens on small business owners in several ways both before and during the *Waterkeeper* litigation. For example, in the Final Rule, EPA stated that the rule would “not impose any additional requirements on small entities” but rather “relieve regulatory burden.”¹³² Likewise, in its Respondent’s Brief, EPA cited a commenter who distinguished the desire for information about large CAFOs as opposed to small family farms.¹³³

However, EPA’s ability to use prosecutorial discretion to give reporting requirement relief to small regulatory business owners reduces its need to use the *de minimis* doctrine. Prosecutorial discretion can serve an important purpose in protecting “mom and pop” business owners, because it is “not only a means to allocate scarce law enforcement resources, but also a means to afford rough justice in making the punishment fit the crime.”¹³⁴

Prosecutorial discretion is not only beneficial to small business owners, but also to agencies themselves. Selective enforcement may be a safer way for agencies to exempt producers from reporting requirements than *de minimis* exemptions, because it is less subject to litigation. Generally, courts may not order an agency to pursue enforcement action if the enforcement duty is discretionary, and “enforcement under the environmental statutes is generally discretionary.”¹³⁵

Agencies may argue that the exercise of prosecutorial discretion consumes more resources than making *de minimis* exemptions and is therefore not a viable alternative. Both state and federal environmental agencies often operate on tight enforcement budgets, because as described by Professor Clifford Rechtschaffen, “in the current-day environment, resources for government enforcement are in short supply.”¹³⁶ However, rulemaking to enact *de minimis* exemptions also takes a significant amount of time. For example, EPA’s Final Rule was finalized a full year after the exemption was initially proposed.¹³⁷ Considering the time intensive nature of rulemaking, combined with the controversy surrounding categorical *de minimis* exemptions and their susceptibility to litigation, prosecutorial discretion offers a superior alternative to *de minimis* exemptions. Additionally, citizen suits offer a way for those concerned about abuse of prosecutorial discretion to directly challenge a facility owner’s failure to comply if an agency fails to do so.¹³⁸

132. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,958 (Dec. 18, 2008).

133. Respondent’s Brief at 17, *Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (Nos. 09-1017, 09-1104 (consolidated)), 2016 WL 891151, at *17.

134. LAW OF ENVIRONMENTAL PROTECTION § 9:4 (Env’tl. Law Inst. ed., 2017).

135. *Id.*

136. Clifford Rechtschaffen, *Promoting Pragmatic Risk Regulation: Is Enforcement Discretion the Answer?*, 52 U. KAN. L. REV. 1327, 1346 (2004).

137. *Waterkeeper All. v. EPA*, 853 F.3d 527, 531–32 (D.C. Cir. 2017).

138. For example, EPCRA provides that anyone may sue the owner or operator of a facility for, *inter alia*, failure to submit a follow-up emergency notice. 42 U.S.C. § 11046(a)(1)(A)(i) (2012).

CONCLUSION

Though advocates of reporting requirements prevailed in *Waterkeeper*, the way that the court came to its decision limits its precedential value in similar future cases. The court's failure to discuss whether the statutory language of CERCLA and EPCRA was so "extraordinarily rigid" as to preclude *de minimis* exemptions weakens the precedential value of the decision because most environmental cases involving the *de minimis* doctrine are decided for the agency if the court determines that the statutory language is not extraordinarily rigid. However, proponents can get ahead of this precedential weakness in two ways. First, they can emphasize the environmental justice benefits of reporting requirements to communities, the government, and businesses, which greatly reduce the probability that a given reporting requirement will "yield a gain of trivial or no value," and thereby make it more likely that a court will find application of the *de minimis* doctrine to be inappropriate.¹³⁹ Second, proponents of reporting requirements may argue that EPA's power to exercise prosecutorial discretion to shield small business owners from reporting requirements renders its use of *de minimis* authority unnecessary. In these ways, reporting requirement advocates may bolster their arguments that application of the *de minimis* doctrine is inappropriate in the reporting requirement context, even if the court determines that the statutory language is not extraordinarily rigid.

However, ongoing changes in administrative law, First Amendment law, and technology may affect environmental agencies' use of the *de minimis* doctrine and offer opportunities for further research. For example, some scholars, noting the aversion to the *Chevron* doctrine that Associate Justice Neil Gorsuch expressed during his time on the Tenth Circuit, have suggested that he could influence the Supreme Court toward his view.¹⁴⁰ If *Chevron* deference is weakened or eliminated, agencies may be more likely to employ the *de minimis* doctrine to justify their deregulatory decisions. Additionally, because evolving internet technology continues to make information sharing easier and less costly than ever before, one fruitful area of study may involve analyzing the relationship between these technological changes and the justification for the use of the *de minimis* doctrine, and other agency justifications for inaction, in the reporting requirement context. Finally, it may be useful to examine the relationship between evolving First Amendment doctrine regarding government speech and compelled speech and environmental agencies' use of the *de minimis* doctrine.¹⁴¹

139. Ala. Power Co. v. Costle, 636 F.2d 323, 361 (D.C. Cir. 1979).

140. See, e.g., Philip J. McAndrews III, *What SCOTUS Nominee Neil Gorsuch's Interpretation of Chevron Could Mean for Environmental Administrative Law*, GEO. ENVTL. L. REV. ONLINE (Mar. 5, 2017), <https://geir.org/2017/03/05/what-scotus-nominee-neil-gorsuchs-interpretation-of-chevron-could-mean-for-environmental-administrative-law/>.

141. See, e.g., Roesler, *supra* note 1, at 1048 (concluding that "other interests that have long supported claims regarding a general right to know in First Amendment law—interests in intellectual progress, personal liberty, and democratic self-government—may provide a stronger foundation [than

In closing, as the competing trends of increasing public awareness of and ease of access to information about environmental hazards and a decreasing willingness on the part of the current Administration to regulate in the area of environmental health and safety collide, an understanding of the ability of agencies to use the *de minimis* doctrine to justify reporting requirement exemptions will become increasingly important.

health and environmental interests] for the environmental right to know in particular contexts [such as claims of compelled speech in labeling conflicts]).

We welcome responses to this Note. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.

