Environmental Law Outline

***Remember***: State the rule and apply the law simultaneously. Concise, crisp, clear analysis!

**~Themes: The Difficulties of Environmental Law~**

“Environmental Law has difficulty developing legal rules b/c nature refuses to cooperate.”

-Richard Lazarus

**Problematic Characteristics of Environmental Law**:

* Complexity:
	+ Two reasons: Complex eco-system and a complex, highly-industrialized economy
	+ National standards themselves are tricky b/c of the varied climates of the United States. This leads toward a tendency for a “weakest among us” regulatory scheme that readily leads to overregulation (This is why environmental policy is ***regional***).
	+ **These complexities cause legal rules to be incredibly technical**
* Scientific Uncertainty:
	+ We often don’t know the exact effects of either regulation or non-regulation.
	+ The scope, both temporally and spatially, of eco-harm makes the science uncertain.
* Dynamism:
	+ Environmental law is based on “scientifically informed value judgments.”
	+ It is dynamic b/c the science and the environment itself are constantly changing and b/c experience teaches.
* Precaution: ***Environmental law by its nature is about prevention, not redress***.
	+ B/c of the exponential increase in risk of environmental harm over time, environmental law necessarily focuses on small risks, which lead to controversies, b/c harm can’t be gauged fully and with certainty ahead of time.
	+ Prevention is the watch cry.
* Controversy:
	+ The distributional conflicts over costs and benefits of regulations create controversy.
	+ “Resource Pools” – Flow among public goods makes capturing benefit or internalizing negative externalities difficult.

**The Challenges for U.S. Law Making Institutions and Process of Environmental Protection Law**:

Structural Obstacles:

* Fragmentation of Authority: (Both among branches (SoP) and within branches (agencies w/in agencies, etc.)
	+ The problematic characteristics above plus the fragmentation of power and interests make environmental laws difficult to pass.
	+ Each agency has been tasked with a narrow purpose, leading to conflicts
* Federalism & Decentralization:
	+ Pros of decentralization: Leaders are politically accountable, they are close to the problem (and the solution), and they have a vested interest in both.
	+ Cons of decentralization: Narrow vision, incentives to create negative externalities, and a lack of power to effectuate a comprehensive solution.
* Constitutional Preferences:
	+ Environmental protection law runs counter to the Constitutional preferences of the founding (*e.g.*, prevent gov’t overreach, protect free markets, protect private property, etc.)
* The Political Process:
	+ Campaign finance is a big hurdle; environmental protection laws tend to hurt those that already have. This, as well as other considerations, makes compromise nearly impossible.
	+ “***In the environmental movement, our defeats are always final, our victories always provisional***.”

**Freeman’s Important Questions of Environmental Law**:

* **When should the Gov’t intervene in the market?**
	+ Scientific uncertainty, when is the risk high enough that we should pull the trigger?
* **What is needed (science, etc.) to justify intervention (health alone?)?**
	+ How much a scientific consensus do we need?
* **What level of Gov’t should intervene?**
	+ SoP, Federalism considerations
* **What authority is there for intervention?**
	+ Look to Constitution. Difficult when environmental laws weren’t foreseen at founding.
* **What tools (regulatory mechanisms) should be used?**
	+ Command and Control:
		- Design Standards or Technology Specifications:
			* Form: specify how the particular plant, machinery, or control apparatus should be set up
				+ Ex: double hulls for oil tankers; lining for wastewater pits; use 2 blowout preventers
			* Cons:
				+ Don’t actually cap emissions levels — just says what design to use, not how much you can use it, so you could actually install the tech, run the plant more, and end up with greater absolute emissions than before.
				+ ***Not technology-forcing*** (i.e. may freeze tech/design in place)
		- Performance Standards:
			* Form: generally is a target pollution rate set at what current technology can produce
				+ Different from a design standard b/c industry can meet the goal in whichever way it prefers
			* Cons:
				+ May be insufficient to protect public health
				+ Not necessarily technology-forcing – no incentive to go beyond current rate, which is set w/ already existing technology in mind.
		- Ambient or Harm-Based Standards:
			* Basis: set a standard for a certain quality of air or water that is driven by what is necessary to protect the health of humans, plants, and/or animals
				+ This may be a standard that is higher than what is currently technologically possible — so it might be technology forcing
			* Form: can be expressed in narrative form or as a concentration limit for a particular pollutant in a particular medium
				+ Not directed at a particular regulatory target
			* Cons: May be too expensive or not achievable under current technology (i.e. the standard may only be aspirational in nature)
		- Information Disclosure: (*e.g.*, cars labeled w/ MPG; disclosure of fracking fluids)
		- Planning or Analysis (Procedural) Requirements:
			* Form: requires that certain info be gathered and analyzed or that certain plans be prepared before undertaking environmentally significant actions
				+ Ex: EIS; cost-benefit analysis
			* Question is often how big of a role the gathered information should play in the decision (e.g., should CBA or EIS serve as decision tools?)
		- Bans and/or Prohibitions (e.g., you cannot put lead in gasoline anymore)
	+ Market Based Incentives:
		- Tax/Subsidies:
			* Pros: a tax may incentivize innovation
			* Cons:
				+ Taxes have to be set high enough to not license a continuing wrong, but taxes are political nonstarters, so that is hard to do.
				+ They may be regressive if producers pass them on to consumers
				+ Choosing who to tax/subsidize involves picking winners and losers
		- Deposit refunds: (cans and bottles turned in for some small amount of cash)
		- Cap and Trade:
			* Pros: It allows you to capture the cheapest reductions possible
			* Cons:
				+ It may not work for many pollutants

Successful example: Trading system in acid rain (sulfur dioxide)

Unsuccessful example: Trading in pollutants like mercury or wetlands destruction b/c it might lead to regional concentrations of the harm

* + - * + Setting the cap, deciding who it covers is a difficult political decision, and it isn’t clear always what role science and/or CBA play in the decision process
				+ Difficult design questions: auction/free; opportunities to offset emissions by buying reductions from non-covered sectors; floor/ceiling prices; market integrity/oversight
				+ **NB**: Freeman questions whether market approaches are really that different from command-and-control (saying most examples are hybrids) — says that whether market-based approaches are really better is context-dependent and not always clear.
* **At what cost?**
	+ See CBA section below.
* **What are the distributional outcomes?**
	+ Who is really paying?
	+ It is not uncommon for industry to get the benefit of polluting (which it shares with those that use its product both via plain utility and in lower prices) and for the public to bear the costs in the form of unhealthy environment. Environmental regulation flips the script and tries (not always successfully) to cause industry to internalize the negative externalities. This also causes industry to bear the bulk of the cost while the public enjoys the benefit at a discounted rate. (Is that right? It depends on what baseline is.)
* **If there is a risk of harm, should we err on the side of over-regulation?**
	+ Harm is often irreversible.
* **How great a role should cost play in Legislation/Regulation?**

**Cost Benefit Analysis (CBA)**:

* CBA is extremely controversial.
	+ The Pope in “Laudato”[[1]](#footnote-1) questions whether CBA is possible given spiritual, moral component of environmental protection can’t be quantified.
	+ Prof. Hsu argues that CBA has a place and that middle ground should be sought. We should use CBA for things that can be quantified and not for those that can’t. The latter group consists of things like outright danger, groups being singled out (discrimination), and physical harm.
	+ CBA assumes an anthropocentric (human centered) approach to environmental law that perhaps the Pope (and others) would reject. ***This is how US Environmental law is setup***.
	+ It is possible to think of environmental protection in terms of “existence-value” or “option-value.”
	+ Despite all of the controversy, econ is the language of environmental law (REMEMBER EXTERNALITIES!)
* The ***threshold*** questions for CBA:
	+ Should we control this (bad) thing at all?
	+ If the decision has been made to regulate it, now how much?

**~Standing~**

**Summary**: There are two tests for standing; the Art. III Constitutional Test and the Zone of Interest (ZoI) or Statutory Test. Both must be met***!*** To be the object of gov’t action/regulation is nearly to automatically have standing but “when the [π] is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.” (*Lujan*)

***Art. III Test***:

*Lujan*🡪

* Injury-in-fact:
	+ Concrete & Particularized, and
	+ Actual or Imminent (not conjectural or hypothetical)
	+ For env’t’l cases: (1) π uses the affected area and (2) is a person for whom the aesthetic/recreational values of the area will be lessened by the challenged activity.
* Causation:
	+ Injury must be “fairly traceable” to the challenged action of ∆
	+ **NB**: Backward looking – if this action had not been taken would the injury have been avoided?
* Redressibility:
	+ “Likely” (not merely speculative) that the injury will be redressed by a ***favorable decision***
	+ **NB**: Forward looking, a probability game – if the remedy sought was granted, would π be whole?

*MA v. EPA*🡪(Special Solicitude for States)

* Injury-in-fact:
* Causation:
	+ Challenged action must make “meaningful contribution” to harm
* Redressibility:
	+ “*Some possibility* that the requested relief will prompt the injury-causing party to reconsider (actually change) the decision that allegedly harmed the litigant.”
	+ Risk will be reduced “to some extent” if relief granted
* **NB** on Procedural Rights (injuries): When Congress affords a procedural right, the litigant may assert standing without meeting “all the normal standards for redressability and immediacy” (but see *Summers*).

***Zone of Interest Test***:

A π is in the ZoI when her “alleged injury was to an interest arguably within the zone of interests to be protected or regulate by the statute that the agencies were claimed to have violated” (*Sierra Club*). When looking to the statute that was violated, look narrowly at the provision itself, not at the overall statutory purpose (*Bennett v. Spear* – ESA § 7).

**Citizen Suit Provisions**:

Individual Provisions – CSPs extend standing to the limits of the Constitution, and thus ***negate*** the ZoI test as to the specific provisions under which a citizen may bring suit (*Spear*). For suits beyond those specified provisions the π must satisfy the ZoI test.

APA § 702 – The “parties aggrieved” language grants a cause of action but does not itself satisfy the ZoI; it just points the courts to the allegedly violated provision of the statute.

**Procedural Injury**:

Both *Lujan* and *Summers* embrace the view that a procedural injury by itself is not sufficient to satisfy the injury-in-fact prong of the Art. III Standing test. While the Court only hints at it in *Lujan*, in *Summers* the Court holds that a procedural injury must be tied to some concrete interest such that a deprivation of that procedural right makes a substantive difference (*Summers*; see also *Lujan*). In this way, procedural injuries are really a composite Art III standing analysis, taking into consideration all aspects of the Standing test (see *Summers*). “Only a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all of the normal standards of redressibility and immediacy” (*Summers* response to *MA v. EPA*).

**Policy Rationale**:

Standing implicates several concerns for the Court –

* SoP (Especially a concern for Scalia):
	+ To create an individual right from an undifferentiated public interest in the Executive following the law is to transfer from Pres, to the Courts, the duty to “take Care that the Laws be faithfully executed.” (*Lujan*)
* Prudential Concerns:
	+ Avoid Frivolous Law Suits
	+ Secure Truly Committed Advocates (*Sierra Club*; *Mass v. EPA*)
* Strategic Concerns:
	+ Easy way to for Court to hear cases it wants and not hear cases it doesn’t want

**Cases:**

*Sierra Club v. Morton* (1972 – Stewart): ***Expansion of Injury; ZoI*** – Held that the there could be a non-economic injury, “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society.” The Court also held that Sierra Club, while they failed to do this here, could sue on behalf of a member of their organization who was injured. There would be a aesthetic or recreational [**JF**] injury if one of their members used Mineral King (hiking, camping, etc.). ***Policy Rationale***: Bad advocates highlighted for why Blackmun’s system can’t work generally.

**Dissent** (Douglas): Inanimate objects should have standing in court (what’s one more legal fiction) and such cases can be brought by those who are intimately involved with them.

**Dissent** (Blackmun): Standing should extend to those bone fide groups who have an long standing interest in the matter before the Court. Sierra Club would obviously be an apt advocate for the environment.

*Lujan v. Defenders of Wild Life* (1992 – Scalia): There was no ESA § 7 consultation for an overseas action taken by an agency. Members of DoW say that they have been injured b/c they have been to see the animals that this action could endanger, and plan to go back at some future time. Court held that there is no imminent injury but if there were, there is no redressibility b/c the consultation is not “likely” to remedy/prevent agency action in this case (***only plurality on this point***). Court indicated that a procedural injury tied to a concrete interest (e.g. a hearing before sentencing, permit/license denial, or ***EIS***) may be sufficient to satisfy the injury-in-fact prong but here it rejects the notion that Congress can create an individual right out of an undifferentiated public interest that the Executive follow the law. ***Policy Rationale***: To create such an interest would be to transfer from the President to the Courts the duty to “take Care that the Laws be faithfully executed.”

**Dissent** (Blackmun): Imminence is a disputed fact for the jury, redressibility too (does that seem right?? Aren’t these questions of law?). The Procedural harms discussed here are not transfers of power that threaten SoPs; they are proper checks. If anything, to deny this procedural right is to injure Congress who has no mechanism to see that the executive follows the laws it passes.

*Friends of the Earth v. Laidlaw Env’t’l Services* (2000 – Ginsburg): ***Injury; Mootness; Civil Penalties & Redresibility*** – π has adequately alleged ***injury*** in environmental cases when she shows that (1) she uses the affected area and (2) is a person for whom the aesthetic/recreational values of the area will be lessened by the challenged activity. When the complain is that the area is unusable due to fear (as here) the court interrogates the reasonableness of that fear. Court held that the polluter (who had the state env’t’l agency sue it to preclude the citizen suit and then settled to make it go away) did not create a moot question by voluntarily ceasing its operation. If a ∆ could create mootness in that way, she could kill a suit and return to her old ways thereafter. A case will not be deemed ***moot*** if there is evidence that ∆ was in violation of the law on the date the complaint was filed and there remains some possibility of a future violation (here Laidlaw still had its CWA permit). The Court also held that π must show ***redressibility*** for each remedy sought and that civil penalties was a permissible remedy for the redressibility prong b/c it creates deterrence (and increase gov’t funds for future enforcement?). Court is emphatic that it is not just the availability of civil penalties but their imposition (no one is scared of unused/unenforced provisions) that create deterrence.

**Dissent** (Scalia): *Steelco* says that civil penalties cannot redress injuries (and Scalia wrote this opinion, thought it settled). He rejects the majorities understanding of the deterrence value of civil penalties (availability only). He is also dubious of the injury and redress here, claiming that it is a general remedy when the Constitution calls for ***individualized redress for individualized injuries***.

*MA v. EPA* (2007 – Stevens): ***Special Solicitude; Modified Standing Doctrine*** – The Court frames the standing inquiry as a ***Policy Rationale***: “whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination.” In other words, when there is a particularly apt and interested advocate (thus improving the quality of the proceedings), the Court is more likely to grant standing. Here, MA alleges that its injury is the “swallowing” of its coastline due to global warming. As a state acting as a property owned (**NB**: not a sovereign representative; this creates problems for the *GA v. TN Copper* comparison), MA merits a special solicitude (a thumb on the scale? Relaxed standing requirements?) in the standing analysis b/c it is such an apt advocate. The Court adopts Kennedy’s concurrence in *Lujan* as the majority opinion (Congress can create injury and causation). The Court found that MA had been ***injured*** by its loss of coastline, the breadth of the injury (how widely shared) was unimportant. (Injury looks pretty solid; it is causation and redressibility that get shaky). The Could found that there was ***causation*** between the injury and the EPA’s failure to regulate b/c such a failure “contributes to [MA’s] injury.” EPA did not dispute the causal connection between GHGs and global warming and US auto emissions account for 6% of the worlds GHG emissions every year. Finally, the it found that ***redressibility*** was met b/c EPA regs would reduce the risk and “slow or reduce” the injurious effects of global warming on MA.

**Dissent** (Roberts): He disagrees with everything. He thinks the injury is to wide-spread to be “concrete and particularized” and to slow moving to be imminent (but doesn’t it fulfill actual?). He somewhat conflates causation and redressibility; causation is not met b/c the science is unclear but even if it was, EPA regulations would not have prevented this from happening and if it takes action now, it may not (remember, probability) do anything to preserve MA’s coastline (could be a threshold amount of GHGs such that even if you reduce the amount by 6%, which number he disputes, it would make no difference; he rejects Stevens’ “every little bit helps” philosophy). He also really dislikes “special solicitude”, says it is made up.

**NB**: After this case it is an open question where the standing doctrine is headed. Can Congress create injuries and causation sufficient for Constitutional standing?

*Summers v. Earth Island Institute* (2009 – Scalia): ***Procedural Injuries; Injury is for the Court*** – Injury complained of is procedural, a deprivation of notice and comment. EII’s member has hiked over 70 national parks and hopes to hike them all but hasn’t done so yet. The Forest Service does not release a list of the woods it will salvage w/o N&C so EII members can’t go hike there to go get standing (**JF**: This is a cartoon!!). B/c of this, the procedural injury is not connected to some concrete interest, just some possible future interest. The Court claimed that it made no difference that the procedural right has been accorded by Congress (**JF**: This is Scalia saying that injury is for the Court to determine – “*Injury in Fact is a hard floor of Article III jurisdiction and cannot be removed by statute*”). **JF** thinks that Scalia is conceding that Congress can loosen standards for Causation & Redressability when it creates procedural rights but I think he is retightening the reqs under procedural rights after *MA v. EPA* loosed them (though I concede that he didn’t tighten them to where they were before *MA v. EPA*). The important thing is that ***Congress cannot loosen the injury req!!***

**Concurrence** (Kennedy): Joins the majority in full and notes that this case would have come out differently if Congress had connected the procedural right to some concrete interest it was meant to protect.

**Dissent** (Breyer): There should be some organizational standing where the organization describes the activities of its members and then asserts that there is some statistical probability that its members would used that environment and that there is, therefore, a concrete injury. Also, the imminence req by it self ensures injury not speculative. “*A threat of future harm…may be realistic even where the plaintiff cannot specify precise times, dates and GPS coordinates*.”

*Bennett v. Spear* (1997 – Scalia): ***Scope of ZoI Test*** – The Court held that Citizen Suit Provisions negate the ZoI by extending standing to the limits of the Constitution but only as to the provisions under which a citizen may sue. Where the CSP does not extend (ESA § 7 here), the ZoI test is focused on the violated provision (again § 7), not the overall statutory purpose.

**~Common Law Foundations of Environmental Law~**

**Public and Private Nuisance**:

**Summary**: Private nuisance is an action brought by private parties for **interference with use and enjoyment of property**. Public nuisance is an action brought by a state (on behalf of its citizens) to **protect public health and welfare, morality**. A private right of action can be brought for public nuisance if the claimant can show property damage. Injunctions are considered discretionary in private nuisance (*Ducktown*). They are a much more common remedy in public nuisance (*Tennessee Copper*). On top of everything else, public nuisances aggregate the costs to many of the ongoing nuisance, stronger balancing position, and states get to throw ***quasi-sovereign*** status around. ***If at all possible bring a public nuisance claim and be as state.***

The most difficult aspects of environmental protection suits are the indeterminate class of defendants and causation (especially getting from general causation to specific causation). There has been some adaptation in tort law, *e.g.*, substantial factor test, etc. It may not be difficult to show that a chemical or a pollutant causes harm but it may be very difficult to show that *that* pollutant/chemical caused *this* harm.

*Madison v. Ducktown Sulphur* (1904): A private nuisance claim is brought for open-air copper refining that is damaging nearby land. The court does not find that the granting of an injunction to be an act of “sound legal discretion.” The property damaged is worth 1k, the industry that would be shut down is worth 2m. The injunction is denied to “preserv[e] to each [party] the largest measure of liberty possible under the circumstances.” ***Serious balancing [of the equities] act here.***

*Boomer v. Atlantic Cement Company* (1970): Another private nuisance claim. Court acknowledges that cement factory’s actions meet the elements of a nuisance (continuing substantial damage). An injunction is denied b/c the value of the plaintiff’s property is “relatively small in comparison with the value of the defendant’s operation.” Permanent damages are ordered. Thinks the delay proposed by the dissent is unreasonable b/c it puts the burden of new research and development on this one plant.

**Dissent**: Enjoin the operation but give it 18 months to fix the problem before it takes effect. Awarding damages like this is to permit a private taking.

*Missouri v. Illinois* (1906): Illinois is dumping Chicago sewage in the Missiouri river and St. Louis is claiming that this has caused an increase in typhoid cases (public nuisance). There are an incredible amount of weird experiments done. In the end, despite the strength of the public nuisance position, ***specific causation is lacking***. Even if Missouri can show that this sewage could cause typhoid it can’t show that it caused these cases. Also note that when it is state v. state it is more like a private nuisance.

*Georgia v. Tennessee Copper Co.* (1907): State v. private party. Same as *Ducktown* but with a smoke stack that is sending the pollution further and across state lines. Georgia is suing as a quasi-sovereign and thus has a right to determine if “its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. Even though company has made all the changes it can, they didn’t fix the problem. SCOTUS doesn’t seem to like it but issues injunction. ***STATE POWER!***

**Preclusion (displacement of the common law) and Statutory Preemption**:

**Summary**: Preclusion is horizontal and preemption is vertical. Preclusion displaces federal common law (Congressional Statute v. Judicially made Fed Common Law). Preemption replaces or pushes out state law (Fed statutory law v. state (both positive and common) law). Common law remedies are backward-looking (necessarily so many (most?) statutes, which are forward-looking) preserve the common law. ***One important distinction*** between bringing a claim under a statute and bringing it under the common law; under the common law, you get paid, under the statute, the US Treasury gets paid.

*Milwaukee v. Illinois* (1981 – Rehnquist): Court holds that the CWA has precluded (displaced) the federal common law of nuisance (as it regards water pollution). “[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.” ***Test***: Whether Congress “spoke directly to the question” and “whether the field has been occupied, not whether it has been occupied in a particular manner.” The court uses leg history, “comprehensive reform” as well as arguments from text/structure of the act to find that Congress has occupied the field.

**Dissent** (Blackmun): The intent of the act was “more!” More regulation, more enforcement. Congress didn’t no occupy the field b/c it was just adding another layer.

*Int’l Paper v. Ouellette* (1987 – Powell): A paper-pulp factory is pumping pulp into the lake in NY but it is polluting Vermont. Property owners want to sue NY factory under a state cause of action for nuisance. Court holds that CWA preempts state law. ***Test***: Preemption of state law “may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation.” Also, state law is actually invalid to the extent that is actually conflicts with a federal statute.

**Dissent** (Brennan): CWA shouldn’t change conflicts of law analysis. Also argues that §§ 505(e) & 510 aren’t just about direct discharges.

*American Electric Power Co. v. CT* (2011 – Ginsburg): This is *Milwaukee* for air pollution. CAA precludes fed common law nuisance claims for GHGs (due to ruling MA v. EPA). Court expounds on the expansive powers and recourses for action in CAA and thus (***Test?***) “see[s] no room for a parallel track.” Court further adds that CAA preempts even if EPA has yet to regulate: **“[T[he delegation is what displaced federal common law.”** BOTTOM LINE: EPA is more fit to handle this problem than individual judges.

**NB**: Environmental statues almost always create a “floor preemption,” but the states are always allowed to set standards above that. Where such statutes do not exist, fed common law has set that floor. The lack of state rights to redress wrongs against another state () makes the argument for preclusion harder (this is one reasons why participation rights in the CWA are important).

**~Constitutional Authority of Environmental Law~**

**The Commerce Clause**:

**Summary**: CC jurisprudence has changed quite a bit over time. The line of cases here is *Hodel* (1981) in which Rehnquist asserts that the test should be “substantially affects.” Then in *Lopez* (1995) Rehnquist gets his way (see test in *Ranch Viejo* below). *NAHB* (DC Cir. – 1997) is the precursor to *Rancho Viejo*, about a fly, ESA upheld. *Morrison* (2000) invalidates the VAWA b/c violence against women is not economic activity. *SWANCC* (2001) in another move to limit CC power by Rehnquist. Finally, we get *Rancho Viejo* (DC Cir. 2003).

The CC analysis begins by remembering that all acts of Congress come with a ***presumption of constitutionality*** and need only have a ***rational basis*** for concluding that the regulated activity substantially affects ISC (*Hodel*). After that, ***Step 1***: What is being regulated (remember, takings not toads)? ***Step 2***: Does the target of regulation have a link to ISC (usually economic)? In step 2 emphasize economic value, Stevens went with the economic value of bio diversity (*SWANCC*).

* + It is easy when the action/actor is clearly economic but regulating “takes” or purely intrastate action, it more difficult, but we can do the work. Attenuated v. non-attenuated.

**Cooperative Federalism**: Many statutes have a state and fed component to them. Fed generally sets standards, states implement, issue permits, etc. (This front line position/activity is called ***“state primacy”***)

*Hodel v. Indiana* (1981 – Marshall): Dct holds that (prime farmland) portions of SMCRA are unconstitutional under the CC b/c mining this land does not have a substantial effect on interstate commerce. This Court reverses. “Legislative acts adjusting the burdens and benefits of economic life comes into the Court with a presumption of constitutionality.” The Court invalidates legislation under CC “only if it is clear that there is no rational basis for congressional findings that the regulate activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.” “The pertinent inquiry therefore is no how much commerce is involved but whether congress could rationally conclude that the regulated activity affect interstate commerce.” The Court also denies the claim that this is a ***taking*** b/c it is just removing one economically beneficial use of the property but permits others.

**Concurrence** (Rehnquist): He doesn’t like the expansive CC doctrine but in the end just wants the law to be “substantially affects,” not just “affects.”

*SWANCC v. US Army Corp of Engineers* (ACE) (2001 – Rehnquist): Rehnquist gets his way. He avoids the constitutional question of whether Congress could regulate intrastate ponds via the avoidance cannon (traditional state power) b/c surely this doesn’t have a substantial effect on interstate commerce.

**Dissent** (Stevens): He argues that the migratory bird rule is valid b/c migratory birds affect interstate commerce (tourism, birders, etc). If not directly, surely via the necessary and proper clause: “The power to regulate commerce . . . necessarily and properly includes the power to reserve the natural resources that generate such commerce.” Remember to aggregate!

**Thing to remember from this case**: It is all about arguments. Can you make an argument that this action has an effect on interstate commerce? Would that affect be substantial ***if aggregated***? It doesn’t seem crazy to think that Congress would have had the power to regulate intrastate ponds when said that way. Maybe this case is also about preventing agency overreach as well?

*Rancho Viejo v. Norton* (2003 - DC Cir.): Developers in CA brought this action, arguing that the ESA is unconstitutional as CC deficient. Court upholds ESA (***regulating “takings not toads!”***) applying the Lopez commerce clause test:

Three areas of permissible regulation under the CC:

* Channels of ISC
* Regulate and protect instrumentalities of ISC or persons or things in ISC (even though the may come from intrastate activities)
* Activities that have a substantial relation ISC, *i.e.*, activities that substantially affect ISC
	+ Whether the regulated activity has anything to do with commerce or any sort of economic enterprise, however broadly one might define those terms.
	+ Whether the statute contains an express jurisdictional element (that limits its application)
		- This is not required but if it is missing “courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transactions, which is viewed in the aggregate, substantially affect ISC.”
	+ Whether there are express congressional findings or legislative history regarding the effect upon ISC of the regulated activity.
		- Also not required unless no such substantial effect was visible to the naked eye (“the naked eye requires no assistance here”).
	+ Whether the relationship between the regulate activity and ISC is too attenuated to be regard as substantial.

**Dormant CC**: States can’t create obstacles to ISC (wasn’t really covered, no need to worry about it).

**Spending Power**:

**Summary**: Simply put, Congress can’t be coercive with the use of its spending power. Spending Power is coercive if:

* A new condition changes the terms of an entrenched spending p-ship (reasonable reliance issue);
* The size of the grants are potentially coercive (between .05% & 10%); ***and***
* The new offer conditions those large federal grants on compliance with an indirectly related obligation.
	+ Don’t forget, ***they have to be able to say no***, that is the whole point of cooperative federalism

Erin Ryan *Sebelius* Article: Prof. Ryan argues that *Sebelius* has changed the spending clause jurisprudence but that it still doesn’t endanger the CAA mostly b/c the reliance issue has long been dealt with and b/c the states can always say no and have the fed gov’t take over.

**Regulatory Takings**:

**Summary**: There are two kinds of regulatory takings. Ad hoc takings (these follow the Penn Central factors – (1) to what degree the gov’t interferes w/ reasonable investment back expectations, (2) the economic impact of the regulation on the private owner (reasonable residuum – what is left to the owner), and (3) character of gov’t action (physical intrusion v. regulation, singling-out v. broadly-applicable)), and *per se* takings. *Per se* includes physical intrusions (cable wire) and total loss of economic value (*Lucas*).

*Lucas v. South Carolina Costal Council* (1992 – Scalia): The state regulation prevents Lucas from developing his land and the Court holds that this is a total loss of economic value (denies all economically beneficial or productive uses of land). To show a nuisance exception, show that the activity regulated would have always been a nuisance, so there was no right to do this when the now-owner took title. This overruns “noxious use” doctrine. Scalia didn’t seem to look very hard for an economic use other than developing the land, perhaps b/c Scalia was worried about deceptive use of regulations to take private property. ***TRADITIONAL NUISANCE EXCEPTION***.

**Concurrence** (Kennedy): “The test must be whether the deprivation is contrary to reasonable, investment-backed expectations.”

**Dissent** (Blackmun): This new test is dangerously broad.

**Dissent** (Stevens): The threshold question should be is this state-wide (or close to it) or individual. If individual then we consider a taking.

**JF**: It is hard to imagine that there will ever be another case like this but remember it.

**The 10th Amendment as a Constitutional Restraint**:

**Summary**: Congress may get state cooperation by offering cash incentives; by directly regulating, preempting state regulation if the state won’t. What it can’t do is force the state to deal with the problem in Congress’ way. It can’t make the State uses its institutions to carry out congress’ programs. If there is not an opportunity for truly cooperative federalism (the state to say no and let the fed gov’t come take over) then it is probably commandeering. The ability to say no is big time.

*New York v. US* (1992 – O’Connor): The Court rules that Congress’ Low-level Radioactive Waste Policy Amendment Act of 1985 is partially unconstitutional b/c it commandeers the states. *“Where Congress encourages state regulation rather than compelling it, state governments remain responsible to the local electorate’s preferences; state officials remains accountable to the people.”* Three incentives are created. The first is constitutional under the CC and spending clauses. The second is constitutional under CC. The third is ruled coercive. It either requires to do what Congress directs or be liable for the waste. You can’t make the states use their institutions to effectuate a federal policy.

**Dissent** (White): We need action to fix this huge problem, and the states agreed to this system. This is an unbecoming brand of formalism.

**~Statutes~**

Statutory Off-Ramps

NEPA – Categorical exclusion; FONSI

ESA – Avoid listing (sage grouse, conservation agreement by industry), God Squad, ITP, ITS (§7)

CAA – SIPs (states have discretion as to individual sources)

CWA – NPS, AG Stormwater (look out for CAFOs)

CERCLA/RCRA – Petroleum exception (CERCLA); Spill cleaned up, no more imminent/substantial danger (RCRA)

**~National Environmental Policy Act (NEPA)~**

**Summary**: NEPA is an aspirational but ***action-forcing*** statute that declares as the policy of the United States “productive and enjoyable harmony between man and his environment.” NEPA §2. It is primarily a procedural statute (in fact, its 0-12 record before SCOTUS has reduced it to that), administered by the ***CEQ***, that principally requires federal agencies to produce an environmental impact statement (EIS). NEPA § 102(2)(c). ***JF*** likes to think that there is more to it, a substantive requirement, that the EIS-informed decisions be subject to (essentially) A/C review (*State Farm* – That there be a rational connection between the facts found (EIS) and the decision made). This has not, and likely won’t happen.

**Policy Rationale for NEPA**: To “ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed info[] concerning significant [EIs]” and to guarantee “that the relevant info[] will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.” (Stevens – *Methow Valley*)

**NEPA and CEQ Regs (pp. 1018 and 1993):**

**§ 2:** Purpose of the statute

**§ 101:** Declaration of Nat’l Enviro Policy (exhortation for country & gov’t to take enviro’l concerns seriously)

**§ 102(c):** EIS Requirement

* ***EIS Trigger***: ““[T]o the fullest extend possible. . . all agencies of the Federal Gov’t shall . . . include in every . . . (1) major Federal action[] (2) significantly affecting (3) the quality of the human environment . . . [an EIS].”
* ***What an EIS Must Include***: ***(1)*** The analysis of the EI of the proposed action; ***(2)*** any adverse environmental effect which cannot be avoided should the proposal be implemented; ***(3)*** alternatives to the proposed action; ***(4)*** the relationship between local short-term use of man’s environment and the maintenance and enhancement of long-term productivity (didn’t talk about this one); and ***(5)*** any irreversible or irretrievable commitments of resources which would be involved in the proposed action should it be implemented (didn’t talk about this one).

**§ 1502:1:** Purpose of the EIS (“action forcing”; “more than a disclosure document”)

**§ 1502.14:** Alternatives (“all reasonable alternatives”; “[those] not within the jurisdiction of the lead agency”; “alternative of no action”; “agency’s preferred alternative”; “mitigation measures [see ***1508.20***]”)

**§ 1508.4:** Categorical Exclusion (CE) – Categories of actions that do not individually or cumulatively have a Sig EI

**§ 1508.7:** Definition: Cumulative Impact

**§ 1508.8:** Definition: Effects

**§ 1508.9:** Environmental Assessment (**EA**)

**§ 1508.13:** Finding of no Significant Impact (**FONSI**)

**§ 1508.14:** Definition: Human Environment (see *Strycker Bay Neighborhood v. Karlen*)

**§ 1508.18:** Definition: ***Major Federal Action*** (Major reinforces but no meaning independent of significantly (§1508.27).

**§1508.20:** Definition: Mitigation

**§ 1508.27:** Definition: Significantly (requires consideration of [(a)] context and [(b)] intensity)

**NEPA Flow Chart**: Whenever there is a major Federal action, the agency produces an Environmental Assessment (EA - §1508.9) to determine if it significantly affects the human environment. If it does ***not***, the agency does not have to produce an EIS but must produce a Finding of No Significant Impact (FONSI - §1508.13). If it ***does*** then the agency ***must*** produce an EIS.

**Judicial Review**: The entire flow chart is reviewable from a procedure standpoint. See Cases.

**No Citizen Suit Provision**: All of the suits challenging the procedures under NEPA are brought under the APA (§ 702) as parties “aggrieved by agency action.”

**Cases and Readings:**

*Scenic Hudson Preservation Conference v. AEC* (1972 – (Douglas **dissent** to denial of Cert): This is where Freeman first sees the possibility of something more in NEPA. Justice Douglas thinks that agencies need to come up with their own alternatives and that NEPA provides a duty to not just to study thoroughly but also to choose well (A/C Review?). NEPA can be seen either as trust in informed agencies or a lack of trust in captured agencies. This case was interesting b/c it was the start of NEPA litigation. A license for a power plant was remanded for the first time.

*Calvert Cliffs Coordinating Committed v. AEC* (1971 – DC Cir.): The agency had passed regs on how they were going to handle EISs, the Court said they were deficient. Judge Skelly-Wright says that §101 is the substantive portion of NEPA and §102 is the procedural. §102’s “***fullest extent possible***” means nothing short of statutory (external) interference permits the agency not to comply with NEPA. Burden is on the agency to bring up and consider environmental issues (and alternatives). Also, agency can’t let other agencies certify to a “clean bill of health.” NEPA requires balance while most regs are about floors and ceilings. It is about taking everything into consideration, not myopic vision.

*Vermont Yankee Nuclear Power v. NRDC* (1978 – Rehnquist): The challenge was that the AEC hadn’t considered the alternative of energy conservation. The Court states that the agency can’t be expected to consider every possible alterative but must *“be judged by the information then available to it.”* Therefore as considering conservation was a discretionary matter, the court doesn’t have much to review under NEPA. History: Agency controls threshold consideration of alternatives. Not just any alterative, analysis needs some boundaries – feasibility matters. This is a ***big burden shift***; show agency that your alterative is feasible. What is eligible as an alterative is an evolving consideration. ***Agencies are only required to consider reasonable alternatives, according the information they have at the time.***

*Strycker Bay Neighborhood v. Karlen* (1980 – Per Curium): Cir Ct ruled that delay could not be an overriding factor of the environmental concerns but SCOTUS held that “*the only role for a court is to insure that the agency has considered the environmental consequences*.” It doesn’t get to step in and say how the concerns should be balanced. The experts must be allowed discretion.

**Dissent** (Marshall): He concerned that all of the low-income housing will be in the same area. Thinks that there should be A/C review for substantive decisions. ***Remember: What is a triggering impact on the human environment is read broadly (but fear doesn’t count), no one argued that housing hadn’t triggered here.***

*Robertson v. Methow Valley Citizen Council* (1989 – Stevens): The Forest Service granted a license (which qualifies as a major Federal action) for a ski resort. The “worst-case scenario” analysis is replaced by a focus of reasonably foreseeable impacts. Also, while an EIS must discuss ***mitigation measures, there is no substantive requirement to employ them*** (or discuss what steps will be taken). “[*I]t is now well settled that NEPA does not mandate particular results, but simply prescribed the necessary process*.” “*Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action*.” (***This is the end of the hope of substantive review for NEPA***)

*DOT v. Public Citizen* (2004 – Thomas): The President lifts a moratorium on Mexican vehicles. DOT doesn’t provide an EIS; suit follows. Thomas holds that b/c the agency didn’t have control over the action, it was not required to provide an EIS. ***Non-discretionary action kills NEPA***. ***Freeman***: this is crazy. She thinks there is discretion. The rule that the agency will lay out will surely have an economic effect, even if the agency can’t control whether it has to issue the rule, it can control what the rule says. **JF**: “SCOTUS finds a way to make NEPA *only* a procedural requirement. Even in reading the triggering terms the Ct is cramping (narrowing) NEPA here.”

*Winter v. NRDC* (2008 – Roberts): Lower cts enjoin Navy training. Court says that injunction is strong medicine, the weighing of the equities tilt in the navy’s favor. ***Takeaways***: NEPA v. Military, military wins (nat’l defense is a heck of an equity). They aren’t exempt but they get *a lot* of deference.

**Concurrence** (Breyer): Agrees that the injunction should be vacated. Would maintain the Cir Ct’s modifications b/c it is only for a little while longer and EIS isn’t finished.

**Dissent** (Ginsburg): ***TIMING***. The whole idea of NEPA is to help agencies make informed decisions. The navy didn’t submit the EIS at the proper time and thus procedurally failed.

*NEPA GHG Guidance Document*: Why issue guidance about 25,000 metric tones of GHG or above should be considered for EIS? Barring a rule from CEQ, no way to argue that GHGs from any one action should be part of an EIS (individual output is too small, not significant impact).

***30*** ***states*** have some version of NEPA, and at least CA requires private actors to prepare EISs.

***Alternatives*** are about reasonableness. Think of the Keystone pipeline. What impacts from having it, what alternatives to having it, what impacts and alternatives to not? Nuclear power plants are the same kind of thing. If you don’t have those, you avoid the radioactive waste but you get energy from a dirtier source.

**Environmental Agencies**: NEPA also applies to environmental agencies; they usually do the “functional equivalent.”

**~The Endangered Species Act (ESA)~**

**Summary**: This is a conservation statute administered by the Dept. of the Interior (Secretary of Interior - SoI). It is interested in preserving species both for their own value (monetary and otherwise) but also to preserve bio-diversity. §4 requires the SoI to list threatened and endangered species and their critical habitat; this is the trigger mechanism. Only after a species is listed can ESA provide them with protection. §7 requires inter-agency cooperation to preserve the listed species. §9 prohibits certain public and private action, and §10 grants exemptions from those prohibited actions (particularly incidental take permits). The end goal is to have no species listed b/c they are all properly conserved.

**ESA (p. 303):**

**§ 3:** Definitions (*DoW v. Norton*; *Babbitt v. Sweet Home*)

* **(3):** “Conservation” means to us all methods and procedures necessary to bring listed species to point that such methods are no longer necessary
* **(5):** “Critical Habitat” means geographical area occupied by species, at time of listing, on which are found those physical or bio features that (I) are ***essential*** to the conservation of the species and (II) which may require special management consideration or protections, and such areas outside of the inhabited area that are ***essential*** for the conservation of the species. ***DOES NOT*** include the entire geographical region that species ***CAN*** occupy unless that area is the same as area essential to the species conservation
* **(6):** “Endangered Species” means any species which is in danger of extinction throughout all or a significant portion its range (except insects that could cause risks to humans) (see *DoW v. Norton*)
* **(19):** “Take” means to harass, ***harm***, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (*Babbitt*)
* **(20):** “Threatened Species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (see *DoW v. Norton*)

**§ 4:** Listing Threatened/Endangered Species and their Critical Habitat (*NSO v. Hodel*; *NSO v. Lujan*; *DoW v. Norton*)

* **(a)(1):** ***Triggering*** factors for listing determination (danger to habitat, overutilization, disease or predation, inadequacy of existing regulation, or other natural or manmade factors) – ***No Discretion*** if sci/com data recommend listing
* **(a)(3)(A):** Designation of Critical Habitat – This should occur “to the maximum extent prudent (for the species – *Lujan*) and determinable” concurrently with listing (see (b)(6)(C)) and may be revised from time to time as appropriate (land owned by DoD is exempted)
* **(b):** Basis for Determinations
	+ **(1)(A):** Listing determination are based ***solely*** on the best scientific/commercial data available (see *Hodel*)
	+ **(2):** Determinations re: critical habitat designations are based on the best scientific data available, economic impact, impact on nat’l security, and any other relevant impact. SoI may exclude an area from Crit Hab if *costs outweigh benefits* ***UNLESS***, based on scientific/commercial data, failure to include that area will result in ***extinction*** of species at issue.
	+ **(3)(A):** Interested persons may petition that a species be added or removed from lists. SoI has 90 days to make finding re: whether the petition has sufficient data to back it up. If finding made, SoI has 12 months to do one of ***3*** things: (1) Accept the petitions request, (2) Deny the petition’s request, or (3) Accept petitions request ***but*** action is precluded by pending proposals *and* expeditious progress is being made.
	+ **(6)(C):** Final regulations designating Crit Hab should be published concurrently with final ruling implementing listing ***UNLESS*** (i) for the conservation of the species, the listing reg must be published immediately (and there wasn’t time to designate Crit Hab), ***or*** (ii) Crit Hab is not then determinable, in which case SoI may extend the deadline but one year but not more than one year.
* **(d):** Protective Regulations – Can promulgate regs to accomplish goal of ESA (added “threatened” to §9(a)(1))
* **(f):** Recovery Plans – **JF**: These are tricky b/c they are hard to enforce

**§ 7:** Interagency Cooperation (*TVA v. Hill*)

* **(a)(2):** Consultation Requirement – This is all about ***action agencies***. All fed agencies must consult with SoI to “insure that any action authorized, funded or carried about by [an action agency] is not likely to ***(1)*** jeopardize the continued existence of any [listed] species or ***(2)*** result in the destruction or adverse modification of [critical] habitat of such species.”
* **(c):** Biological Assessment – All action agencies must request from SoI whether a listed species may be present in the area of the proposed action. If present, Biological Assessment (can be part of EIS): Likely to be affected? If No, proceed (subject to A/C). If Yes, Formal Consultation - Biological Opinion. Possible findings: ***(1)*** No Jeopardy or Adverse Mod (Incidental Take Allowed), ***(2)*** Jeopardy or Adverse Modification ***but*** Reasonable & Prudent Measures will Avoid (Incidental Take Allowed (ITS)), or ***(3)*** Jeopardy (Agency action ***MUST*** stop) – almost NEVER happens, ***many escape hatches***.
* **(e)-(h):** Exemption from the Consultation Requirement via The God Squad and its Procedures
	+ **(h)(1),(2)**: Conditions for Granting an Exemption

**§ 9:** Prohibited (Public and Private) action (*Babbitt v. Sweet Home*)

* **(a)(1):** No one can, among other things, take listed species

**§ 10:** Exemptions (*Babbitt v. Sweet Home*)

* **(a)(1)(B):** Incidental Take Permits - SoI may issue permits if take is incidental to other wise lawful activity
* **(a)(2)(A)**: Conservation Plans – Parties must submit a conservation plan for ITP (plans subject to public comment); **JF**: This is essentially a contract, can be very collaborative.
* **(b)**: Hardship Exemption – If a party enters into a K regarding a species before it was listed and its listing causes undue hardship the SoI may exempt that party to the extent she deems appropriate
* **(e)**: There are exemptions for Alaskan Natives (hunting rights etc.)

**§11**: Civil and Criminal Penalties

* **(g):** Citizen Suit Provision: against any person (including US) for violation of any provision of ESA or any rule promulgated under ESA; against EPA for failure to carryout any non-discretionary act or duty of ESA

**ESA Flow Chart**: Threshold question is, is this species endangered or threatened (? If yes then SoI must list. If listed then ***(1)*** critical habitat must be designated - §4(a)(3)(A), ***(2)*** a recovery plan must be implemented - §4(f), ***(3)*** Fed agencies must consult with SoI re: their proposed actions and possibly produce a Bio Assessment - §7(a)(2),(c), ***(4)*** the listed species gets protection from takes, etc. - §9(a)(1).

**Cases:**

*Northern Spotted Owl (NSO) v. Hodel* (1988 – DCt, Washington): A petition was made under §4(b)(3)(A) for listing of the Northern Spotted Owl, FWS denied the request (not listing the owl).FWS decision not to list was ruled A/C b/c there was no scientific support for it. This a good case to see A/C and for political capture (war in the woods). **JF**: I gave you this case so that you can see what it takes for an agency action to be ruled A/C.

*Northern Spotted Owl (NSO) v. Lujan* (1991 – DCt, Washington): Follow-up case to *Hodel*. FWS did not designate Crit Hab at time of listing. Decision not to list is ruled A/C because the agency just said it was indeterminable but had not support for that claim. In §4(a)(3)(A), “prudent” means prudent for the species and “determinable” means science is clear, can determine, not whether it is logistically or politically difficult (see also §4(b)(6)(C) – not determinable means science is unclear, not that FWS lacks ability). ***NB***: Citizen suits can cause agency to lose control of enforcement agenda, this is why they must notify the agency and give it a chance to “diligently prosecute” before going forward.

*Defenders of Wildlife (DoW) v. Norton* (2001 – 9th Cir): SoI issued a proposed rule to list the flat-tailed horned lizard as a threatened species but then withdrew the proposed rule, deciding not to list it. The court struggles with the interpretation “extinct throughout a significant portion of its range” portion of the “threatened” definition and finally decides that to be “extinct throughout a significant portion of its range” means “***there are major geographical areas in which it is no longer viable but once was***.” This obviously applies to endangered species as well b/c the definitions are embedded. **JF**: There is the possibility of an argument that a small but key portion of the range is enough to trigger listing.

*TVA v. Hill* (1978 - Burger): Snail Darter and 80% complete Tellico Dam case. Court held that there was no wiggle room; agency action just can’t injure listed species. This was a one off case; §7 consultation requirement will almost never stop agency action now. B/c of this case, the God Squad was created and the language in §7(a)(2) was altered to be more permissive. ***NB***: Even if no Crit Hab has been designated, you can bring a §7 claim but it will just be harder to show that it is in danger as a matter of fact. Cheek

**Dissent** (Powell): Reading is unreasonable, too strict.

**Dissent** (Rehnquist): Even if read this way, no injunction b/c requires equitable balancing and dam wins.

*In re Polar Bear Listing v, Salazar* (2013 – DC Cir.): Challenge to the listing of Polar Bear as threatened due to loss of sea ice as a result of Global Warming. Not A/C b/c all of the arguments were about how the FWS interpreted the data but its interpretation was no “so implausible that it could not be ascribed to a different view or the product of agency expertise,” nor did it “run counter to the evidence before the agency. ***BUT*** reg passed under §4(d) removes §7 and §9 protections from polar bears for action occurring outside their range (see ***ALL*** GHG emissions).

*Babbitt v. Sweet Home* (1995 – Stevens): DoI passes a reg that interprets “harm” in the “Take” definition (§3(19)) to include “***significant habitat modification that actually kills or injures wildlife***.” Court upholds this reg in part b/c ordinary meaning supports it, ITPs imply that Congress thought of just this concern, the purpose of the statute supports it and leg history supports it. Know this for the definition above. ***NB***: Modification of habitat here does not require that crit hab be designated, only listing, but designation definitely helps.

**Concurrence** (O’Connor): She is exercising judicial restraint, okay with this reg b/c limits habitat modification nthat ACTULLY kills or injures, which is limited by ordinary proximate cause principles. Also, this is a facial challenge and so it has to be shown to be wrong in ALL cases. She deals with Scalia’s *Palila* claim.

**Dissent** (Scalia): 3 problems – (1) Regulation forbids essential behavior under *Palila*, (2) Regulation doesn’t require an act, an omission will do, and (3) Prohibits damage to populations, not specific animals/species. ***NB***: As in Lucas, Scalia is worried about the conscription of private land. This is an important consideration to remember.

**Citizen Suit Provisions**: All such provisions require the private party to notify the agency and allow them the opportunity to “diligently prosecute” the alleged violation (this allows agency to keep some control over enforcement agenda); agency always may intervene ***as a matter or right***.

**~The Clean Air Act (CAA)~**

**Summary**: This command-and-control statute uses both nat’l, health/harm-based ambient air quality standards (NAAQS – Primary and Secondary) and technology-forcing, performance-based emission standards (RACT, BDAT, BACT, MACT, and LAER and BESR) to cleanup and maintain a minimum level of air quality. CAA divides the States into zones (air quality control regions), which must meet NAAQS for each of six (6) air pollutants. Each of these zones will always be classified as “Prevention of Significant Deterioration” (PSD) or “Nonattainment,” for each of the six (6) NAAQS. PSD areas are only allowed to increase emissions by a specified amount each year and new sources must get a permit, in order to maintain air quality and Nonattainment zones have their own set of special (strict) regs (direct reg on sources; new sources must meet a performance standard (“PS”) (LAER) and have off-sets, existing sources must meet PS (RACT). States are required to submit a “State Implementation Plan” (SIP), which allows them to distribute the pain (often a political decision) within their own state; if they do not, EPA will issue a Federal Implementation Plan (FIP) which will make those allocations for them (States want to control these decisions). CAA also provides ***category-by-category*** direct reg of sources (§§ 111, 112). New (or ***modified***) sources within the listed category must meet New Source Performance Standards (NSPS), which are reevaluated every 8 years. These serve as a “ratcheting-up” mechanism (in the meantime, SIPs continually ratchet-up BACT until NSPS reevaluated). All ***major*** (more stuff happens) sources (existing/new) within a listed category that emit hazardous air pollutants (HAPs) must meet MACT (also reevaluated every 8 years). States are responsible their pollution that affects other States (see Good Neighbor Provision (§110(a)(2)(D)), *EME Homer*).

**CAA Graphic Layout**:

For each Air Quality Control Region and each NAAQS the following applies:

|  |
| --- |
| **NAAQS (1-6) and Corresponding SIPs or FIPs** |
| **PSD – Done in SIPs** | **Nonattainment – Done in SIPs** |
| **New Sources** (NSReview) – BACT § 165(a)(4) (+ permit) | **New Sources** – LAER + Off-sets §§ 171(3) & 173(a)(2) |
| **Existing Sources** – None; no blanket direct reg on ES | **Existing Sources** – RACT §172(c)(1) |
| **If Source falls into a listed Category Nationwide:** |
| § 111(a)(1) & (b) – NSPS (New Sources) BACT (which is just a BSER rule) |
| § 111(a)(1) & (d) – (Existing Sources – must have § 111(b) to get § 111(d)) (EGUs under CPP) BSER ***as part of SIPS*** |
| § 112 – Hazardous Air Pollutants (HAPs) (Existing and New Major and Area Sources) |

***Remember: You can be in PSD for one pollutant and Nonattainment for another!***

**CAA (p. 1241):**

~NAAQS and SIPs~

**§ 108(a)(1)**: ***Triggering*** factors for issuing criteria (scientific doc that accompany NAAQS) for a pollutant (emissions of the pollutant, in Administrator’s judgment, ***(A)*** cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, ***(B)*** such emissions come from numerous/diverse mobile/stationary sources) – ***No Discretion***; ignore ***(C)***; see *NRDC v. Train*

**§ 109**: Primary and Secondary NAAQS

* **(a)**: For new NAAQS (after 1970), proposed NAAQS (P&S) must but published jointly w/ criteria issued in §108
* **(b)**: How to set Primary and Secondary NAAQS (In all but one case (SO2) P & S standards are the same)
	+ **(1)**:Primary: Based on §108 Criteria; requisite to protect the public health, allowing for an adequate margin of safety (***no cost consideration*** – *American Trucking*)
	+ **(2)**: Secondary: Based on §108 Criteria; “requisite to protect the public welfare [**JF**: Property] from any known or anticipated adverse effects associate with the presence of such air pollutant in the ambient air”

**§ 110**: State Implementation Plans (SIPs)

* **(a)(1)**: States have three (3) years from the issuance of a new NAAQS to submit a SIP for each zone w/in the state
* **(a)(2)**: SIP must: Include enforceable emission limitations, Monitor data, Establish permit program, Provide adequate personnel, funding, and authority, for implementation, enforcement, and maintenance of AQS, and **(D)**.
	+ **(D)**: Good Neighbor Provision: SIP must provide for how it will not interfere w/ neighboring states’ implementation plans; “contribute significantly to nonattainment,” etc. (*EME Homer* and Transport Rule)
* **(c)(1)**: Federal Implementation Plans (FIPs); EPA can FIP a state if SIP does not the minimum criteria, is incomplete, or if it disapproves, in whole or in part, with the submission.

~NSPS~

**§ 111**: Standards for New Stationary Sources (BSER for Existing, BDAT for New (modified))

* **(a)**: Definitions (new source, standard of performance, existing source, modification, stationary source, etc.)
* **(b)**: Listed categories and PSs for new sources in each of these categories
* **(d)**: Standards of Performance for Existing Sources; ***must have § 111(b) to get § 111(d)***. Via *MA v. EPA*, possible that EPA can directly regulate existing sources under this provision b/c GHG’s are pollutants but are not regulated via NAAQS. This is the basis for the ***Clean Power Plan***.

~Toxics~

**§ 112**: Direct Regulation of (new and existing) Major and Area Sources that Emit Hazardous Air Pollutants

* **(a)**: Definitions – (***Major Source***, Area source, stationary source, new source, EGU, etc.)
* **(b)**: List of Hazardous Pollutants
* **(c)**: List of Source Categories
* **(d)**: Emitters of Hazardous Pollutants must meet MACT
	+ **(2)**: Take cost into consideration; methods or techniques for emission reduction
	+ **(3)**: MACT defined (not less stringent than the average limitation achieved by the best performing 12% of the existing sources in that same category or subcategory)
	+ **(6)**: Emissions standard reevaluated every 8 years
* **(n)(1)(A)**: Req to make an “appropriate and necessary” finding re: the regulation of EGUs (*Michigan v. EPA*)

~PSD~

**§ 165**: New Sources; major-emitting facilities must get a permit (a)(1), and must meet BACT (a)(4).

**§ 169**: Definitions; “major-emitting facility” (very important for *UARG* – any other source) and “commenced”

~Nonattainment~

**§ 171**: Definitions (Reasonable Further Progress (“RFP”) and Nonattainment Area)

**§ 172**: Nonattainment Plan; States must submit a nonattainment plan which will lay out how the area will achieve attainment in no fewer than five (5) years.

* **(c)**: Existing sources must meet, at minimum, RACT, plan must show RFP, new sources must get permits

**§ 173**: Permitting; new sources must get permits (§ 172(c)), meet LAER ((a)(3)), and get offsets ((c))

**§ 177**: Interstate Transport Commission; EPA can add bad neighbors to the nonattainment zone (create a transport region)

**§ 179**: Sanctions; ***Highway funds*** can be taken in nonattainment zones (***Spending Power Question***)

~Emission Standards for New Mobil Sources~

**§ 202**: Power to regulate mobile sources that contribute to air pollution anticipated to endanger health or welfare

**§ 209**: Regs pursuant to §202 are ceiling and floor (i.e., total) preemption

* Waiver: CA is exempt as long as it is more strict, not A/C, enforcement is consistent with statute, and needs standards to meet “compelling and extraordinary conditions.” Other states can join – ***TWO-CAR NATION***!

~Other~

**§ 302**: Statute-wide Definitions

**§ 304**: Citizen Suit Provision; against any person for violation of PS or order; against EPA for failure to carryout any non-discretionary act or duty of CAA; against any person who proposed to construct or constructs any new or modified major emitting facility without a permit or in violation of any condition of such a permit

**NAAQS**:

* + Carbon monoxide (CO)
	+ Lead (Pb)
	+ Nitrogen dioxide (NO2)
	+ Ozone (O3)
	+ Particulate matter (PM)
	+ Sulfur dioxide (SO2)

**Performance Standards (Least to Most Stringent; Most to Least Consideration of Costs)**:

RACT – Existing Sources in Nonattainment Zones (§172(c)(1))

BDAT – New (modified) Sources under NSPS; determined categorically (§ 111(a)(1)) Just a different BSER rule

BACT – New (modified) Sources in PSD (§ 165(a)(4))

MACT – Major Sources (New/Existing/PSD/Nonattainment or otherwise) of hazardous pollutants (§ 12(d)(2) & (3))

LAER – New (modified) Sources in Nonattainment Zones (§§ 171(3) & 173(a)(2))

* ***NB***: If two or more apply, whichever is the most strict (probably) controls
* ***NB***: None of these standards require the ACTUAL application of SPECIFIC technology (in fact that would be illegal under § 111(b)(5)); the source just has to be as good (emissions-wise) as the technology on which the standard is based. It can arrive at that level anyway it wants.

BSER: Not on the continuum – Existing Sources under NSPS (determined categorically) (§ 111(a)(1))

**Floor and Ceiling Preemption**:

CAA is floor preemption (States may be more stringent but not less) in all cases except mobile source standards, which are ceiling preemption. CA is the exception to this rule, it can regulate mobile sources more stringently – See §§ 179 & 209. ***Two-car nation***.

**Belt and Suspenders Program**:

* **Belt**: Feds set health based standard for 6 worse pollutants, states implement through performance standards.
	+ NAAQS and SIPs
* **Suspenders**: to strengthen program CAA allows EPA to regulate some pollutants directly, ensure that AQ doesn’t degrade, and constrain development of a SIP
	+ **Toxics Program/HAPs**
	+ **PSD**
	+ **Nonattainment**
	+ **NSPS** new source performance standard for certain categories of industry
		- EPA determines whether a category of industry (i.e. smelters pulp and paper mill) is a significant contributor to AQ degradation. If so, then regulate them directly – apply to sources themselves
		- Apply to new (modified) sources b/c cheaper to upgrade if you are already building or modifying
	+ **Threats**: SIP call, FIP, take over permitting, etc.

**Important Dichotomies**:

* New v. Existing Sources
* Harm-based v. Tech (performance)-based Standards
* Stationary v. Mobile Sources
* Major v. Area (minor) Sources

**Cases and Readings:**

*NRDC v. Train* (1976 – 2d Cir.): EPA argued that it had discretion under § 108(a)(1) issue criteria for lead (and thus for setting it for NAAQS) b/c (a)(1)(c) grants discretion and § 211 give EPA power to regulate additives, so it could regulate lead there. Ct rejected this, explaining that §§ 108-110 would be an “exercise in futility” if EPA could avoid listing by not issuing criteria. ***If (a)(1)(A-B) are satisfied, listing is mandatory***. § 211 is a compliment not a substitute for § 108. (c) doesn’t matter anymore and court thinks CAA was “taking a stick to the states.”

*Whitman v. American Trucking Associations* (2001 – Scalia): ***Cost Case*** – Whether EPA can consider costs when setting primary NAAQS. Text states that the standard should be “requisite to protect the public health . . . allowing for an adequate margin of safety.” Court UNANIMOUSLY says EPA ***cannot consider costs***. Congress specified the use of cost in other places in the statute and could have done so here if it wanted that, i.e. ***there must be a “textual commitment” to require the consideration of cost***. Also the “elephant in mouseholes” argument. **JF**: If costs were considered then no harm-based standard, costs would swallow CAA b/c § 109 sets NAAQS that drive CAA.

**Concurrence** (Breyer): Disagrees about the textual commitment. Cost considerations are rational and all else being equal, costs should be considered. But Congress was so clear here (leg history indicates tech-forcing so not all equal, costs should not be considered).

*Lead Industries v. EPA* (1980 – DC Cir.): Case about discretionary policy moments in the process of setting NAAQS. The NAAQS here was for lead. The method for setting it was: (1) Choose population to protect, (2) Decide threshold blood level for “adverse” effects, (3) Allocate share of blood level to airborne lead, (4) Decide air lead/blood led ratio, (5) Adjust for “adequate margin of safety.” The “criteria” is really important here, if this is solid, these discretionary steps will not look A/C. ***Question of the Case***: Who should bear the cost of scientific uncertainty? Should industry always get the benefit?

*Kennecott Copper v. Train* (1975 – 9th Cir.): Case is about the relationship between EPA and states when submitting SIPs. When NAAQS come out the state must (1) Determine extent to which they will violate, (2) Calculate emission cuts needed, (3) Allocate reductions among their sources. The plant didn’t have the technology to sufficiently reduce emissions so they used “intermittent” controls like dispersion. EPA rejected the SIP b/c it was not reducing emissions, thus not meeting attainment and FIPed the Nevada, requiring the best tech available + reduction in production + research into technology emission reduction technology. SIPs can include “***other control measures***” to reach their goals. CAA is technology forcing so lack of technology is not an excuse.

*Union Electric v. EPA* (1976 – Marshall): A the approval of a SIP was challenged by industry in the state saying that it was not technologically feasible. The Court held that EPA cannot consider economic/tech feasibility when approving or disapproving a SIP. It ***shall*** approve if §110(a) is satisfied. ***This is a tech-forcing statute***! (See § 110(k). Also, Congress did think of all of this, there are other escape hatches: Governor suspension (§ 110(g)), EPA has enforcement discretion (§ 113), and states can appeal to EPA for extension. But, EPA can consider feasibility under §§ 110(e), 110(f) and 113(a)(4). ***NB***: FIPing a state is episodic, it is expensive and burdensome on the agency, so it doesn’t want to do it if it can help it.

* ***Q:*** Is it a taking to regulate a business out of business? ***A:*** In the case of polluters, there is no pre-existing constitutional right to creat ea nuisance/to engage in harmful conduct, so no, no taking.

**Concurrence** (Powell): Just wrote to say that if Congress had fully understood what it was doing it wouldn’t have done this (CAA) b/c of the risk of cutting power to a major city.

*EPA v. EME Homer* (2014 – Ginsburg): Good Neighbor Provision & ***Cost Case*** – § 110(a)(1)(D) prohibits States “from emitting any air pollutant in *amounts* which will contribute significantly to nonattainment” of another state. The crux of this case was whether EPA can consider cost in determining how to reduce interstate pollution that contributes to downwind state nonattainment. The Transport rule, which EPA promulgated to handle the Good Neighbor Problem called for reductions by getting reductions from the most efficient decrease, in other words, from whomever it would be cheapest to reduce emissions. The Court held that ***cost may be considered where there is ambiguity*** and there was ambiguity in “significantly.” ***NB***: EPA FIPed here, and didn’t have to give any notice to the States, FIP can be used to motivate States, once they get thing in order the FIP can come off. ***Remember***: CAA preempted Fed Common Law Nuisance (for interstate pollution) only recourse ***§ 126(a)(2)(b-c)***

**Dissent** (Scalia): No ambiguity so no consideration costs in this way. AMOUNTS! Amounts is everything, regulation must be proportional to the amounts contributing to downwind nonattainment.

* ***If GNP used on Exam, check slides, very helpful!***

*Michigan v. EPA* (2015 – Scalia): Cost Case – Must EPA consider cost when making the “appropriate and necessary” finding under § 112(n)(1)(A)? Scalia says that the word appropriate is ambiguous so he moves to *Chevron* Step 2 but finds that an interpretation that does not consider costs (possibly influenced by the disparity) is unreasonable. In other words, Scalia ***decided this case at* Chevron *Step 2*** and held that ***if the language is ambiguous, EPA MUST consider costs***. Remember, due to an Exeutive Order, EPA did a Regulatory Impact Analysis, which requires cost benefit analysis. The Court ***does NOT require a formal CBA, just some consideration of cost*** and did not reject ancillary benefits as legally irrelevant. But suggested cost considerations now require A/C review.

**Dissent** (Kagan): All 9 justices get behind the proposition that costs are “***always a relevant***” factor. The difference, she thinks, is that consideration does not need to be made up front, and she makes the point that cost has been considered a lot already.

*MA v. EPA* (2007 – Stevens): Court defines GHG’s as a pollutant under CAA and requires that EPA make a finding one way or the other on the danger of GHGs. EPA later made an endangerment finding (upheld in *UARG*) starting the domino effect: Endangerment finding (§ 302(g)) 🡪 Mobile Regulation (§ 202(a)(1)) 🡪 Stationary Source Regulation (§ 111(d)).

*American Electric Power Co. v. CT* (2011 – Ginsburg): This is *Milwaukee* for air pollution. CAA precludes fed common law nuisance claims for GHGs (due to ruling MA v. EPA). BOTTOM LINE: EPA is more fit to handle this problem than individual judges. The States recourse now is the federal courts (§ 307) and a petition under ***§ 126(a)(2)(b-c)***.

*Utility Air Regulatory Group (UARG) v. EPA* (2014 – Scalia): Case about the “Tailoring” rule to make GHGs make sense with the definition of “major emitting facility.” Instead of 250tpy EPA changed it, for GHGs only, to 100k tpy. The Court held that the interpretation of “pollutant” for PSD was not statutorily compelled as many statutes have one word mean one thing in single context but not in another (here it is only pollutants that would make sense with the quantities specified), therefor it is not clear on its face, so move to *Chevron* step 2. It then held that the interpretation was not permissible, that is unreasonable (***another defeat at* Chevron *step 2***). BUT for anyway sources, that is, sources that are being regulated already, GHGs do count as pollutants and PSD and BACT applies. The Court just didn’t let EPA get to source solely on the grounds that it is a GHG emitter.

**Dissent** (Breyer): Thinks that rewriting should be allowed, he is concerned with the “chipping away” of “any pollutant” including GHGs.

*Why I Worry about* UARG (Jody Freeman): Dangerous for the CCP - Another loss at *Chevron* Step 2; GHG as a pollutant will be determined program-by-program; There were hints that the Court would look at this kind of rule as executive overreach

**Clean Power Plan**:

EPA has promulgated a rule under § 111(d) to regulate GHGs emitted by EGUs. The Statue states that EPA has the authority to issue performance standards for “any existing source for any existing pollutant.” Via Mass v. EPA, UARG and mobile source regulation of GHGs, everything has come together for them to regulate here.

Three (3) building blocks of BESR for the CPP:

* Heat-rate improvements at coal-fired plants
* Displacing coal with gas
* Displacing fossil fuels with zero-emission electricity (renewables)

Possible reasons why no NAAQS?

Lead industries (challenging the process)

UARG reevaluation of the definition of pollutant

Essentially already a NAAQS (though it seems that new source would get a new allotment but it would be regulated under NSPS, we are just trying to get to existing sources here)

More tools in tool kit??

*Fence Line Issue*: The § 111(a) performance standard is BE***System***R. Does that system mean that EPA can regulate beyond the source? Should EPA take energy conservation into account? Does this mean they are regulating energy? This is the fence line issue.

The Building Blocks were applied regionally and the standard from the “worst” region (the one that would have been allowed the larges GHG budget) was used.

***Before the DC Cir right now (2 Libs and 1 Con)***.

**~The Clean Water Act (CWA)~**

**Summary**: The CWA is a sort of foil to the CAA. Its primary regulatory mechanism is effluent (tech-based) standards, set by EPA, targeting point sources (“PS”) (with their own acronyms: BPT, BCT, BAT & BDAT). Different kinds of effluent (conventional, nonconventional, and toxic) get different standards. In order to discharge effluent into “waters of the US”, the point source must have a permit, which it gets from the permitting program run by the State. The backup system, also run by the States, is the ambient water quality standards. The state categorizes each body of water according to designated use (DU) and then sets a quality standard that waters designated for that use must meet (but see § 302). The major weakness (read: gap) in CWA is that it does not regulate nonpoint sources (“NPS”) (prohibition is on any discharge of any pollutant and that is defined as coming from a PS) thought it can do some work with TMDLs (***NB: Don’t forget BMP***). CWA is an even more tortured statute than CAA; its jurisdiction is even up in the air. For POTWs see Class #18 slides.

**CWA (p. 525):**

**§ 101**: Goals and policies; demonstrates that CWA was extremely idealistic (achieve goal of ZERO discharge by 1985; control of nonpoint sources be developed and implemented in an “expeditious manner” ((a)(7)))

**§208**: Areawide Waste Treatment Management: Requires states to identify areas with substantial water quality control problems and to engage in areawide planning including identification of both point source and nonpoint source contributions. There is ***money*** here but ***not enforceable***.

**§ 301**: Effluent Limitations -

* **(a)**: The baseline is that ***discharge*** of ***any*** pollutant by ***any*** person is ***unlawful*** – overcome w/ ***§ 402 permit***
* **(b)**: Timetables (now defunct but still indicate that the idea of the statute is a continual one way ratchet)
	+ (1)(A): Conventional pollutants must meet ***BPT*** (initially)
	+ (2)(A): Pollutants in (C), (D), and (F) (Toxics and Nonconventionals) must meet ***BATea***
		- **(C) & (D)**: Toxic Pollutants (meet ***BAT***)
		- **(E)**: Conventional Pollutants must meet ***BCT***(by 1989)
		- **(F)**: Nonconventional Pollutants (meet ***BATea***)

**§ 302**: Water Quality Related Effluent Limits

* **(a)**: EPA authorized to tighten (essentially, make new) effluent limits for point sources “which can reasonably be expected to contribute to the attainment or maintenance of such [WQS]” (***Can index EL on WQS***)

**§ 303**: Water Quality Standards and Implementation Plans (***Enforceable***)

* **(a)**: Existing WQS
	+ **(1)**: Anti-degradation Policy
	+ **(3)**: New WQS (If no previous WQS); if consistent w/ CWA, EPA has no discretion, must approve
* **(b)**: EPA sets WQS if States fail to submit adequate standards
* **(c)**: State WQS must (I) designate the water body’s use (DU) and (II) the criteria for such standards (WQC) – revise every 3 yrs
	+ Criteria can be ***Narrative*** (unhelpful) or ***Numeric***
* **(d)**: TMDL; State identifies waters for which EL “***are not stringent enough to implement [the WQS]*** applicable to such waters. Then the state must set a pollution budget (***TMDL***) for such waters – see *Prosolino v. Nastri*

**§ 304**: Information and Guidelines (Issuance of Criteria for and the promulgation of performance standards)

* **(a)**: Issuance and Publication of Criteria
	+ **(4)**: Identify Conventional Pollutants
* **(b)**: Effluent Limitation Guidelines (how to arrive at a performance standard)
	+ **(1)(B)**: What BPT means – See *Chem Mfg v. EPA*
	+ **(2)(B)**: What BAT(ea) means
	+ **(4)(B)**: What BCT means – See *Chem Mfg v. EPA*

**§ 306**: New Source National Standards of Performance

* **(a)**: Definitions: (1) – Standard of Performance (BDAT); (2) – New Source
* **(b)**: Categories of New Sources
	+ **(1)(B)**: What BDAT means

**§ 307**: Toxic and Pretreatment Effluent Standards

**§ 316**: Thermal Discharges

* **(b)**: Cooling Water Intake Structures; “best tech[] available for minimizing [env’l] impact” (BTA) – see *Entergy*

**§ 319**: Nonpoint Source Management Programs (There is ***money*** here but ***not enforceable***)

* **(a)**: State Assessment Reports; requires States to identify waters that do not meet WQS b/c of NPS; draft management plans; identify best management practices (***BMP*** – over saturation wouldn’t make you a point source if following BMP) ***NB***: looks like this was trying to do what § 303 now does; it couldn’t do it b/c it wasn’t enforceable, just money.

**§ 401**: State Certification; threshold for getting ***ANY fed license or permit*** for any activity that ***may result in discharge***

* **(a)**: Trigger: “***any discharge into the navigable waters***” – no permit until certificate from the state that says that “any such discharge” will comply with the effluent standards.
* **(d)**: Certificate includes EL and “***any other limits***” necessary to assure that any “***applicant***” will comply with EL and “***other limitation under §§ 301 or 302*** . . . and ***any appropriate requirement of state law***.” – See *PUD No. 1*

**§ 402**: Nat’l Pollution Discharge Elimination System (NPDES) – This is what gets you past § 301 prohibition

* **(a)**: EPA issues permit for discharge (despite § 301) if the discharge meets ELs
* **(b)**: State can run permit program; must meet requirements
	+ **(3)**: Notify downstream states of each applicant and give opportunity to comment
	+ **(5)**: Downstream states can submit recommendations for permit application, for any rejected recommendation permitting state must explain reasoning
* **(c)**: Fed Permitting Program suspended if State takes over; ***presumption in favor of state permitting***
* **(p)**: Municipal and industrial Stormwater Discharges; storm water doesn’t generally require a permit but construction sites over a certain size and urban storm sewers do

**§ 404**: Permits for Dredged or Fill Material

* **(a)**: ACE may issue permit for discharge of dredged/fill material into navigable waters – see *SWANCC*; *Rapanos*

**§ 502**: Definitions

* **(6)**: Pollutant – [***Long list of stuff, check it, but it is probably on there***]; exemptions for Military and Oil Industry
* **(7)**: Navigable Waters – The waters of the United States, including the territorial seas
* **(12)**: Discharge of (a) pollutant(s) – Any addition of any pollutant to navigable waters from any PS (***more to this***)
* **(14)**: Point Source – Any discernible, confined and discrete conveyance, including but not limited to any pipe . . . CAFO (***but CAFO exception for 25-yr, 24-hr storm event***), from which pollutants are or may be discharged. ***Ag Stormwater; Irrigate Ag return flows exempted***.
	+ ***NB***: People, themselves, are not point sources

**§ 505**: Citizen Suits; against any person for violation of EL or order (from EPA or State) re: an EL; for failure to carryout any non-discretionary act or duty of CWA

**§ 510**: State Authority; State may always be more stringent

**NPS** – EPA Regs have defines the following as NPSs:

* Runoff from silviculture (Forestry)
* Excess fertilizers, herbicides & insecticides from agricultural lands and residential areas
* Oil, grease & toxics from urban runoff & energy prod’n
* Sediment from improperly managed construction sites, crop and forest lands, and eroding stream banks
* Salt from irrigation practices & acid drainage from abandoned mines
* Bacteria and nutrients from livestock, pet wastes and faulty septic systems​

It is possible that these could be PS if they meet *Abston*(?) but normally they are NPS (make arguments!!)

**Performance Standards** **(Least to Most Stringent; Most to Least Consideration of Costs)**:

BPT: Conventional Pollutants – § 301(b)(1)(A); Total cost vs. total benefit (not marginal) (See *Chem Mfrs v. EPA*)

BCT: Ratcheting up on Conventional Pollutants – § 301(b)(2)(E); CBA for incremental increase (See *Chem Mfrs v. EPA*)

BAT(ea): Toxics and Nonconventional Pollutants – § 301(b)(2)(A); consider cost as one factor

BDAT: New Sources (applied Category-by-Category) - § 306; cost considered?

* Progression over time, eventually every existing point source must meet BAT(ea).

**Cases and Readings:**

*Sierra Club v. Abston Construction* (1980 – 5th Cir.): ***What is a point source?*** Construction/mining company sets up spoil piles and sediment basins to catch runoff when it rained. The rain overfilled the basins and the material got into a nearby river. If not one of the listed conveyances in § 502(14) then ***Test***: ***Some affirmative act + reasonably likely (foreseeable) discharge = point source***. “*Surface runoff collected or channeled by the operator constitute a point source discharge*.” “*Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other minerals*.” After leaving the initial collection/channeling: “*Nothing in the act relieves miners from liability simply b/c the operator did no actually constructed those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water*.” The CWA is about controlling industrial discharge. Big Ag may worry about this case (an indentation can be a PS, ***FOCUS ON THE CONVEYANCE***).

*CARE v. Southview Farm* (1994 – 2d Cir.): ***What’s up with Big Ag?*** Manure was spread over a field at a farm. The fields were oversaturated and this wastes (in a round about way) gets to the navigable waters of US. Normally, if rain caused the discharge then it Ag gets a storm water exception. But, this farm qualified as a CAFO (700 head of dairy cattle) despite the field being adjacent to the feeding lot. The court concluded that the rain was incidental (waste would have gotten to the river anyway) so no stormwater exception. Farm a PS as a CAFO. This case illustrates both the power of Big Ag (even though they lose) and how tricky defining a PS (***focus on the conveyance!***) can be.

*Dupont v. Train* (1977 – Stevens): EPA, under § 301 can set national EL; it does not have to do it case-by-case via § 402.

*Chem Mfrs Association v. EPA* (1989 – 5th Cir.): ***How much cost for BPT and BCT?*** The challengers wanted a “knee-of-the-curve test” for BPT and BCT. ***BPT*** is a consideration of ***total cost v. total benefit*** and a standard is acceptable as long as the cost is not “wholly disproportionate” to the benefit. ***BCT*** requires something more like CBA, ***marginal cost v. marginal benefit*** for ***each increment increase*** in the ELs stringency. Must justify incremental reductions as cost effective (must be cheap pounds).

*Entergy v. Riverkeeper* (2009 – Scalia): ***Cost Case*** – § 316 governs thermal discharges from cooling nuclear cores. § 316(b) requires that such thermal discharges use the “best tech[] available for minimizing [env’l] impact.” The Court found that this language is ambiguous (“best” and “minimize”) and held that ***EPA may consider costs***. This cost consideration seems to consistently occur at Chevron Step 2 indicating that it is reasonable to read the ambiguous terms to consider cost by at least looking at the cost/benefit balance. Of course, the problem is that the benefits are hard to quantify but the costs are easy.

**Concuring/Dissenting** (Breyer): Leg history should be included in the analysis but either way cost may be considered.

**Dissent** (Stevens): Like *Whitman*, the language precludes the consideration of cost.

*PUD No. 1 v. Washington Dept. of Ecology* (1994 – O’Connor): A dam operator tried to get a license to build a dam but it had to go through state certification (§ 401) b/c the project may have resulted in a discharge of pollutants into navigable waters. The state gave the permit but required a minimum steam flow. The operator sued. The Court held that the discharge requirement was a threshold requirement only. It further held that § 401(d) broadens state authority to impose conditions not just on the discharge but the applicant herself and that ensuring compliance w/ § 303 (the water had been designated for salmon runs) was a proper function of § 401.

**Concurrence** (Stevens): States can always regulate more strictly.

**Dissent** (Thomas): Court interprets § 401 in such a way as to make is disharmonious with the Federal Power Act.

*Pronsolino v. Nastri* (2002 – 9th Cir.): NPS pollutes river, under § 303 if EL aren’t “stringent enough” to meet WQS then State must set TMDLs. After they are set it is up to the State to figure out how to meet them, limiting PSs under § 302 or requiring things of NPSs (no ELs but “best practices, like carrying away dirt, etc.). Here the NPS polluter (Logging) has to reduce his production or take steps to keep the debris out of the water. ***NB***: There were no PSs on this body of water but TMDLs were still permitted. This is an important gap filler, on way to get at NPSs (§§ 208, 319, and 402(p) don’t do enough) ***NB***: No ***direct*** fed regulation off NPSs.

*Arkansas v. Oklahoma* (1992 - Stevens): Three (3) Questions – Must EPA apply a downstream (DS) states WQS to an upstream (UpS) permit? (***Not Answered***) May EPA apply DS state’s WQS to UpS permits? (***Yes!***) If a body of water fails to meet WQS, must all permits for discharges that yield effluents that reach that body of water be denied? (***No!***) This may have been a result of the fact that it looks like these discharges didn’t contribute to impairment.

Rapanos v. U.S. (2013 – Scalia): ***Plurality***. This is a kind of follow up decision to *SWANCC*. The question is about what constitutes the Navigable Waters (defined as The Waters of the United States). It is really important b/c it determines the jurisdiction of the CWA. Scalia defines “Waters of the United States” as:

“only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”

 A wetland may be considered ***adjacent*** to WotUS if it is:

(1) a “relatively permanent body of water connected to traditional interstate navigable waters” and (2) “the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

Plurality thinks we have to give SOME effect to “navigable.” Scalia seems to imply that there could be § 402 jurisdiction where there isn’t § 402 jurisdiction (CRAZY!)

**Concurrence** (Roberts): He is mad that there wasn’t a rule change after SWANCC and that Kennedy didn’t join them.

**Concurrence** (Kennedy): Possibly controlling as most narrow concurrence. Water or wetland must have a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made. He rejects the continuous flows (semi-permanent) requirement and notes that not only do wetlands provide eco-system services but they also have positive and negative hydrological impacts on other waters of the US. His is a more functional test, not hydrological. He is more worried about the effects of UpS bodies of water on DS bodies of water. He wants a case-by-case analysis which would put a greater burden on the ACE; requires more findings!

**Dissent** (Stevens): Thinks that this is a reasonable interpretation and congress has implicitly agreed (by not speaking). He thinks there is no reason to let question of endless jurisdiction change the question before the court.

**NB**: After this case there was absolute chaos. It dramatically effects §§ 402 and 401 (permitting) and ESA § 7 consultations (EPA & ACE permitting is restricted by smaller jurisdiction therefore not permitting as widely and thus the tie of private action to fed action is gone and fewer triggers of this req) so EPA is promulgating new rule:

*EPA’s New Clean Water Rule (WotUS)*: ***What are the waters of the United States?***

* Traditional interstate navigable waters
* All interstate waters, including interstate wetlands
* Tributaries of such waters
* Territorial seas
* **All waters, including wetlands, adjacent to navigable waters (Scientifically confirmed “significant nexus")**
* Includes waters, including wetlands, separated from other waters by man-made dikes or barriers, natural berms, beach dunes, and the like
* **On a case-specific basis, other waters, including wetlands, provided that those waters have a significant nexus to a navigable water**
* “The concept of significant nexus is critical b/c courts have ruled that . . . there needs to be ‘some measure of the significance of the connection for downstream water quality’”
* Concede that *SWANCC* and *Rapanos* put limitations on the scope of “other waters”
* “Other waters” that are adjacent to a jurisdictional water are categorically jurisdictional
* “Other waters” that are non-adjacent require case-by-case determination of significant nexus
* Proposal also allows for broader aggregation of “other waters”

WotUS was stayed, this makes CPP people nervous.

***Is § 404 a taking?*** No econ value b/c it just has to sit there??

**~Cost Cases~**

**Summary**: Via opinions mostly written by Justice Scalia, the Court has gone from the requirement that there by a textual commitment to considering costs before engaging in that analysis to, if the statutory langue is ambiguous the agency MAY consider costs to, if the statutory langue is ambiguous the agency MUST consider costs. There is the possibility that the facts are different when an agency is determining if to regulate versus how much to regulate (when the decision to regulate has already been made by congress). Only time will tell.

*Whitman v. American Trucking* (2001 – Scalia): Cannot consider costs, statute precludes it. Cost consideration requires a textual commitment from Congress (for harm-based standards)?

* Breyer Concurrence: Disagrees about the textual commitment. Cost considerations are rational and all else being equal, costs should be considered. But Congress was clear here (leaves open soft CBA)

*Entergy v. Riverkeeper* (2009 – Scalia): If the language is ambiguous it is not unreasonable to consider costs; agency ***MAY*** consider costs.

* Stevens (w/ Ginsburg) Dissent: Like *Whitman*, the language precludes the consideration of cost b/c unambiguous.

*EPA v. EME Homer* (2014 – Ginsburg): Court doubles down on Entergy; where there is ambiguity an agency ***MAY*** consider costs.

* Scalia Dissent: Holds to *Whitman*, thinks there is no ambiguity so no consideration costs. Heyday

*Michigan v. EPA* (2015 – Scalia): The Court flips presumption that agency has discretion to consider costs. If ambiguous, agency ***MUST*** consider costs (otherwise unreasonable at Chevron Step 2). Is it limited to the facts? Must an agency only consider costs when they are beginning to regulate a new area? Maybe still “MAY” if Congress has already made the decision to regulate and agency is just deciding how much but “MUST” if the decision is about whether the regulate or not. ***Threshold consideration v. stringency consideration??*** Court interprets *Whitman* to express the “modest proposition” that where the statute precludes costs, the agency may not consider it. It no longer takes seriously the “textual commitment” requirement.

* Kagan Dissent: May actually make this worse. All 9 justices get behind the proposition that costs are “***always a relevant***” factor. She thinks that consideration need not be made up front, cost has been considered a lot already.

**~(RCLA) and (CERCLA)~**

**Summary**: Resource Conservation & Recovery Act and Comprehensive Env’l Response, Compensation & Liability Act. RCRA is a cradle to grave law; it regulates hazardous waste from its generation to its disposal (know where he waste is at all times). It is forward-looking, primarily concerned with release prevention and regulates “generators”, “transporters” and “treatment, storage, and disposal facilities” (TSDs), the latter being most heavily regulated. It utilizes a collection of mechanisms: permitting, information disclosure (labels called manifests), monitoring/reporting, design reqs, capitalization reqs, etc. (all but labels burden TSDs specifically). It is only one part (subtitle C) of the Solid Waste Disposal Act (SWDA). CERCLA, known as the Superfund (**JF**: now “mini”-fund or “no”-fund) is backward-looking. It isn’t a command-and-control statute but a liability and finance program. It requires the creation of a “National Priorities List” and authorizes federal clean up of the sites on the list (***removal actions***: emergency response, ***remedial actions***: for sites that can afford a long-term solution) and creates a superfund to finance the cleanups. Either EPA orders someone to clean it up (Potentially Responsible Parties (PRPs)) or it does the cleanup itself and then whoever cleaned up goes after (other) PRPs to get restitution/contribution – not about damages. (***When you think of these laws remember environmental justice***).

**RCLA (p. 1067):**

**§ 1004**: Definitions

* **(3)**: Disposal – the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste (SW) or hazardous waste (HW) into or on any land or water so that such SW/HW or any constituent thereof may enter the enviro or be emitted into the air or discharged into any waters, including ground waters.
* **(5)**: Hazardous Waste – a SW, or combination of SWs, which b/c of its quantity, concentration or physical, chemical, or infectious characteristics may
	+ **(A)**: cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
	+ **(B)**: pose a substantial present or potential hazard to human health or the enviro when improperly treated, stored, transported or disposed of or otherwise managed.
* **(27)**: Solid Waste – any garbage refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other ***discarded*** material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and Ag operations, and from community activities but ***does not include*** solid dissolved material in domestic swage, or solid or dissolved materials in irrigation return flows or industrial discharges which are ***point sources*** subject to permits under [CWA] or source , special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954.
	+ **NB**: To be HW it must be SW and to be SW it must be ***DISCARDED***; not ***waste*** until then (*AMC v. EPA*)

**§ 3001**: Identification and listing of Hazardous Waste

* **(a)**: EPA must develop criteria for determining what is HW
* **(b)**: EPA must identify and list HW (using the criteria)

**§ 3002**: Standards Applicable to ***Generators*** of Hazardous Waste (Cradle)

* **(a)&(b)**: Generators must use recordkeeping and manifest system for tracking waste; use appropriate containers

**§ 3003**: Standards Applicable to ***Transporters*** of Hazardous Waste

* **(a)**: Transportersmust use manifest system; may ***only*** deliver to TSDs

**§ 3004**: Standards Applicable to Owners and Operators of Hazardous Waste ***TSDs*** (Grave)

* **(a)**: TSDs must get permit; ensure safe handling; meet financial reqs; minimum tech reqs for treatment prior to disposal; design reqs (e.g., double liners); and monitor.
* **(d)**: General prohibition on land disposal of HW; exception if showing of (I) no harm to human health (no protections needed) and (II) a reasonable degree of certainty that HW or its constituents won’t migrate.
* **(m)**: No land disposal without treatment of HW

**§ 3008**: Federal Enforcement(including compliance orders)

**§ 7002**: Citizen Suit Provision

* **(a)(1)(A)**: Against any person in violation of any permit, standard, regulation, condition, req, prohibition, or order that is effective under RCRA
* **(a)(1)(B)**: Contributor Liability - Against any past/present generator, past/present transporter, past/present TSD, or disposal facility “who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any [SW/HW] which may present an ***imminent and substantial endangerment*** to health or the environment”;
* **(a)(2)**: Against EPA for failure to carryout any non-discretionary act or duty of RCRA ; ***Remedies*** – to restrain any contributor, to order contributor to take such other action as may be necessary, or both (does ***not*** include restitution for previous clean ups (see *Meghrig*)

**§ 7003**: Imminent Hazard (Agency Enforcement)

* **(a)**: Contributor Liability – If evidence that past or present handling, storage, treatment, or disposal, of SW/HW presents an ***imminent and substantial endangerment*** to health or the environment 🡪 EPA may go after any person, including past/present generator, past/present transporter, past/present TSD, or disposal facility “who has contributed or is contributing to such handling, storage, treatment, transportation, or disposal - ***Remedies*** – to restrain any contributor, to order contributor to take such other action as may be necessary, or both (does include restitution for previous clean ups (**JF**).
* **(b)**: Violations; a much at $5,000 PER DAY out of compliance

**CERCLA (p. 1668):**

**§ 101**: Definitions

* **(9)**: Facility – defined broadly, has included roadsides where HW was dumped (*NEPACCO*)
* **(14)**: Hazardous Substance – This is the trigger for § 107 liability (and § 106 orders); very broad but excludes oil and natural gas.
* **(20)**: Owner or Operator
* **(21)**: Person – Includes corporations, does not exclude corporate officers (see *NEPACCO*)
* **(22)**: Release – Spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, etc.)
* **(32)**: Liable or Liability – ***Strict*** liability, allows for (though doesn’t require) joint and several liability
* **(35)(A)**: Innocent Purchaser Defense – No contractual relationship if real property was acquired after the disposal and (1) ∆ did not know/had no reason to know hazardous substance was disposed, or (2) ∆ inherited the property

**§ 104**: Gov’t can take Removal or Remedial Action; Use Superfund

**§ 106**: Abatement Actions

* **(a)**: If an imminent and substantial endangerment to public health or welfare or the enviro b/c of an actual or threatened release of a hazardous substance from a facility then AG may issue an abatement order to clean up site.
* **(b)**: Fines; Reimbursement
	+ **(1)**: Violations of order; a much at $25,000 PER DAY out of compliance
	+ **(2)**: After cleanup, ordered party (OP) can seek reimbursement from Superfund
		- **(D)**: If OP is a PRP, only reimbursed if order was A/C, otherwise only § 113(f) contribution

**§ 107**: Liability (***When Gov’t or OP cleans up the release***)

* **(a)**: If there is an actual or threatened release of a hazardous substance which caused the incurrence of response costs (on the part of the gov’t or some OP) the following entities (PRPs) will be liable (1)-(4) for (A)-(B):
	+ **(1)**: (Current) Owner or Operator of the facility;
	+ **(2)**: Owner or Operator of the disposal facility at the time of disposal (**NB**: not release!);
	+ **(3)**: Arranger Liability – any person who by contract, agreement, or otherwise ***arranged*** for disposal or treatment or ***arranged*** with a transporter for transport for disposal or treatment, of HSs owner or posses by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such HSs (see *Monsanto*); and
	+ **(4)**: Transporter of HS to the facility
		- **NB**: The link to for all of these is the ***facility***!
		- **(A)**: All costs of removal/remedial action incurred by US Gov’t/State, etc. not inconsistent w/ CP
		- **(B)**: Any other necessary costs of response incurred by any other person consistent w/ CP
* **(b)**: Defenses; ***SOLE DEFENSES***; release of HS & the resulting damage were caused ***solely by***
	+ **(1)** An act of God; **(2)** an act of war; or
	+ **(3)**: An act/omission of a 3d party, if ∆ establishes by a preponderance of the evidence that ***(a)*** he exercised due care w/ respect to the HS, and ***(b)*** he took precautions against foreseeable acts/omissions of any such 3d party and such actions foreseeable consequences.
	+ **NB**: 3d Party cannot include an employee or agent of ∆, or any person whose act/omission occurred in connection w/ a (direct or indirect) contractual relationship w/ ∆ **BUT SEE** § 101(35)(A) (***IP Defense***)

**§ 113(f)**: Contribution

* **(1)**: During or following §§ 106 or 107 actions PRP may seek contribution, equitable factors of apportionment
* **(2)**: Parties who settle with the government are immune from contribution actions, amount settled for taken from the remainder of recovery costs to be paid off. Settlers cannot use §113(f)(1) b/c they have no recover costs.

**Liability**:

Under both §§ 7003 and 107, liability is ***strict*** and ***personal*** liability (no corp veil protection). § 7003 is strict if the person contributed to the endangerment. § 107 is strict if the person is a PRP (falls into one of four categories). § 107 is also retroactive, holding PRPs liable for past conduct that my have been lawful at the time, it has a weak causation element (chem similar at facility; was a release), and may (but not must) be J&S liability. The vital component of § 107 liability is ***the connection to facility*** (not the place where the HS was generated but where it was dumped. It is the relationship that will create liability.

**Contributor (§ 7003) v. Arranger (§ 107(c)) Liability** (see *NEPACCO*):

NEPACCO teaches us that Arranger liability is harder to get and more fact intensive than Contributor liability:

***Test for Contributor***: Actual Participation in Conduct that violates RCRA (e.g., personally arranging for disposal - Lee) ***or*** Ultimate Authority to Control Disposal (e.g., in charge and directly responsible for all operations - Michaels). If someone neither has ultimate control nor personally participated but had control somewhere in the line of authority, make strong arguments (**JF** thinks such a person would be liable).

***Test for Arranger***: Owns or possess HS and arranged for HS to be transported to or disposed at a facility where there are chemically similar substances and some HS is released (no proof that HS ever arrived is necessary)

* **Possession**: If not strictly the owner, possession established by ***(1)*** actual knowledge about, ***(2)*** immediate supervision over, and ***(3)*** direct responsibility for arranging the disposal (***Authority to control is critical for possession***). Compare Michaels (too attenuated?) and Lee to get an idea of what arranger liability looks like and then make arguments for scenarios in the middle.
* *Monsanto*: No requirement of ownership over any of the HSs at the facility or even over the HS that was released
* *Burlington Northern*: To be an arranger one must “take[] ***intentional steps*** to dispose of [HS].” Knowledge that substance will be leaked, dumped or otherwise discarded provides evidence of intent but is not alone sufficient.

**Apportionment v. Contribution (CERCLA)**:

* The decision to apportion liability or hold PRPs J&S liable is a matter of who is left holding the bag/covering the orphan shares. If liability is apportioned upfront then the total amount (minus the amount of any settlements) is divided up by quality (negative in this case) the contribution to the release or even the volume and some portion will not be accounted for, leaving the Gov’t to cover it. If J&S is used then apportionment at the contribution stage must cover the entire bill, leaving the Gov’t whole – see *Burlington Northern*. In order to use § 113(f) to get contribution there must have been a 106 or 107 proceeding (*Aviall*). ***Factors for § 113(f) contribution apportionment***: volumetric share, toxicity, relative fault, cooperation, etc. If there was no such action b/c cleanup was undertaken “voluntarily” then cleaner may use § 107(a)(4)(B) – (*Atlantic Research*).

**NB**: *Monsanto* presents the dominant approach (J&S) and reminds us that volume alone should not be the basis for apportionment, some HSs are more dangerous, more readily mix, or just create a greater risk of a release.

**NB**: If ∆ can show basis for apportionment the Ct must allow the evidence (doesn’t mean they won’t use J&S)

**NB**: *Burlington Northern* upheld an apportionment based on (1) parcel size, (2) duration of the lease, and (3) how many of the chemicals were spilled (2/3) on that portion of the parcel. **JF**: Other factors used; volume and relative toxicity.

**NB**: ***§ 107(a)(4)(B) is much more favorable to π than § 113(f)*** – J&S instead of several only, equitable factors are irrelevant, and SoL is one yr longer. Further incentive to cleanup before action required!

**Common law**is still needed under CERCLA and RCRA b/c there are no damages for any private injuries.

**Cases and Readings:**

*American Congress v. EPA* (1987 – DC Cir.): EPA issued a rule that materials destined for recycling may be HW; subject to regulation even if stored and not yet strictly discarded. This case defines “discarded” (to be HW it must be SW and to be SW it must be ***discarded***; not ***waste*** until then). ***Discarded***: disposed of, abandoned or thrown away. Spent material that is going to be recycled or reused is still part of an ***ongoing process***; not discarded b/c not part of the “waste disposal problem.” The storing entity of such materials cannot be regulated under RCRA (even if they stuff is just sitting there in the meantime).

**Dissent** (Mikva): It is not strictly discarded SW that is the problem. Storage is problematic as well b/c there is a risk of a release and the heart of RCRA is the prevention of a release. Also, this dramatically handicaps enforcement of RCRA b/c it’s difficult, if not impossible to get into the head of person claiming to reuse material. Discarded should be read functionally; “could it come into contact with environment?” (Looks to disposal definition, bad move IMO)

*Meghrig v. KFC* (1996 – O’Connor): KFC cleaned up petroleum spill (hence CERCLA not an option) on its property (state ordered clean up) and sues previous owner (Meghrig) as a contributor to the endangerment. KFC seeks restitution under § 7002 for its cleanup costs. Court held that § 7002’s remedies, “other action as may be necessary” doesn’t allow for restitution b/c the endangerment must imminent and that is not if it has already been cleaned up. CERCLA does allow for restitution (if fact that is the whole point) but CERCLA doesn’t apply to oil/natural gas spills.

**JF**: Courts have treated §§ 7002 and 7003 differently, allowing for restitution only in the case of 7003 (private party no longer acting as “private AG” if seeking restitution)

**NB**: The primary and court-preferred recovery statute is CERLCA

*US v. NEPACCO* (1987 – 8th Cir.): ***Contributor v. Arranger Liability*** – NEPACCO leased plant from Syntex. Michaels was the Pres of NEPACCO, Lee was the VP and plant supervisor (over seeing Ray, the plant manager who oversaw Mills, the shift supervisor). Mill comes up with a plan to dispose of HW on Denney Farm (for which they pay Denny). Ray gets Lee’s personal approval for the dumping and then Mill carries out the disposal of 85 drums of toxic waste, which then leaked. Ray, Mills, and Denny(?) are too small to go after so gov’t doesn’t go after them. NEPACCO went out of business and Syntex settled for 100k (***remember run don’t walk to settle***) of gov’t response costs. So the gov’t goes after Lee under RCRA 7003 and CERCLA 107(c) and after Michaels for RCRA 7003. Court held that ***7003 liability is strict***, no need for negligence, etc. and that it is personal liability so ***corp veil does not protect*** ***corp officers*** (not dealt with in this case but could thus make corp vicariously liable). Also held 107(a)(3) liability to be personal liability. Also held that recover for abatement costs is essentially equitable so *no jury trial*. ***Test for Contributor***: Actual Participation in Conduct that violates RCRA (e.g., personally arranging for disposal - Lee) ***or*** Ultimate Authority to Control Disposal (e.g., in charge and directly responsible for all operations - Michaels). If someone neither has ultimate control nor personally participated but had control somewhere in the line of authority, make strong arguments (**JF** thinks such a person would be liable). ***Test for Arranger***: Owns or possess HS and arranges for transport or disposal of HS – If not strictly the owner, possession established by ***(1)*** actual knowledge about, ***(2)*** immediate supervision over, and ***(3)*** direct responsibility for arranging the disposal (***Authority to control is critical for possession***). That is Lee. Michaels was “out golfing” so he didn’t know about it, didn’t have direct authority over the disposal, and was not the immediate supervisor (Lee personally approved it) so no liability. Looks like Court felt that it was too attenuated. Compare Michaels and Lee to get an idea of what arranger liability looks like and then make arguments for scenarios in the middle.

**NB**: Facility is where things are dumped ***NOT*** where the waste came f rom. ***Only Denny could have been liable under § 107(a)(1)-(2) here!***

*US v. Monsanto* (1988 – 4th Cir.): Scope of § 107 Liability – This case stands for the proposition that ***the key to § 107 is a link to the facility***. The arranger need not own the HS that was released or any of the HSs at the facility. To be an arranger it only need be proved that one arranged for transport to or disposal at the facility, there are chemically similar HSs (to the one arranged for) at the facility and there was a release of some HS at said facility. § 107 is a strict liability scheme, ***degree of participation is unimportant***; J&S liability (the Monsanto and dominant approach) is permissible (not required). Affirmative defense are limited to those in § 107(b). Arranger liability requires ***no proof of ownership***.

*Burlington Northern v. US* (2009 – Stevens): ***Arranger Liability and Apportionment*** – RR owned about 20% of a release site was owned and it were being sued for under § 107(a)(1) as an owner of the land. Shell was transferring HS (useful chemicals) to the site but they weren’t being disposed of, they were being transferred to another party. Gov’t seeks liability as an arranger b/c disposal includes terms like leak or spill. The Court held that to be an arranger one must “take[] intentional steps to dispose of [HS].” Knowledge that substance will be leaked, dumped or otherwise discarded provides evidence of intent but is not alone sufficient. “*In order to qualify as an arranger, Shell must have entered in to the sale of [HSs] with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in [the definition of disposal].*” **JF**: This case was a move away from strong enforcement and ***undermines strict liability***. In the end, Court upholds lower court decision to find the injury divisible, apportionment of liability is appropriate where there is a ***reasonable basis*** for determining each contribution to a single harm. The liability was apportioned to the RR by (1) parcel size, (2) duration of the lease, and (3) how much (of each kind of chemical) was spilled on that portion of the parcel. Stevens really seems to like precautions taken and it looks like the thrust of J&S might be over (JF: Monsanto is still the dominant approach but this arms industry to oppose J&S).

**Dissent** (Ginsburg): Shell changed its system, which made spills more likely. Shell is a bad actor, could have prevented the spilling but didn’t. Also, apportionment should be reheard.

*Cooper v. Aviall* (2004 – Thomas): ***Contribution*** – Corp cleans up release site when no § 106 order was issued nor after being held liable under § 107. § 113(f) says that a person may seek contribution “during or following any civil action under section [106] . . . or under section [107].” The Court held that § 113(f) could not be used w/o a § 106 or § 107 proceeding. It left open the question whether contribution could be sought under 107(a)(4)(B). *Atlantic Research* answered that question. If a party voluntarily cleans up she may use § 107(a)(4)(B) to get contribution (which is MUCH more favorable to πs). If there is a §§ 106 or 107 action, party may ONLY use §113(f). ***This is a big incentive to clean up on your own!!*** The saving clause at the end of § 113(f) is viewed, by the court to preserve the rights of those seeking contribution under state law only.

**Dissent** (Ginsburg): This a procedural wild goose chase. *Key Tronic*, in a portion of the opinion that was unanimous (albeit in dicta), the Court held that § 107(a)(2)(B) could be used for contribution.

1. The Pope is also worried about “rapidification.” We are supposedly out pacing the planet. [↑](#footnote-ref-1)