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ENVIRONMENTAL NIHILISM

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*Who controls the past . . . controls the future.*¹

*He who controls information controls the world.*²

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¹ GEORGE ORWELL, 1984, at 44 (1949).

² J. Michael Straczynski, *Babylon 5: Ship of Tears*, (Babylonian Productions, Inc. Apr. 29, 1996).

Introduction

Information is the lifeblood of environmental law. Pollution control standards depend on data about public health and technical information about the availability and effectiveness of abatement technologies.³ Pesticide and chemical registrations rely on studies about efficacy and potential adverse impacts.⁴ Environmental remediation requires surveying contaminated sites to identify the location and prevalence of hazardous substances.⁵ Enforcement efforts, whether initiated by regulatory agencies or through citizen-suits, depend on monitoring the waste streams of regulated industries and the conditions of environmental systems.⁶ Accurate and abundant information is a prerequisite for these elements of environmental law and many others, and information disclosure rules are themselves an important, quasi-regulatory element of the architecture of environmental law.⁷

This list of some of the components of environmental law suggests the contours of the field for purposes of this essay. Environmental law, as I use the term, addresses the effects of human activities on the environment, often striking a delicate balance between environmental protection and other competing interests.⁸ Precisely defining the boundaries of the field is unnecessary for my present purposes, because the subject of this essay is the information that animates substantive regulatory provisions rather than the particulars of those provisions.⁹

Information also informs political debate and inspires the public to demand change. Environmental law is the subject of ongoing reevaluation in Congress and the executive branch, although the importance of accurate information is rarely called into question.¹⁰ Rather, contest over environmental

³ *E.g.* 33 U.S.C. § 1314(b) (2018).

⁴ *E.g.* 7 U.S.C. § 136a (2018); 15 U.S.C. § 2605(b) (2018).

⁵ *E.g.* 42 U.S.C. § 9604(a) (2018).

⁶ *E.g.* 16 U.S.C. § 1540(a), (e) (2018).

⁷ *E.g.* 42 U.S.C. § 9603(a).

⁸ See Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 263 (2010). Professor Todd Aagaard provides a nuanced and compelling taxonomic analysis, concluding that laws should be considered a component of the corpus of environmental law if they “reflect a consideration of human impacts on the natural environment.” *Id.*

⁹ I am mindful that others, most recently Professor Sarah Light, have argued in favor of defining environmental law more broadly to encompass “a broader set of legal doctrines that are critical to its enterprise,” such as “the law governing the corporation throughout its life cycle.” Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140 (2019). To the extent that new rules are adopted governing information in any context that are designed to subvert provisions related to the environment, those too would qualify as environmental nihilism.

¹⁰ For an account of the changing tides of environmentalism within the conservative movement that provides a useful exploration of many of the policy and political dynamics influencing debates over environmental law see Daniel A. Farber, *The Conservative as Environmentalist: From Goldwater and the Early Reagan to the 21st Century*, 59 ARIZ. L. REV. 1005 (2017).

law examines questions like: Are standards too high? Are regulations too burdensome? Should agencies take a precautionary approach or delay regulation until more certainty can be achieved? Should the costs of environmental protection fall on corporations, property owners, or taxpayers? Is environmental protection more appropriately pursued by the federal government, states, or municipalities?

Presidential administrations answering these questions differently have resulted in successive waves of regulation and deregulation, and Congress perennially considers proposals to amend federal environmental laws, although it has rarely done so.¹¹ Even unsuccessful legislative efforts have, however, spurred innovation within federal agencies. For example, in 1994, then-Speaker of the House Newt Gingrich identified reform of the Endangered Species Act (ESA) as a legislative priority in his Contract with America.¹² A bill substantially amending—some might even say gutting—the ESA was voted out of committee but never brought to the floor.¹³ This congressional attention resulted in the U.S. Fish and Wildlife Service, under the leadership of Secretary Bruce Babbitt, adopting creative new regulations to ameliorate the ESA's impact on property owners by enhancing regulatory certainty in exchange for mitigation efforts.¹⁴

As anyone attentive to American politics knows, the current mood in Washington is one of deregulation.¹⁵ The Trump Administration views much of federal environmental law as imposing an unacceptable burden on business and has pursued a broad agenda to remove or relax legal requirements.¹⁶ It has advanced this agenda in a somewhat unorthodox fashion. For example, it has sought to repeal regulations whose effective dates have not yet come without engaging in notice and comment rulemaking and used legal opinions to disclaim statutory authority that agencies have exercised for many years.¹⁷ As the Administration has discovered, amending substantive environmental regulations

¹¹ See Richard Lazarus, *Environmental Law Without Congress*, 30 J. LAND USE & ENVTL. L. 15 (2014).

¹² See J.B. Ruhl, *Does Congress Exist?*, 30 J. LAND USE & ENVTL. L. 79, 84 (2014).

¹³ See Shi-Ling Hsu, *A Game-Theoretic Approach to Regulatory Negotiation and a Framework for Empirical Analysis*, 26 HARV. ENVTL. L. REV. 33, 43 n.65 (2002).

¹⁴ See Justin R. Pidot, *Public-Private Conservation Agreements and the Greater Sage-Grouse*, 39 PUB. LAND & RESOURCES L. REV. 161, 182-83 (2018); Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 366 (1994).

¹⁵ See William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1349, 1359 (2018).

¹⁶ See Michael Greshko, et al., *A Running List of How President Trump is Changing Environmental Policy*, NATIONAL GEOGRAPHIC (Apr. 1, 2019), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/>.

¹⁷ See Bethany Davis Noll, Op Ed: *Trump's regulatory 'whack-a-mole'*, POLITICO (Oct. 10, 2019), <https://www.politico.com/agenda/story/2019/04/10/trump-federal-regulations-000890>; Justin R. Pidot, *The Bureau of Land Management's Infirm Compensatory Mitigation Policy*, 30 FORDHAM ENVTL. L. J. 1, 3 (2018). As Bethany Davis Noll noted, the Administration's abysmal record in court should not be mistaken for failure because "the administration has learned to use delaying tactics to undermine and even repeal federal regulations it doesn't like, even when judges rule against it in court." Davis Noll, *supra*.

can be exceedingly difficult; according to one observer's assessment, the Administration has prevailed in only five percent of lawsuits challenging its deregulatory actions.¹⁸ Yet despite procedural irregularities, these efforts, and the litigation they have engendered, are in keeping with historic debates about the substance of environmental law.

This essay tentatively diagnoses a new, subversive approach to controlling environmental law. Instead of amending substantive provisions, this approach—"environmental nihilism"—strives to choke the flow of information. To illustrate this approach, imagine a statute or regulation making it illegal to study the health effects of chemical exposure. Such a rule would enervate numerous components of environmental law designed to protect public health—from air pollution, from water pollution, from workplace dangers, from hazardous substances in the soil.¹⁹ Without information produced by the research subject to this new ban, those provisions cannot restrict economic activity to protect human health and the environment. Similarly, a law making it illegal to survey wildlife would render the ESA ineffective, because the federal wildlife agencies would lack information to determine if species face a risk of extinction.²⁰

These extreme examples illustrate an important fact: controlling environmental law, even to the point of effectively eliminating its protections altogether, can be accomplished by controlling environmental information.²¹ Put differently, opponents of environmental protection can quietly accomplish goals of deregulation without openly challenging popular environmental programs.²²

Environmental nihilism seeks to manipulate substantive environmental law by suppressing or manipulating information. I use the term nihilism because those who pursue this course seek to cynically manipulate truth in a ruthless pursuit of an agenda.²³ To provide a pop-culture analogy, consider the self-proclaimed nihilists in the movie *The Big Lebowski*.²⁴ The hapless protagonist of

¹⁸ See Davis Noll, *supra* note 17; see also Buzbee, *supra* note 15, at 1360.

¹⁹ See, e.g., Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1190-94 (2014) (discussing different approaches to health-based standards included in various environmental laws).

²⁰ See 16 U.S.C. § 1533(a) (2018) (identifying factors governing listing decisions).

²¹ As Patrice McDermott noted in describing the W. Bush Administration's efforts at secrecy across a range of policy arenas, "lack of information leads to lack of power." Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL'Y 671, 671 (2002).

²² Proponents of environmental protection could similarly seek to control information that would trigger laxer regulation as a means of controlling environmental law. See *infra* notes 89-92 & accompanying text.

²³ I borrow the term nihilism recognizing that it is the subject of an extensive philosophical literature. The usage I intend echoes the Egoistical Nihilism of Max Stirner, who expressed a self-interested world view rejecting all ethics and viewing other people as objects important only to the extent of their "useableness, utility, use." David Holbrook, *A Philosopher of Today?: Max Stirner's Egoistical Nihilism*, 58 NEW BLACKFRIARS 382, 382 (1977) (quoting MAX STIRNER, *DER EINSZIGE UND SEIN EIGENTHUM* (1945)).

²⁴ *THE BIG LEBOWSKI* (Working Title Films 1998).

the film is tasked with delivering a ransom to secure the release of a kidnapped woman. Only no kidnap has occurred. When the protagonist confronts the putative kidnappers, they declare themselves nihilists, proclaiming “We believe in nothing Lebowski. Nothing.” They believe in nothing, that is, except that they deserve a payday regardless of the facts of the situation. Environmental nihilism similarly views truth as irrelevant, and facts subject to manipulation and suppression to achieve desired results.

This essay describes *environmental nihilism*—a posited worldview—rather than *environmental nihilists*—individuals ascribing to that worldview. It does so because environmental nihilism arises from motivation, and discerning subjective motives is difficult, particularly because they are so often mixed. Rarely will a government official proclaim that she adopts an information rule for the purpose of subverting the law, but rather will offer a seemingly legitimate justification. Only if that justification is a pretext, and if the rule suppressing information has been adopted for the purpose of subverting environmental law, will environmental nihilism exist.

Environmental nihilism may become an increasingly common component of disputes over environmental law. Environmental protection remains popular with the American public. A 2018 Gallup Poll reported that “[s]ixty-two percent of Americans currently say the government is doing too little to protect the environment.”²⁵ Technological changes also increasingly enable the public to generate vast quantities of environmental information, which will often trigger specific regulatory consequences. Moreover, administrative law principles constrain the ability of agencies to change policies without engaging the body of information before the agency.²⁶ Information may, therefore, increasingly lie in the crosshairs of those opposed to federal environmental regulation.

I don’t claim that environmental nihilism is currently a dominant component of American politics. Its extreme forms have yet to materialize. Yet, this essay identifies laws, regulations, and other government actions that obstruct the generation of information, or constrain the government’s ability to use information for regulatory purposes, that appear consistent with environmental nihilism. These examples are of sufficient number and variety to suggest that environmental nihilism is something to be taken seriously. The stakes are high. Where legal rules block the ability of private parties to obtain information, they cannot call public attention to issues of concern, initiate citizen suits against violators, or petition the federal government for relief. Where information lies beyond the purview of government, people suffer, ecological systems deteriorate, and polluters evade legal obligations.

This essay proceeds in three parts. Part I addresses the interconnection between information and environmental law. It begins looking backward, explaining that gaps in information have resulted in significant under-enforcement of legal requirements. It then looks ahead to an emerging paradigm in which

²⁵ Frank Newport, *Americans Want Government to Do More on Environment*, GALLUP (Mar. 29, 2018), <https://news.gallup.com/poll/232007/americans-want-government-more-environment.aspx>.

²⁶ See Buzbee, *supra* note 15, at 1365.

increasing capacity to collect and share information may allow regulators, and the public, to comprehensively monitor and evaluate environmental conditions, and thereby engage in complete enforcement. Part II defines environmental nihilism as a potential response to the transformative potential of increasing information. Part III describes three potential manifestations of environmental nihilism and identifies examples that appear consistent with them.

Parts of this essay may appear to verge into futurism—envisioning a world in which environmental information is comprehensive—and conspiracy theory—worrying that dishonest brokers will try to marshal the resources of the government to suppress information to subvert the law. By illuminating this potential through theoretical, extreme, and repressive rules, and through less extreme, real-world examples, I counsel vigilance. We should scrutinize efforts to regulate information, question whether they have been selected because of their capacity to reshape substantive environmental law, and if so, be relentless in our efforts to reveal their true nature.

I. Information and Environmental Law

Environmental law is a highly technical field requiring extensive information, often of a complicated scientific nature. It requires data about a broad range of variables—biological, medical, climatological—and conceptual knowledge about how ecological and human health systems function, interact, and respond to disturbance.²⁷ This Part describes the role information plays in effectuating environmental law and how information gaps lead to under-enforcement. It then describes how increasing capacity to gather and distribute information may be swiftly closing such gaps, leading toward a future in which full enforcement of environmental law will be possible. That potentiality highlights the critical nature of information and the vulnerability of environmental law to information suppression. As Parts II and III will describe, environmental nihilism may be a response.

A. Information, Information Gaps, and Environmental Law

Environmental statutes depend on information. Yet uncertainty is endemic, arising from the complexity of biological and ecological interactions, and gaps in data abound.²⁸ These deficits result in significant under-enforcement.

Consider the following, striking example: in 2011 the U.S. Fish and Wildlife Service denied a petition to add the giant Palouse earthworm to the federal list of threatened and endangered species, because “very little

²⁷ See, e.g., Pidot, *supra* note 14, at 174-75 (discussing scientific information related to conservation of threatened and endangered species).

²⁸ See Justin R. Pidot, *Governance and Uncertainty*, 37 CARDOZO L. REV. 113, 125-27 (2015) (cataloging sources of uncertainty for environmental law).

information” existed about the earthworm, which had only been positively identified in the wild a handful of times, making it impossible, the Service believed, to adequately evaluate threats to the species’ persistence.²⁹ Because of sparse information, the ESA could not be applied, and this elusive earthworm, thought to be extinct until researchers discovered two specimens on a small tract of native Idaho prairie in 2010,³⁰ may slip into oblivion without ever enjoying the protections of “one of the world’s most powerful species preservation laws.”³¹

The creation of environmental law depends on information. The field experienced remarkable growth in the 1970s when Congress enacted the major federal environmental statutes—the Clean Air Act, Clean Water Act, the ESA, and many others.³² This transformation in the legal landscape was occasioned by a public awakening to the effects of human activities on the environment born from media coverage of vivid examples of environmental degradation, like news stories in 1969 covering a serious oil spill in Santa Barbara and the Cuyahoga River in flames.³³ Today, Congress has largely been out of the business of legislating in the field for several decades,³⁴ with a few minor exceptions, like amendments to the Toxic Substances Control Act enacted in 2016.³⁵ Yet, information continues to dominate debate over environmental law in Washington, D.C. and in the public square. It’s hard to imagine, for example, proponents of limiting greenhouse gas emissions making a case for federal climate legislation in the absence of the extensive body of climate science.³⁶

Information is equally critical for the implementation of most federal environmental statutes.³⁷ Consider one of the Clean Air Act’s quintessential programs, the National Ambient Air Quality Standards (NAAQS), which

²⁹ U.S. Fish & Wildlife Service, *Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the Giant Palouse Earthworm (Drilolierius americanus) as Threatened or Endangered*, 76 Fed. Reg. 44547, 44559 (July 26, 2011).

³⁰ See Jim Robbins, *Researchers Find Rare Giant Worm Doesn’t Live Up to Its Billing*, N.Y. TIMES (Apr. 27, 2010), <https://www.nytimes.com/2010/04/27/science/27earthworm.html>.

³¹ Federico Cheever, *The Road to Recovery: A New Way of Thinking about the Endangered Species Act*,

23 ECOL. L.Q. 1, 15 (1996).

³² Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law*, 20 VA. ENVTL. L.J. 75, 77-79 (2001); see Aagaard, *supra* note 8, at 223 (identifying the “environmental-legal revolution of the 1970s”).

³³ See Lazarus, *supra* note 32, at 79. Publication of Rachel Carson’s seminal work *Silent Spring* is often also credited with focusing public attention on the perils pesticides posed for wildlife. *Id.* (discussing RACHEL CARSON, *SILENT SPRING* (1964)).

³⁴ See Todd S. Aagaard, *Environmental Law’s Heartland and Frontiers*, 32 PACE ENVTL. L. REV. 511, 512 (2015) (“A stalemate in environmental politics has impeded major legislative innovation in Congress since 1990.”).

³⁵ Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (codified at 15 U.S.C. § 2601 (2018)).

³⁶ See, e.g., Philip B. Duffy et al., *Strengthened Scientific Support for the Endangerment Finding for Atmospheric Greenhouse Gases*, 363 SCIENCE 597 (2019).

³⁷ Professor William Buzbee recently addressed “reality based factors” affecting agency decisions to revisit and change prior decisions, “including past legal documentation, history, regulatory experience, health impacts, science, data, models and predictions, past agency studies, and published explanations of the previous regulatory choice.” See Buzbee, *supra* note 15, at 1361.

addresses some of the most prevalent air pollutants.³⁸ The NAAQS, like most of the major regulatory provisions of the Clean Air Act, remain inactive until the EPA makes an affirmative regulatory determination.³⁹ Section 108 of the Clean Air Act authorizes the EPA to designate air pollutants as “criteria pollutants” if they originate from “numerous or diverse mobile or stationary sources” and “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”⁴⁰ Section 109 requires the EPA to establish NAAQS for each criteria pollutant sufficiently stringent to protect public health.⁴¹ The statutory text does not appear to allow any compromise, it is obligatory, and as the Supreme Court has instructed, it only allows the EPA to consider health risks, rather than balance risks and the economic cost of pollution abatement.⁴² The text standing alone, however, has literally no effect unless and until the EPA has adequate information to form judgments about the risks criteria pollutants pose to public health. NAAQS, once adopted, also depend upon information to be effective, because in the absence of air quality monitoring data, it is impossible to determine whether a geographic area satisfies the regulatory standards.⁴³ Even if data reveals exceedance of the NAAQS, corrective action—largely mediated through implementation plans adopted by states⁴⁴—requires locating pollution sources and identifying and implementing techniques for reducing emissions at those sources. Finally, ensuring compliance with the provisions of a state implementation plan and initiating enforcement against non-compliant sources requires information about actual emissions on an ongoing basis.⁴⁵

Many other federal environmental programs similarly require affirmative regulatory steps to translate statutory requirements into enforceable limitations.

³⁸ 42 U.S.C. §§ 7408-7409 (2018); see Livermore & Revesz, *supra* note 19, at 1198.

³⁹ Substantial parallels exist in the structure of the NAAQS, New Source Performance Standards, and mobile source provisions, each of which require the EPA to find endangerment to human health or the environment. See 42 U.S.C. §§ 7408 (a)(1)(A), 7411(b)(1)(A), 7521(a)(1).

⁴⁰ *Id.* § 7408(a)(1)(A)-(B).

⁴¹ *Id.* § 7409(b)(1).

⁴² *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 465 (2001); see Livermore & Revesz, *supra* note 19, at 1189 (arguing that express reliance on cost benefit analysis in establishing NAAQS would likely result in more protective standards).

⁴³ See Ann E. Carlson, *The Clean Air Act’s Blind Spot: Microclimates and Hotspot Pollution*, 65 U.C.L.A. L. REV. 1036, 1060 (2018) (“The NAAQS measurements are based on averages, culled from monitoring and models, of the ambient air quality across large geographic areas.”). Professor Ann Carlson argues that the EPA’s approach to monitoring ambient air quality overlooks “hotspot air pollution,” the concentration of pollutants and attendant health risks in microclimate within a region. *Id.* at 1041-42.

⁴⁴ 42 U.S.C. § 7410.

⁴⁵ As Professor Joel Mintz has explained, environmental enforcement typically is viewed through a deterrence theory that posits that regulated parties will “comply with environmental laws where they perceive that it is in their economic self-interest to do so.” Joel A. Mintz, *Thinking Beyond Gridlock: Towards a Consistent Statutory Approach to Federal Environmental Enforcement*, 46 ENVTL. L. 241, 243 (2016). Under this view, “the central tasks for environmental enforcement agencies are thus to detect violations promptly and punish them effectively.” *Id.*

The ESA requires a listing decision.⁴⁶ The Clean Water Act requires testing of waterbodies to determine if water quality standards are met.⁴⁷ The Comprehensive Environmental Response, Liability, and Compensation Act requires detection of hazardous substances in the environment and identification of the parties responsible.⁴⁸ Even self-executing provisions require information to be effective. For example, section 301 of the Clean Water Act directly prohibits unpermitted point source discharges.⁴⁹ Agencies issuing permits to exempt discharges from that prohibition must, however, evaluate existing pollution control technologies to establish effluent limitations.⁵⁰ And every statutory scheme requires evidence of noncompliance for enforcement to occur.

Congress did not leave generation of necessary information to the winds of fate. Rather, Congress authorized federal agencies to fund or carry out research tasks. For example, the Clean Air Act requires the EPA to “conduct a program of research, testing, and development of methods for sampling, measurement, monitoring, analysis, and modeling of air pollutants.”⁵¹ It also directs the EPA to “conduct a research program on the short-term and long-term effects of air pollutants on human health and ecosystems.”⁵² The agency may choose to directly fund and carryout these research tasks or “make grants to air pollution control agencies, to other public or nonprofit private agencies, institutions, and organizations, and to individuals”⁵³ for the purpose of examining “the causes, effects (including health and welfare effects), extent, prevention, and control of air pollution.”⁵⁴

Congress also required regulated parties to furnish information relevant to the implementation and enforcement of environmental law. Such obligations sometimes occur in conjunction with traditional, prescriptive requirements.⁵⁵ For example, the Clean Water Act obligates holders of National Pollution Discharge Elimination System permits to monitor their effluent and report data on a regular basis.⁵⁶ Because many environmental laws are coupled with potent citizen-suit

⁴⁶ 16 U.S.C. § 1533(a) (2018).

⁴⁷ 33 U.S.C. § 1313(d)(1)(A) (2018).

⁴⁸ 42 U.S.C. §§ 9604, 9606, 9607.

⁴⁹ 33 U.S.C. § 1311(a).

⁵⁰ *E.g.*, *id.* § 1314(b)(1)(A) (requiring certain effluent limitations be established based on “the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources”).

⁵¹ 42 U.S.C. § 7403(c).

⁵² *Id.* §§ 7403(d)-(e).

⁵³ *Id.* § 7403(b)(3).

⁵⁴ *Id.* § 7403(a)(1).

⁵⁵ See David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 COLO. L. REV. 379, 380 (2005). For an excellent catalogue of information disclosure laws, see John D. Echeverria & Julie B. Kaplan, *Poisonous Procedural ‘Reform’: In Defense of Environmental Right-to-Know*, 12 KAN. J.L. & PUB. POL’Y 579, 581-86 (2001).

⁵⁶ 33 U.S.C. § 1314(i) (2018).

provisions,⁵⁷ information included in such reports can reveal illegal activities leading to enforcement regardless of the appetite of federal agencies.⁵⁸

Other laws, most famously the Toxic Release Inventory (TRI), rely on information disclosure as a substitute for direct government regulation of behavior.⁵⁹ The TRI operates from a “right to know” perspective requiring companies to report any release of specific hazardous chemicals into the environment.⁶⁰ Information disclosure can galvanize popular opinion and, potentially, lead to administrative or legislative intervention. Moreover, because companies are sensitive to public sentiment, requiring information disclosure can change behavior;⁶¹ the TRI has been credited with significantly reducing releases of the chemicals it covers as companies strive to avoid reportable incidents.⁶²

So far, this section has explained that environmental law relies upon information at numerous points: to educate the public, to craft legislation, to assess risk, to monitor environmental condition, to identify harmful activities, to evaluate available treatment technology, to reveal non-compliance, and to pursue enforcement. Just as each of these aspects of environmental law (and others too) rely upon information, gaps in information limit its efficacy. Broad non-compliance may exist undetected and unenforced—for example, roughly 10,000 point source discharges had failed to obtain permits in the first two decades of the Clean Water Act.⁶³ While the facts necessary to identify those unpermitted discharges are not conceptually difficult—the mere existence of a pipe or other discrete conveyance discharging water pollution without a permit is sufficient—regulators have limited resources and often little political appetite to pursue polluters thought to be relatively insignificant.⁶⁴

⁵⁷ *E.g., id.* § 1365; 42 U.S.C. § 7604.

⁵⁸ *See* Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 68 (3d Cir. 1990) (explaining that Clean Water Act “provides an effective mechanism for monitoring and limiting polluting discharges” because it compels permit holders to monitor effluent and “[a] comparison of the permit limits with the reported concentrations quickly reveals whether a permittee is complying with its permit”).

⁵⁹ *See* Case, *supra* note 55, at 382; Paul R. Kleindorfer & Eric W. Orts, *Information Regulation of Environmental Risks*, 18 RISK ANALYSIS 155 (1998) (describing various information regulation approaches to environmental problems).

⁶⁰ *See* 42 U.S.C. § 9603(a).

⁶¹ *See* Echeverria & Kaplan, *supra* note 55, at 580 (“[P]ublic awareness of hazards can be a powerful incentive to eliminate or minimize hazards . . .”).

⁶² *Id.* at 570.

⁶³ Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 304-305 (1999).

⁶⁴ Richard Webster has suggested “the possibility of states engaging in a hidden race-to-the-bottom by not vigorously enforcing the legal standards that are in place.” Richard Webster, *Federal Environmental Enforcement: Is Less More?*, 18 FORDHAM ENVTL. L. REV. 303, 303-04 (2007). The potential for citizen suits as a substitute for government enforcement provides a counterweight to intentional under-enforcement by states, so long as the information necessary to detect violations exists, or at least remains available for collection by individuals or non-government entities.

Compliance with legal requirements may itself produce erroneous information undermining environmental standards. As Professor Ann Carlson recently explained, a “major concern about emissions from refineries and chemical plants—which emit some of the most toxic pollutants along with conventional NAAQS pollutants—is that there may be systematic underreporting errors in emissions measurements based on measuring techniques the plants use with approval from the EPA.”⁶⁵ Other information problems are thornier still because they require sophisticated scientific determinations at the outer edge of current capacities. For example, public health standards rarely incorporate cumulative risk assessment to evaluate risks associated with exposure to multiple chemicals.⁶⁶ As Professor Sanne Knudsen has explained, that deficit arises (at least in part) from the difficulty of developing models of chemical interactions in the human body and of acquiring adequate data to run those models that are developed.⁶⁷

Information gaps thus define the contours of environmental law. Methodologies that under-report emissions may lead to laxer standards. Undetected air pollution hot-spots and impaired waterways may remain unaddressed. The cryptic nature of rare species may prevent accurate assessment of their viability. Chemicals with unknown health risks may remain available for sale. Polluters escaping notice may persist in their activities unencumbered by legal requirements. Sites containing undetected contaminants may remain polluted, potentially until long after those responsible parties have disappeared. Lacking the resources to acquire comprehensive environmental data and the sophistication to fully characterize the risks associated with human activities, we fail to fully actualize existing legal requirements. That has been the history of environmental law. As the next section describes, however, it may not be the future.

B. Transformation in the Information Age

The information age may transform environmental law. New technologies continuously lower barriers to gathering information about pollution, species, climate, and other conditions in the natural world, and the internet enables individuals and other non-government actors to easily coordinate and organize research activities. This section describes those trends, which place the importance of information to the full expression of environmental law as it currently exists in sharp relief, highlighting its vulnerability to the manifestations of environmental nihilism described in Part III.

Comprehensive environmental information would result in a radical change in scope of environmental law. As Professor Daniel Espy opined in 2004, “we stand on the verge of an environmental revolution perhaps as important as that which launched the modern environmental movement,” that presents “an

⁶⁵ Carlson, *supra* note 43, at 1059.

⁶⁶ See Sanne H. Knudsen, *Regulating Cumulative Risk*, 101 MINN. L. REV. 2313, 2314 (2017).

⁶⁷ *Id.* at 2332.

opportunity to make environmental protection more data-driven, empirical, and analytically rigorous.”⁶⁸ As information gaps close, fewer risks to human health and ecological systems will remain undetected and an increasing number of actors and activities causing those risks will be revealed. Espy envisions a world in which no polluter remains hidden because “virtually all emissions will be susceptible to tagging, tracking, and measurement at low cost.”⁶⁹

To understand the significance of comprehensive environmental information, consider the ESA. Critics of the ESA have long argued that it creates incentives for property owners to kill listed species entering land before anyone detects the species.⁷⁰ This posited strategy of “shoot, shovel, and shut-up” would evade the ESA’s strictures.⁷¹ It’s unclear how often landowners pursue this strategy, which is patently illegal. In any case, technology to continuously track and monitor each individual fish, bird, animal, or insect that is a member of a listed species would make it virtually impossible for landowners engaging in such conduct to evade detection. Total information would, in other words, result in the potential for total enforcement of the ESA’s prohibition on the take of listed species.⁷²

A total information state may seem far-fetched. After all, who could track every bird or insect within the United States? Yet the last decade has witnessed considerable changes in the direction of comprehensive information. For example, as George Wyeth and his distinguished colleagues recently wrote, “[c]itizen science is flourishing as a tool for scientific advancement and as a movement for engaging the public.”⁷³ As they report, a leading inventory of citizen science has more than 50,000 active members and identifies more than 1,700 projects.⁷⁴ Put differently, an army of individuals stands ready to produce vast quantities of information about the environmental conditions that surround them. Highly sophisticated efforts exist too. The non-profit Environmental Defense Fund has announced that it will launch its own satellite in 2020 to monitor methane emissions from oil and gas operations around the globe.⁷⁵

⁶⁸ Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 119 (2004).

⁶⁹ *Id.* at 157.

⁷⁰ See Tony Hoch, *Tools for Managing Endangered Species on Private Lands*, 31 WYO. LAW. 30, 30 (2008).

⁷¹ J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT’L ENVTL. L. REV. 343, 346 (2015); Jeffrey J. Rachlinski, Book Review, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act*, 82 CORNELL L. REV. 356, 364-65 (1997).

⁷² 16 U.S.C. § 1358(a)(1)(C) (2018).

⁷³ George Wyeth et al., *The Impact of Citizen Environmental Science in the United States*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10,237, 10,238 (2019).

⁷⁴ *Id.*

⁷⁵ Press Release, Env’tl. Def. Fund, EDF Announces Satellite Mission to Locate and Measure Methane Emissions (Apr. 11, 2018), <https://www.edf.org/media/edf-announces-satellite-mission-locate-and-measure-methane-emissions>; see also Wyeth, et al., *supra* note 73, at 10,237.

Citizen science is not a new phenomenon. For more than twenty years, the Audubon Society has organized an annual Great Backyard Bird Count to enlist tens of thousands of birdwatchers around the world to survey bird populations.⁷⁶ Yet advances in technology enable everyday people to collect information today that would have required extensive training and costly equipment just a decade ago. New infrared cameras and even wearable devices detect air emissions invisible to the naked eye, new technologies can identify the source of water born bacteria based on DNA analysis, and “[t]he use of smartphones for citizen science allows data to be collected in photographs and video, and through built-in and add-on sensors (such as accelerometers) easily tracked through global positions systems.”⁷⁷

The apparent inevitability of massively expanded data about the environment, and the ability of the public to access and distribute it, may appear to inevitably lead to improvements in environmental law, which in turn will improve outcomes for human and non-human communities. To be sure, the Internet also facilitates the spread of misinformation, enabling evangelists for discredited theories to reach new audiences—the rise of the Flat Earth Movement is an obvious example.⁷⁸ The information commons enabled by the Internet will hopefully serve a sorting function, casting misinformation into the dustbin of history in much the way that crowdsourcing information promotes accuracy and reliability of Wikipedia entries.⁷⁹ Moreover, administrative law should serve as a corrective to false information when it enters the cognizance of the government and to ensure that agencies have “processes in place to ensure the reliability or veracity of the informational inputs to [their] policy decisions.”⁸⁰

In other words, crackpots on the Internet are not a true threat to environmental law in the information age. As the remainder of this essay will suggest, a backlash may be growing to the increasing capacity to produce information. Environmental nihilism may be on the rise, seeking to suppress information as a means to enervate environmental law.

II. Defining Environmental Nihilism

Environmental law’s dependence on information leaves it vulnerable to efforts to suppress and control information as a means of subversion. Enter

⁷⁶ *About the Great Backyard Bird Count*, NAT’L AUDUBON SOC’Y, <https://www.audubon.org/conservation/about-great-backyard-bird-count> (last visited Dec. 10, 2019).

⁷⁷ Wyeth et al., *supra* note 73, at 10,242-43.

⁷⁸ See Alan Burdick, *Looking for Life on a Flat Earth: What a Burgeoning Movement Says about Science, Solace, and How a Theory Becomes Truth*, NEW YORKER (May 30, 2018), <https://www.newyorker.com/science/elements/looking-for-life-on-a-flat-earth>.

⁷⁹ See Jim Giles, *Internet Encyclopaedias Go Head to Head*, 438 NATURE 900 (2005). *But see* Adam M. Wilson & Gene E. Likens, *Content Volatility of Scientific Topics in Wikipedia: A Cautionary Tale*, 10 PLOS ONE 1 (2015), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0134454> (noting frequent editing of Wikipedia entries about scientific topics that are politically controversial).

⁸⁰ Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 745 (2014); *see also* Buzbee, *supra* note 15, at 1396-01.

environmental nihilism—a worldview seeking to control substantive environmental law without engaging in the forthright dialogue and political debate necessary to amend it. To be precise, environmental nihilism targets information underpinning the operation of existing legal rules and seeks to engage the apparatus of the state to prevent its generation, dissemination, or use by regulators. A necessary predicate for environmental nihilism, then, is the existence of legal rules—like those catalogued in Part I—that demand information to become effective.

Environmental nihilism implicates state action, distinguishing it from purely private efforts to conceal inconvenient truths. For example, while far from endemic, a few private actors have always falsified data to hide their misconduct,⁸¹ and some property owners may have pursued the “shoot, shovel, and shut-up” strategy for evading the ESA.⁸² Private acts to conceal damaging information from the government are, however, different in kind from efforts to wield the instrumentalities of the state for such purposes.⁸³ The first is a cover-up to avoid the law, the second corrupts the law itself. In its ultimate form, environmental nihilism would manifest through legal rules designed to comprehensively suppress information that runs contrary to the objectives of those holding the reins of power, while leaving existing legal rules in place. For example, imagine a government that professes an abiding commitment to preserving biodiversity under the ESA while simultaneously suppressing any information about the decline of species. Such a government would typify the cynical, disingenuous nature of environmental nihilism.

The United States does not currently have such extreme despotic rules, although since censorship of that degree exists elsewhere, we shouldn’t blithely assume it could never occur here.⁸⁴ Less radical manifestations of environmental nihilism may be difficult to detect because they may masquerade as rules designed for legitimate purposes. Indeed, none of the real-world examples described in Part III involve policies adopted for the express purpose of

⁸¹ See, e.g., Press Release, U.S. Dep’t of Justice, Jury Finds Asbestos Air Monitoring Company and Employees Guilty of Clean Air Act and Fraud Violations (Oct. 13, 2010), <https://www.justice.gov/opa/pr/jury-finds-asbestos-air-monitoring-company-and-employees-guilty-clean-air-act-and-fraud> (describing conviction for falsifying lab results related to asbestos).

⁸² See *supra* notes 70 to 71 & accompanying text.

⁸³ This distinction between purely private actions designed to advance private interests in evading environmental law and actions designed to achieve such goals through government action resembles differentiating between consumer preferences and political or ideological preferences. See Mark Sagoff, *We Have Met the Enemy and He Is Us or Conflict and Contradiction in Environmental Law*, 12 ENVTL. L. 283, 286 (1982).

⁸⁴ See, e.g., Kuang Keng Kuek Ser, *How China Has Censored Words Relating to the Tiananmen Square Anniversary*, PUBLIC RADIO INTERNATIONAL’S THE WORLD (June 4, 2016), <https://www.pri.org/stories/2016-06-03/how-china-has-censored-words-relating-tiananmen-square-anniversary> (reporting that due to government censorship, only 15 percent of Beijing University students could recognize the infamous photograph of a man standing in front of a convoy of tanks in Tiananmen Square).

information suppression. Rather, they were advanced under the guise of either improving the quality of the information considered by the government or advancing values unrelated to the application of environmental law, like protecting the sanctity of private property.⁸⁵ Those justifications may be pretexts. Indeed, I believe some of them are. But it is difficult to be certain.

Detecting environmental nihilism is further complicated by the inherent difficulty in determining whether a legal rule obstructs or advances truth seeking. All information is subject to interpretation, and the manner by which each of us interprets it is influenced by our history, perspective, personality, and place in society.⁸⁶ Cognitive science confirms, for example, that people inevitably emphasize information consistent with their world view and take a more skeptical eye to that which calls it into question.⁸⁷ Even well-intentioned legal rules can embed these human frailties, having the effect of suppressing truthful information, although designed for the purpose of weeding out falsity.⁸⁸ There is, however, a subtle yet vital difference between actions intended to exclude information because it is likely to be in error and those designed to suppress truthful information to avoid its implications. Honest and open debate can occur to adjust a policy motivated by a desire to promote accuracy. A policy motivated by a furtive desire to avoid truthful information, on the other hand, will resist such discourse.

⁸⁵ See *infra* Part III.A-B for discussion of Wyoming's Data Trespass Law and the EPA's proposed Data Transparency Rule.

⁸⁶ See, e.g., Stephanie Tai, *When Natural Science Meets the Dismal Science*, 42 ARIZ. ST. L.J. 949, 962-73 (2010) (describing practical and philosophical limitations on scientific objectivity).

⁸⁷ See Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245, 288 (2016) (discussing confirmation bias).

⁸⁸ The Information Quality Act (IQA), enacted as part of an appropriations bill in 2000, could be an example of such a policy. Pub. L. No. 106-554 § 515, 114 Stat. 2763 (2000) (codified at U.S.C. 44 § 3516 (2018)). The IQA established procedures through which non-governmental parties could seek corrections of information disclosed by federal agencies. See James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL'Y 521, 526 (2001). The law has been criticized because it has the potential to delay agency action. As professor Sidney Shapiro explained: "Ensuring high-quality information is a worthy goal, but procedural requirements have an important side effect—they slow down the government's capacity to act and, if they are sufficiently burdensome, they can bring government to a standstill." Sidney A. Shapiro, *OMB's Dubious Peer Review Procedures*, 34 ENVTL. L. REP. 10,064, 10,064 (2004); see also Echeverria & Kaplan, *supra* note 55, at 580. A process ultimately designed to correct errors, even if such errors are rare and the process potentially burdensome, see *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2001 Part 3: Executive Office of the President and Funds Appropriated to the President: Hearing before the Subcomm. on Treasury, U.S. Postal Serv., and Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 106th Cong. 509-10 (2000) (Questions for the Record Submitted by the Committee to the Office of Management and Budget) (expressing the view of the Office of Management and Budget that it did "not believe there is a government-wide problem that would require regulations"), represents different judgments about the importance of error correction as compared to expeditious governmental action. If, on the other hand, the true purpose of advocates for the IQA were to delay the ability of regulators to consider and disclose truthful information, for the purpose of obstructing substantive law, then it would constitute a manifestation of environmental nihilism.

Environmental nihilism could appear inherently deregulatory and anti-environmental, an impression that the examples identified in this essay will reinforce because the early manifestations I detect have been of that nature. New information often, but not always, supports greater environmental protection. As a result, environmental nihilism need not be inherently ideological. Just like proponents of deregulation, proponents of environmental protection could establish rules designed to suppress information that would have regulatory consequences they dislike. To illustrate this potential, consider the facts surrounding *Tennessee Valley Authority v. Hill*, a case pitting the snail darter, a newly discovered species of fish, against the Tellico Dam, which impounded the last free flowing portion of the Little Tennessee River.⁸⁹ The story is a complicated one, involving a seminal Supreme Court decision, an amendment to the ESA to create the so-called “God Squad” exemption, and eventually a specific congressional directive to complete the dam.⁹⁰ For the present purpose, however, the important fact is this: at the time of the litigation, only one population of snail darter had been identified; thereafter scientists identified other populations in other rivers.⁹¹ The discovery of those other populations during the pendency of the litigation would have compromised the interests of those opposed to damming the Little Tennessee. A rule designed to prohibit research on the snail darter or suppress information about other populations would have manipulated application of the ESA. It would, in other words, fall within the ambit of environmental nihilism as I have described it. Similarly, environmental nihilism would include rules designed to suppress information that chemicals are less toxic than previously thought, and therefore subject to fewer regulatory restrictions, or that climate change is proceeding more slowly than estimated, and therefore need not be considered as a component of the environmental review process required by the National Environmental Policy Act.⁹² While I am unaware of examples of advocates for environmental protection seeking to establish such rules, recognizing the potential for such environmentalist versions of environmental nihilism helps to illuminate the siren song of information manipulation. For those committed to the preservation of old growth forests, gray wolves, or free-flowing rivers, the allure of rules designed to suppress information likely to erode legal protections could be powerful.

⁸⁹ *Tenn. Valley Authority v. Hill*, 437 U.S. 153 (1978).

⁹⁰ For a comprehensive treatment of the Tellico Dam saga, see ZYGMUNT J.B. PLATER, *THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER* (2013).

⁹¹ See Final Rule Reclassifying the Snail Darter (*Percina tanasi*) From an Endangered Species to a Threatened Species and Rescinding Critical Habitat Designation, 49 Fed. Reg. 27,510, 27,510 (July 5, 1984) (codified at 50 C.F.R. pt. 17) (noting discovery of other populations of snail darter in 1979 and 1980).

⁹² See Arnold W. Reitze, Jr., *Dealing with Climate Change under the National Environmental Policy Act*, 43 WILLIAM & MARY ENVTL. L. & POL’Y REV. 173, 197-214 (2018) (discussing National Environmental Policy Act case law addressing climate change).

Ultimately, the point is this: environmental nihilism may be cynical. It may be disingenuous. It may undermine the rule of law. But it also presents a potent strategy to achieve desired outcomes under existing legal rules. It would be Panglossian to assume that such a strategy will not be pursued someday. As we shall see, it may already be upon us.

III. Manifestations of Environmental Nihilism

This Part describes three potential manifestations of environmental nihilism: suppressing citizen science, restricting the use of information by regulatory agencies, and limiting information generation by the government. Each section begins by describing extreme exemplars of these approaches and then proceeds to identify recent, less extreme examples that resemble those exemplars.

A. Obstructing Citizen Information Gathering

Environmental nihilism may be a response, at least in part, to burgeoning citizen science that promises exponentially greater information about the environment and human activities affecting it. Thus, the first manifestation of environmental nihilism attempts to turn the tide and chill those who would collect information about the environment. Implementation of such a strategy would occur through punishment; for example, consider a Machiavellian despot imprisoning anyone who dared generate information inconvenient to her policy preferences.

Unfortunately, this analogy is not as hyperbolic as it first appears. Animal rights activists have been the subject of extensive legislative efforts, collectively referred to as “ag gag laws,” to punish them for collecting truthful information about animal agricultural practices,⁹³ including information about illegal animal abuse.⁹⁴ These statutes generally target undercover investigations of the meat industry and have come in a variety of forms: some impose criminal liability, some civil penalties, and some create private rights of action.⁹⁵ In 2015, Wyoming enacted the first (and so far only) law targeting environmental data, rather than information about animal agriculture.⁹⁶ The history of this law, which

⁹³ See Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1466-71 (2015); Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 65 (2014).

⁹⁴ See Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1002 (2015) (describing under-cover video of a California slaughterhouse leading to “criminal charges against a slaughterhouse manager, the largest beef recall in U.S. history, a \$500 million False Claims Act Judgment, and state legislation mandating better treatment of injured animals”).

⁹⁵ See Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1335-39 (2015) (describing existing ag gag laws).

⁹⁶ WYO. STAT. ANN. § 6-3-414 (2015); *Id.* § 40-27-101. Because the law included both a criminal and civil provision, it was enacted through two companion bills. See 2015 Wyo. Sess. Laws 507-09 (criminal law); 2015 Wyo. Session Laws 593-94 (civil law). This essay refers to these collectively as the “Data Trespass Law.”

the state termed a “Data Trespass Law,”⁹⁷ provides an example of how environmental nihilism can be embedded in rules to suppress citizen science. It also illustrates that such strategies may founder because they conflict with the First Amendment.⁹⁸

Wyoming adopted its Data Trespass Law in response to work performed by the Western Watersheds Project (WWP) in the intermountain west.⁹⁹ The organization advocates for the protection of public lands and has a history of challenging grazing practices it views as causing environmental damage in contravention of federal law.¹⁰⁰ As a component of its work, WWP collects water samples from streams in areas frequented by livestock and tests for contaminants, including *E. coli* bacteria.¹⁰¹

The significance of WWP’s water sampling arises from the water quality program established by section 303 of the Clean Water Act.¹⁰² Section 303 is not directly regulatory in nature. It requires states—or should they decline to participate, the EPA—to designate uses for waterways, adopt water quality standards to protect those uses, and monitor for compliance with the standards.¹⁰³ If a waterway exceeds the applicable water quality standards, it must be included on a biannual list of impaired waters.¹⁰⁴ The water quality standards program does not directly regulate non-point source pollution, like grazing, which the Clean Water Act generally leaves to the states.¹⁰⁵ Federal agencies must, however, ensure that federal actions, such as issuing and renewing permits for grazing on public lands, do not cause or contribute to violations of water quality standards.¹⁰⁶ WWP detected levels of *E. coli* bacteria in several streams that exceeded Wyoming’s water quality standards, causing those streams to be included in the state’s 2012 list of impaired waters.¹⁰⁷

⁹⁷ See Trevor Hughes, *Wyoming Law Bans “Data Trespassing”*, USA TODAY (May 14, 2015), <https://www.usatoday.com/story/news/nation/2015/05/14/wyoming-data-trespassing/27310567/>.

⁹⁸ See *W. Watershed Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017).

⁹⁹ See *About WWP*, W. WATERSHEDS PROJECT, <https://www.westernwatersheds.org/about/> (last visited Dec. 10, 2019).

¹⁰⁰ See, e.g., *W. Watersheds Project v. BLM*, 721 F.3d 1264, 1268 (10th Cir. 2013) (challenging grazing permits alleged to be “substantial cause of environmental degradation”).

¹⁰¹ WYO. DEP’T OF ENVTL. QUALITY, WATER QUALITY ASSESSMENT AND IMPAIRED WATERS LIST (2012 INTEGRATED 305(B) AND 303(D) REPORT) 48 (2012) (hereinafter “2012 WYOMING 303(D) LIST”), https://www.nrcs.usda.gov/wps/PA_NRCSCConsumption/download?cid=stelprdb1248144&ext=pdf.

¹⁰² 33 U.S.C. § 1313 (2018).

¹⁰³ *Id.* § 1313(d).

¹⁰⁴ *Id.*

¹⁰⁵ See Robin Kundis Craig, *Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation*, 15 J. ENVTL. L. & LITIG. 179, 179 (2000) (“States . . . are the exclusive regulators of nonpoint source pollution.”).

¹⁰⁶ 33 U.S.C. § 1341; see Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 ECOL. L.Q. 201, 286-300 (1996).

¹⁰⁷ 2012 WYOMING 303(D) LIST, *supra* note 101.

The Data Trespass Law was designed to chill the collection of environmental data, such as WWP's water quality data. It imposed civil and criminal penalties on any person who enters "open land for the purpose of collecting resource data" without written or verbal permission from the property owner.¹⁰⁸ The law defined "open land" to encompass areas outside the boundaries of any incorporated municipality,¹⁰⁹ and defined "resource data" to include data "relating to land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species," subject to exceptions for surveying property boundaries, assessing taxes, and engaging in police activities.¹¹⁰ The law further defined the term "collect" to mean "to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form from open land which is submitted or intended to be submitted to any agency of the state or federal government."¹¹¹ This last definition connected criminal and civil liability directly to communicating information to the government.

The legislative debate over the Data Trespass Law clearly indicated that it was designed in response to WWP's activities. A sponsor of the law described it as "extraordinary measures" designed to address "egregious abuse by those collecting water quality samples around the state of Wyoming."¹¹² Moreover, the law was enacted in the wake of a lawsuit filed by a group of ranchers who, seeking to bar the organization from accessing public lands, brought a trespass lawsuit against WWP for driving on roads built and maintained by the BLM that crossed small areas of private property.¹¹³

WWP, along with other organizations facing potential liability, challenged the Data Trespass Law on First Amendment grounds.¹¹⁴ After the district court denied the state's motion to dismiss because the judge had "serious concerns and questions as to the Constitutionality of various provisions of these trespass statutes,"¹¹⁵ the Wyoming legislature made modest amendments.¹¹⁶ The amendments redefined the term "collect" to eliminate the clause related to submitting data to the government and limited liability to persons crossing private

¹⁰⁸ WYO. STAT. ANN. § 6-3-414(a) (2015) (criminal); *Id.* § 40-26-101 (civil).

¹⁰⁹ *Id.* § 6-3-414(d)(iii)

¹¹⁰ *Id.* § 6-3-414(e)(iv).

¹¹¹ *Id.* § 6-3-414(d)(i).

¹¹² Transcript of Senate Debate for Wyoming Senate File 12, January 19, 2015 (on file with author); *see also* Compl. at 66, *W. Watersheds Project v. Michael*, Civil No. 15-cv-169-s (Sept. 29, 2015).

¹¹³ *See* Arno Rosenfeld, *Ranchers, Environmental Group Settle Trespass Lawsuit*, CASPER STAR TRIBUNE (Sept. 5, 2016), https://trib.com/news/state-and-regional/ranchers-environmental-group-settle-trespass-lawsuit/article_43fcb94e-cd0d-5e46-a6d4-19326c4c892e.html. I served as co-counsel defending WWP in the trespass lawsuit.

¹¹⁴ *W. Watershed Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017). I served as counsel to several of the plaintiffs, including WWP, in this litigation.

¹¹⁵ *W. Watersheds Project v. Michael*, 2015 W.L. 12852338, * 17 (unreported) (Dec. 28, 2015).

¹¹⁶ *See* WYO. STAT. ANN. § 6-3-414(a) (2016) (criminal); *Id.* § 40-26-101 (civil).

land while traveling to public land to collect resource data.¹¹⁷ Plaintiffs amended their complaint to address the revised law. This time the district court dismissed the case, concluding that the amended law did not implicate First Amendment rights because it protected private property against trespassers.¹¹⁸ The Tenth Circuit reversed, holding that notwithstanding the connection to private property, the Data Trespass Law “regulate[s] protected speech under the First Amendment and [is] not shielded from constitutional scrutiny merely because [it] touch[es] upon access to private property.”¹¹⁹

Wyoming’s Data Trespass Law was a brazen effort by the state to suppress truthful information demonstrating that water quality violated the Clean Water Act. It demonstrates the potency of this manifestation of environmental nihilism, but also the potential for the First Amendment to protect against it. Future rules may, however, be constructed that accomplish the same information suppressing ends through subtler means more likely to evade constitutional scrutiny. To the extent they succeed, they have the potential to insulate illegal activities and environmental conditions from legal scrutiny.

B. Restricting Agency Information Use

Information only shapes environmental law to the extent it is cognizable to regulators. Environmental nihilism may also manifest, therefore, by restricting government use of information. The exemplar of such a strategy would be to entirely bar an agency from considering information that would trigger an undesirable regulatory consequence. Imagine a rule that prevented consideration of water quality data in any decision-making process under the Clean Water Act. Recall that section 303 requires states to designate waterbodies within their borders that exceed water quality standards as impaired. If water quality information cannot be considered, then *a fortiori* no waterway can be so designated, leading to the result that every lake, river and stream would be declared healthy, at least from a regulatory perspective.

Rules restricting governmental use of information would constitute environmental nihilism if, and only if, adopted for the purpose of manipulating substantive environmental standards without regard to the veracity or relevance of information—or worse yet, precisely because of information’s veracity and relevance. This excludes the vast majority of information regulation: for example, rules of agency practice require applicants for government benefits to submit standardized forms, thereby excluding information provided in other formats;¹²⁰

¹¹⁷ See *id.* § 6-3-414(a), (e).

¹¹⁸ *W. Watershed Project v. Michael*, 196 F. Supp. 3d 1231 (D. Wyo. 2016) *rev’d*, 869 F.3d 1189 (10th Cir. 2017).

¹¹⁹ *W. Watersheds Project*, 869 F.3d at 1191.

¹²⁰ See, e.g., *Jem Broadcast Co., Inc. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (considering rules governing information provided in applications for broadcast licenses).

the federal rules of evidence exclude certain materials, like hearsay, from judicial proceedings;¹²¹ and the ESA requires that listing decisions be based on the best available science,¹²² excluding other categories of information from consideration. These and many other rules attempt to structure the manner in which the government receives and considers information to enhance the fairness, accuracy, and efficiency of government proceedings.¹²³ These rules are an important, or at least necessary, component of government operations, rather than efforts calculated to subvert the law.

Wyoming's Data Trespass Law included a provision that could qualify as this kind of environmental nihilism. In addition to punishing those collecting environmental data in the fashion described above, it included two provisions restricting the use of environmental data. The first provided that "Resource data unlawfully collected under this section is not admissible in evidence in any civil, criminal or administrative proceeding, other than a civil action for trespassing under this section or a criminal prosecution for trespass."¹²⁴ This provision essentially covered enforcement proceedings—whether civil or administrative—creating a rule that superficially resembles the 4th Amendment's exclusionary rule. Its sweep was, however, much broader because the 4th Amendment's exclusionary rule does not apply in civil or administrative proceedings and requires unconstitutional conduct on the part of a government actor to serve as its basis.¹²⁵ The second Data Trespass Law section provided that "Resource data unlawfully collected under this section in the possession of any governmental entity . . . shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action."¹²⁶ In other words, environmental data subjected to this provision could not serve as the basis for any regulatory determinations, not just enforcement actions. Had the Data Trespass Laws survived judicial review,¹²⁷ these provisions would have barred government agencies from considering truthful information about violations of environmental law and ecological conditions. So, for example, the waterways that WWP's sampling revealed to contain illegally high concentrations of *E. coli* bacteria would nonetheless be deemed to meet water quality standards because information to the contrary would be placed beyond the cognizance of regulators.¹²⁸

¹²¹ FED. R. EVID. 801.

¹²² 16 U.S.C. § 1533(b)(1)(A) (2018).

¹²³ See Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on Dodson's Trichotomy*, 102 NW. U. L. REV. 1547, 1553 (2008) (describing judicial procedural rules as pursuing goals of fairness and efficiency).

¹²⁴ WYO. STAT. ANN. § 40-27-101(e) (2015).

¹²⁵ See *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (noting that the protections of the Fourth Amendment "prescrib[e] only governmental action"); *United States v. Janis*, 428 U.S. 433, 447 (1976) ("In the complex and turbulent history of the [exclusionary] rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state.").

¹²⁶ WYO. STAT. ANN. § 40-27-101(f).

¹²⁷ See *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017).

¹²⁸ See 2012 WYOMING 303(D) LIST, *supra* note 101.

The EPA's proposed Data Transparency Rule may provide a second example of this kind of environmental nihilism.¹²⁹ The rule would address scientific studies for which underlying data are not publicly available and bar the EPA from considering them in promulgating rules. Then-Administrator Scott Pruitt described the proposal as bringing about the end of "[t]he era of secret science at EPA," claiming that "[t]he ability to test, authenticate, and reproduce scientific findings is vital for the integrity of rulemaking process."¹³⁰ He further claimed that the proposal is "[c]onsistent with data access requirements for major scientific journals like *Science*, *Nature*, and *Proceedings of the National Academy of Sciences* as well as recommendations from the Bipartisan Policy Center's Science for Policy Project and the Administrative Conference of the United States' Science in the Administrative Process Project."¹³¹

If all that were true, the Data Transparency Rule would not qualify as environmental nihilism, but rather, establish a standard related to the quality and validity of scientific evidence serving as the basis for agency action. It might still be poor public policy. Critics could argue that it set too high a standard and that studies detecting public health risks should be considered even if of lower quality. That debate, however, would simply carry on recurring disagreements over how the government should respond to uncertain information in regulatory decisions.¹³²

There are serious reasons to doubt, however, that the Data Transparency Rule is truthfully motivated by concerns about the quality of scientific information. Instead, it may be designed to exclude relevant, reputable scientific studies the findings of which require regulatory action. Contrary to the EPA's assertion, the proposal is not consistent with the procedures of the cited scientific journals or bipartisan recommendations. The journal editors identified by the EPA issued a statement explaining the divergence between their practices and the proposal and opining that "[e]xcluding relevant studies simply because they do not meet rigid transparency standards will adversely affect decision."¹³³ A lead author of the bipartisan reports cited by the EPA responded that the proposed rule didn't "adopt any of the recommendations in the sources they cite I'm not

¹²⁹ Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,769 (proposed Apr. 30, 2018) (to be codified at 40 C.F.R. pt. 30).

¹³⁰ Press Release, EPA, EPA Administrator Pruitt Proposes Rule to Strengthen Science Used in EPA Regulations (Apr. 24, 2018), <https://www.epa.gov/newsreleases/epa-administrator-pruitt-proposes-rule-strengthen-science-used-epa-regulations>.

¹³¹ *Id.*

¹³² See Wendy Wagner et al., *Whose Science? A New Era in Regulatory "Science Wars"*, 362 SCIENCE 636, 636 (2018) ("With 'science wars' waging in health and environmental regulation for at least three-quarters of a century, it is tempting to conclude that recent proposals for reforming regulatory science are similar to what has occurred in the past.").

¹³³ Jeremy Berg et al., *Joint Statement on EPA Proposed Rule and Public Availability of Data*, 360 SCIENCE 501, 501 (2018).

sure why they cited them.”¹³⁴ Moreover, prominent scientific, medical, and academic organizations opposed the rule, arguing that it would function to deny the EPA access to “the best available science in its policymaking.”¹³⁵ The scope of the proposal also undercuts its stated purpose because it is restricted to rulemaking processes. The EPA, however, must also rely upon studies of chemical safety in approving the use and sale of new chemicals and pesticides.¹³⁶ Yet those administrative processes to remove regulatory restrictions designed to protect human health and the environment occur through a process of adjudication, rather than rulemaking, and therefore fall outside the scope of the proposed rule. Because the rule creates an uneven playing field for the use of information in regulatory and deregulatory actions, it suggests that it may be motivated by a desire to shape the application of environmental law, and therefore manifests environmental nihilism.

Reasonable minds may disagree about the motivation behind rules like the EPA’s Data Transparency Rule and the information components of Wyoming’s Data Trespass Law. Sometimes advocates will tip their hand and fess up to their intentions, but probably not often. Nonetheless, recognizing that informational rules can subvert legal requirements, and that they may be created precisely for that purpose, enables scrutiny to be brought to bear.

C. Limiting Government Information Production

Finally, environmental nihilism could manifest as an effort to quell or distort the government’s own information production. I discuss this category last because it is likely the most disputable and difficult to accurately detect. Generating information requires resources. It is, therefore, difficult to assess whether a decision to defund research tasks is motivated by a desire to suppress the information those tasks are likely to produce or merely indicates differing priorities.

Nonetheless, there are rules that unquestionably qualify. Exemplars of this manifestation of environmental nihilism might include the following: State and federal agencies install and maintain equipment to monitor ambient air quality emissions. Imagine a rule requiring immediate relocation of any monitoring equipment that detects elevated levels of pollution, thereby preventing the government from generating information about impermissible air quality. The state and federal governments also routinely test water quality in lakes, rivers, and streams subject to water quality standards. Imagine a rule requiring that

¹³⁴ Robinson Meyer, *Even Geologists Hate the EPA’s New Science Rule*, THE ATLANTIC (July 17, 2018), <https://www.theatlantic.com/science/archive/2018/07/scott-pruitts-secret-science-rule-could-still-become-law/565325/>.

¹³⁵ Anne Q. Hoy, *Scientific, Medical, Academic Groups Urge EPA to Drop ‘Transparency’ Rule*, AM. ASS’N FOR THE ADVANCEMENT OF SCIENCE (July 15, 2018), <https://www.aaas.org/news/scientific-medical-academic-groups-urge-epa-drop-transparency-rule>.

¹³⁶ See *Pesticide Safety Data Transparency a Blind Spot under EPA Policy*, BEYOND PESTICIDES (May 8, 2018), <https://beyondpesticides.org/dailynewsblog/2018/05/pesticide-safety-data-transparency-blind-spot-epa-policy/>.

government employees alter testing data so that they always indicate exceptionally clean water. These hypothetical rules operate differently: the first seeks to avoid data about environmental problems, the second simply falsifies it. They both, however, manipulate government information production to subvert environmental law.

Examples of both strategies exist. In March 2019, the Los Angeles Times broke a story consistent with the EPA having taken affirmative action to avoid production of information about pollution.¹³⁷ Hurricane Harvey damaged numerous facilities in the Houston area containing hazardous chemicals.¹³⁸ In the weeks that followed, rescue crews and residents in the area experienced a range of health symptoms that could have been the result of chemical exposure.¹³⁹ NASA scientists planned an operation to collect air quality information from an aircraft using state-of-the-art air sampling equipment, but the EPA—purportedly in conjunction with state officials—waved NASA off, grounding the flight.¹⁴⁰ It is, of course, entirely possible that NASA would not have detected air pollution beyond that which had been identified at ground monitoring sights. Nonetheless, to the extent the EPA made its decision to avoid the production of additional information about air pollution, which could have required regulatory action or revealed violations of environmental law that could, in turn, have been the subject of citizen suits, this decision sought to suppress information to subvert the Clean Air Act.

The activities of Deputy Assistant Secretary Julie MacDonald during President George W. Bush's Administration appear to be an example involving the outright falsification of information. MacDonald oversaw the U.S. Fish and Wildlife Service's implementation of the ESA and according to a complaint received by the Department of Interior's Office of Inspector General "persistently harassed, bullied, and insulted [Fish & Wildlife Service] employees to change documents and ignore good science related."¹⁴¹ The Inspector General ultimately

¹³⁷ Susanne Rust & Louis Sahagun, *Post-Hurricane Harvey, NASA tried to fly a pollution-spotting plane over Houston. The EPA said no*, L.A. TIMES (Mar. 5, 2019), <https://www.latimes.com/local/california/la-me-nasa-jet-epa-hurricane-harvey-20190305-story.html>; see also Justin Pidot, Op-Ed, *EPA Broke Faith with the Victims of Hurricane Harvey*, THE HILL (Mar. 14, 2019), <https://thehill.com/opinion/energy-environment/434109-epa-broke-faith-with-the-victims-of-hurricane-harvey>.

¹³⁸ See Frank Bajak & Lise Olsen, *Silent Spills Part 1: In Houston and Beyond, Harvey's Spills Leave a Toxic Legacy*, HOUSTON CHRONICLE (Mar. 23, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/In-Houston-and-beyond-Harvey-s-spills-leave-a-12771237.php>.

¹³⁹ See Rebecca Hersher, *Slow and Upbeat EPA Response to Hurricane Harvey Pollution Angers Residents*, ALL THINGS CONSIDERED (Nov. 13, 2017), <https://www.npr.org/sections/health-shots/2017/11/13/560476366/slow-and-upbeat-epa-response-to-hurricane-harvey-pollution-angers-residents>.

¹⁴⁰ See Rust & Sahagun, *supra* note 137.

¹⁴¹ U.S. DEP'T OF THE INTERIOR, OFFICE OF THE INSPECTOR GEN., INVESTIGATIVE REPORT: ON ALLEGATIONS AGAINST JULIE MACDONALD, DEPUTY SECRETARY, FISH, WILDLIFE, AND PARKS,

concluded that MacDonald's interference in scientific determinations required under the ESA tainted at least fifteen decisions.¹⁴² A federal district court reached the same conclusion, vacating a decision not to list the greater sage grouse because, in part, "MacDonald had extensive involvement in the sage-grouse listing decisions, used her intimidations tactics in this case, and altered 'best science' to fit a non-warranted decision."¹⁴³

Environmental nihilism may rarely manifest as efforts to falsify information, and where that occurs, the likelihood that a whistleblower will bring them to the public's attention is high. Such efforts may also be the most likely to trigger broad condemnation. Historically, America has frowned upon government officials lying, although in an era in which the President "seems to lie as reflexively as other people breathe," it's fair to question our nation's commitment to truth.¹⁴⁴ We must remain vigilant for decisions to discontinue government research and investigation to avoid the implications of what might be unearthed, because environmental nihilism of that form will be more difficult to detect and have a similarly pernicious effect on environmental law.

Conclusion

I haven't been cagey about my views of environmental nihilism in this essay, although I also haven't stated them expressly. Let me do so. I view environmental nihilism as antithetical to basic democratic principles and the rule of law. It is an infection that should be named and rooted out, even if deployed in service of a seemingly worthy cause. I don't suggest that it is a widespread phenomenon, not yet anyway. Rather, the examples discussed in the essay suggest a testing of the waters.

To the extent that environmental nihilism proves ineffective, we will continue to engage in robust disagreements about the substance of environmental law. The experience with Wyoming's Data Censorship Law suggests as much. As litigation over its constitutionality proceeded, the state also pursued a more forthright course to address revelations about *E. coli* in waterways near livestock. In 2014, the Wyoming Department of Environmental Quality submitted revised water quality standards to the EPA proposing to tolerate substantially higher

<https://www.doioig.gov/sites/doioig.gov/files/Macdonald.pdf>; see also *W. Watersheds Project v. Fish & Wildlife Service*, 535 F. Supp.2d 1173, 1188 (D. Idaho 2007).

¹⁴² Charlie Savage, *Report Finds Interferences in Interior Dept. Actions*, N.Y. TIMES (Dec. 15, 2008), <https://www.nytimes.com/2008/12/16/washington/16interior.html>.

¹⁴³ *W. Watersheds Project*, 535 F. Supp. 2d at 1188; see also *Cottonwood Env'tl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015) (noting MacDonald interference in critical habitat designation for lynx).

¹⁴⁴ Charles Lewis, *Truth and Lies in the Trump Era: Real Journalism Is the Necessary Antidote to Out Bullshitter in Chief*, THE NATION (Oct. 13, 2017), <https://www.thenation.com/article/truth-and-lies-in-the-trump-era/>; see Glen Kessler et al., *President Trump Has Made 9,014 False or Misleading Claims over 773 Days*, WASH. POST, (Mar. 4, 2019), <https://www.washingtonpost.com/politics/2019/03/04/president-trump-has-made-false-or-misleading-claims-over-days/>.

levels of the bacteria in low flow streams, which the EPA approved in 2017.¹⁴⁵ In other words, Wyoming amended the substantive standard governing water quality within its borders. That process *should be* the way that environmental law changes, because it enables the public to evaluate the balance struck between environmental protection and other important social interests, and to hold the government accountable.

¹⁴⁵ See Angus M. Thuerrmer, Jr., *Water War Continues Despite Court "Settlement"*, WYOFILE (Oct. 11, 2016), <https://www.wyofile.com/water-war-continues-despite-court-settlement/>.