1. **Economics of Pollution**
   1. Polluters have incentives to shift costs to where cost is lowest
      1. Regulation forces industries to consider negative externalities
   2. Economic Theories
      1. Cost Considerations
         1. One way to regulate would be internalize external costs
            1. Polluter pays- person emitting pays

Atlantic Cement v. Boomer

* + - * 1. Beneficiary pays- party enjoying the public resource must pay to continue enjoying it

Ex- pay to use the national parks

* + - 1. Cost effectiveness
      2. Cost benefit
      3. Environmental justice concerns
  1. Tragedy of the Commons
     1. Even when every actor behaves rationally, outcome can be bad for all (irrational outcome)
        1. When there is a common pool of resources, race to use natural resources first
     2. Privatizing property rights
        1. Privatizing things like fishing rights can be good
  2. Coase theorem
     1. When transaction costs are zero, whoever values it the most will pay
  3. Free Riders
     1. One hold-out who doesn’t share the costs may enjoy the benefits
  4. Valuing Resources
     1. Commodifying and internalizing
        1. Commodifying creates a situation where the polluter can sell and buy credits
        2. Internalizing means the polluter must absorb the cost
     2. Contingent valuation
        1. Ask people what they pay to keep the resources available
           1. Problems emerge when asking how much a parent would pay to keep a child free from lead

Problem is morality considerations

1. **Common Law Environmental Claims- Private nuisance, Trespass, Strict Liability, or Public Nuisance**
   1. **Process for addressing common law claims, recoveries, and procedures (Nuisance actions are most common)**
      1. **Standing-** injury, causation, redressibility
         1. Prudential considerations
         2. Justiciability- Political question?
      2. **Private or Public nuisance claim**
         1. Usually private
         2. For public claim a private individual must make a showing of special damage
      3. **Is equitable relief available?**
         1. Court will have to do a balancing test and that the π usually has to show immediate threat of irreparable injury
      4. **If this is a federal common law claim, is there federal preemption**
      5. **Alternative causes of action**
      6. **Address Causation**
         1. ∆ had to be the proximate cause of the injury or damage
         2. Consider scientific uncertainty
      7. **Procedural issues**
      8. **Damages**
         1. Is nuisance claim temporary or permanent
         2. Aware of prejudgment interest
         3. For toxic tort, consider the risk of disease and medical monitoring costs
   2. **Private Nuisance- must prove ∆’s activity unreasonably interfered with use or enjoyment of a protected interest and caused π substantial harm**
      1. Unreasonable- determined by balancing social utility of activities against the harm they create
         1. Could ∆ have prevented the activity that caused the harm
         2. Local conditions?
      2. Policy: Connection between interference and the polluter’s acts can be difficult to establish b/c of the long time period and attenuated nexus in which some pollution manifests harm
         1. If social utility is great, court may apply rationale from Boomer v. Atlantic Cement Co., and pay damages compensating π for all present and future economic loss to their properties b/c of Atlantic’s operation, or an injunction would be issued against them
      3. Remedy
         1. Damages
         2. Injunction
      4. *Madison v. Ducktown Sulphur, Copper & Iron* (1904) **balance the value of activities that generated pollution against the rights of the victims**
         1. Damages appropriate
         2. Injunction denied b/c it would destroy the business and livelihood of employees (held considerable economic value to community)
            1. Injunctions are discretional and must consider every element appertaining to the injury
         3. Approach shifted from strict liability **to balancing approach**
   3. **Trespass**- a direct physical invasion or intrusion of the π’s land- by the ∆, ∆’s agent, or an object that the ∆ has caused to be deposited on the land
   4. **Strict Liability-** liability without intent or negligence, where ∆ has carried on an abnormally dangerous activity and has subjected a π to a foreseeable harm resulting from that activity
   5. **Public Nuisance**- an unreasonable interference with a right common to the general public.
      1. Definition
         1. involves significant interference with public health, safety, comfort, or convenience,
         2. is illegal; or
         3. is continuing or has a long-lasting effect on the public right and the actor has reason to know that the effect will be significant.
      2. Private citizen can bring claim only if he can show he suffered a special injury, distinct from general public
      3. ***Missouri v. Illinois*** (77)- Ct found Chicago’s sewage discharges into the Mississippi River did not constitute a public nuisance
         1. Unclean hands- Missouri was polluting its own water
         2. Shaky statistical data
      4. ***Georgia v. Tennessee Copper Co*.** (82)- Ct issued an injunction requiring Tennessee companies to stop creating pollution which was causing damage in Georgia
         1. Ducktown private nuisance- no injunction issued, but here when π is state, injunction issued
            1. Holmes suggests the Court has less latitude to balance the equities in public nuisance case, b/c the plaintiff is a sovereign state

|  |  |
| --- | --- |
| Georgia v . Tennessee (public nuisance) | Missouri v. Illinois (no public nuisance) |
| 1. Government π, private ∆ | 1. Government π, gov’t ∆ |
| 2. Causation obvious | 2. Causation unclear, conflicting testimonies,  shaky statistical data |
| 3. Georgia not contributing to pollution any,  clean hands | 3. Unclean Hands- MO polluted its own water |
| 4. Consequences less painful, some companies  shut down | 4. Consequences severe b/c Chicago has no  place to dispose of waste and their own  citizens are dying from typhoid |
| -Forced development of new technology,  setting the bar higher than what currently  exists or is possible |  |

* + 1. Current State of Public Nuisance
       1. Easily displaced by federal CL and statute
          1. Milwaukee I- delegated jurisdiction over federal common law nuisance actions between states to the federal district courts
          2. Milwaukee II- S. Ct held Illinois’s federal common law nuisance action had been preempted by the federal Clean Water Act

Legislative policy preempts federal common law here

* + 1. *N. Carolina Case*- **Federal Act can preempt federal common law:** North Caroline sues Tennessee Valley Authority under federal common law
       1. Parties: Government- government
       2. Causation: obvious
       3. Very Clean Hands 🡪 They passed a statute that prevented that sort of action in their state
          1. 4th circuit says Clean air act preempts state action
          2. Actions available to the state

Section 126

Should have filed a § 126 petition under the Clean Air Act- which is a suit requiring the EPA to stop the emissions

Citizen suit

* + - * 1. 4th circuit does not say all public nuisance cases preempted, just under the given facts the federal common law is preempted

Administrative Route- Exhaust your administrative remedies

* + 1. Expansion of public nuisance to cover other areas besides air and water pollution
       1. Starts to take in public nuisance laws for specific products
       2. RI decision show how public nuisance law develops historically
          1. Think MTBE suits- where chemical lowered emissions but released benzene
       3. Still a powerful tool
          1. when dealing with a local nuisance- like tire dump, grease rendering plant, or
          2. where the law has not caught up yet- like genetically altered animals
    2. Questions to think about
       1. How would you write a complaint alleging climate change is a public nuisance
       2. How does a state statutory public nuisance affect the preemption analysis
          1. Criminal generally, but some environmental

1. **Constitutional Law Issues**
   1. Evaluating an issue
      1. Start with the **Commerce Clause: this covers most of the environmental fights; Art. I, Sec. 8., Cl. 13**
         1. Two Part Analysis
            1. Has congress explicitly dealt with the issue through legislation? OR
            2. Could congress legally regulate the area of commerce?
            3. Dormant Commerce Clause: Even if Congress passes either test, a state’s law may still prevail if all elements of the pike balancing test are met

Legitimate purpose

Balancing of interests- the state interest in need of protection must clearly outweigh its detrimental effects on interstate commerce

No alternatives

* + - 1. Case law
         1. *Wickard* any economic activity with any connection (considering aggregate effects) to interstate commerce.
         2. *Lopez* – Guns; no substantial effects on interstate commerce.
         3. *Morrison* – Violence against women; non-economic, traditional state area; if this substantially affects interstate commerce then everything does.
    1. **Could fall under Spending Power: Congress gives grants based on state actions; Art. I, Sec. 8, Cl. 1**
       1. This one doesn’t get covered as much but drives environmental law
  1. Other categories smaller but still cover the outfield
     1. **Property Cl, Art. IV; Sec. 3, Cl. 12**
     2. **Necessary and Proper, Art. I, Sec. 8, Cl. 18**
        1. More structural areas to get at how the government is setup
     3. **Due Process**
        1. Some discussions of reinstituting Lochner
     4. **Equal Protection**—constrains the way government can use its power; therefore creates rights for certain groups of people
        1. Environmental justice issues—strong Constitutional backing
     5. **Takings**
        1. again, regulates the way government can exert power; becoming a very big deal in environmental law; case where, if the judge determined an area of beach belonged to a group, then it would be a judicial taking
     6. **Treaty Power (foreign affairs power)—**more important later but good to keep it in mind
        1. Fairly obscure but increasingly important; ex. Congress decides to protect certain migratory waterfowl; Congress goes to Canada and Britain and negotiates a treaty to protect the birds; even if the treaty is unconstitutional, the treaty would still be legal
  2. Limits on State power:
     1. Supremacy Clause
     2. 10th Amendment—Low Level Radioactive Waste Act—rarely used but could have a major impact
     3. What about situations where a state tries to form a relationship with another nation regarding trading power, emissions, etc? No. Foreign affairs power
     4. Compact Clause—allows states to enter into binding obligations with each other when the federal government has failed to act as long as they get Congressional approval first
        1. But generally, states have much freer power to act under the state police power act
  3. Judiciary—doesn’t have the same constraints as the other branches; focus on the words “case” and “controversy” and what parties have standing
     1. Remember: only Art. III courts are constrained; Art. I courts such as bankruptcy courts are not
     2. Standing deals with the standing of persons; has some important consequences—Prof. Stone’s article: do trees have standing?
  4. **Standing in Citizen Enforcement Actions**
     1. Constitutional (needed to establish a case or controversy):
        1. **Injury in fact**
           1. *Lujan v. Wildlife Defenders*-

Scalia holds that there is no injury in fact because the people identified as the injured parties had no definite plans to ever return to Egypt. They had gone to Nile for purpose of seeing the crocs; but w/o definite plans to return, there is no actual or imminent threat to her interest.

Dissent, Blackmun says if the ESA is intended to protect *the species*, then injury is to the species, and all a citizen need to show is a nexus b/n their interest and the injury to the species.

* + - * 1. *Sierra Club v. Morton-* special interest alone not enough for standing

Sierra Club has not suffered an injury in fact which permits them to bring this claim. In order to have standing the Sierra Club should have alleged that it or its members would be affected in any of their activities or pastimes by the Disney development.

* + - 1. **Causation**
      2. **Redressability** – can the court do anything to mitigate the injury?
         1. *Massachusetts v. EPA-* held state has standing to challenge the EPA’s denial of their rulemaking petition.

This case is distinguished from Lujan because the party seeking review here is a sovereign state and not a private individual (Georgia v. Tennessee Copper, Justice Holmes).

*Lujan held litigant must suffer concrete and particular injury that is actual or imminent, causation, and redress is likely.*

However, a litigant whom congress has accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.

* + 1. **Prudential Standing Analysis** 
       1. “zone of interests” test
       2. Justiciability
          1. political question doctrine- (Carr v. Baker) makes an initial policy determination, which is solely the purview of the legislature
  1. Takings Clause
     1. *Penn Central*- distinct investment backed expectations
        1. Nature of governmental regulations- how does it burden the landowner
     2. *Loretto*- Permanent physical occupation is a taking
     3. *Lucas v. South Carolina*- when regulation deprives the owner of all economic value, it is a taking
        1. Beachfront property could not be developed after new regulations put in place

1. **Administrative Law**
   1. Modes for Attacking Actions/Inaction
      1. Rulemaking/petitioning for rulemaking
         1. Bringing suit for agency action, Mass v. EPA
      2. Adjudication
         1. On permitting or licensure
      3. Statutory delegation
         1. Was power inappropriately delegated to agency?
   2. Judicial Review- final agency action (Ripeness)
      1. **Exhaustion**- cant’ sue and agency until you have exhausted all your other remedies offered by the agency
      2. **Standards of Review**
         1. Final agency decisions- arbitrary and capricious
         2. Guidance and interpretive rules- have no notice and comment process and are therefore non-binding
         3. The Record that agency relied on for rulemaking process must satisfy- substantial evidence (Overton Park)
         4. Court’s remedy is usually to remand back to agency
      3. Chevron- NRDC contested the EPA’s Bubble permitting program and Court held Bubble program is a reasonable interpretation of statute and is therefore permissible
         1. **Is the language clear?** 
            1. **Whether congress has directly spoken to the precise question at issue**
            2. **Clarity turns on:**

**Statutory interpretation**

**Chevron Analysis**

**Congressional intent**

**Legislative history**

* + - 1. **Is the agency’s interpretation reasonable?** 
         1. **Is the interpretation permissible based on the statutory language?**
      2. If passes steps one and two, the agency decision is given deference
      3. If Congress has explicitly left a gap for the agency to fill, there’s an express delegation of authority to the agency to clarify the provision of the statute by regulation.
         1. *These regulations should get controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute*
    1. **Permitting**
       1. Public review
       2. Administrative record
          1. Whether its complete
          2. Whether they considered all the evidence from the record in making their decision
       3. Record goes before the decision maker
       4. Contested hearing
    2. **Enforcement Action**
       1. Notice of the enforcement action
          1. Opportunity for a hearing
       2. Transparency is critical to process
       3. Weakness in that it is a long process that favors those with deep pockets

1. **Environmental Justice**
   1. The Environmental Justice movement-
      1. Challenges current environmental policy to shift to a new paradigm that would emphasize preventing vulnerable populations from being exposed to environmental risks, rather than simply managing, regulating, and distributing such risks
      2. Executive Order 12898- Agency must report to the white house how they are incorporating EJ concerns
   2. **Environment & Race:** positive correlation between minority racial status and proximity to commercial hazardous waste facilities and uncontrolled waste sites
      1. Enforcement disparities
      2. Cleanup
      3. Environmental decision making and public participation
   3. **Major Roadblocks for people trying to bring suits**
      1. Equal protection and due process
      2. Title VI of the Civil Rights Act of 1964
         1. Private parties can seek declaratory or injunctive relief under section 601 w/proof of discriminatory intents
         2. Statistics on disparate impact alone is insufficient, must have intent
            1. ***Alexander v. Sandoval***, 532 U.S. 275 (2001), held that a regulation enacted under Title VI of the [Civil Rights Act of 1964](http://en.wikipedia.org/wiki/Civil_Rights_Act_of_1964)[[1]](http://en.wikipedia.org/wiki/Alexander_v._Sandoval#cite_note-cra64-0) did not include a [private right of action](http://en.wikipedia.org/wiki/Implied_cause_of_action) for private lawsuits based on evidence of disparate impact, as policies with a disparate impact on minorities are presumed to be unintentional discrimination.

Stevens argues in dissent that claim should be brought under 42 USC 1983 (section 1983) which establishes liability against any person who under color of state law deprives any citizen of the US of any rights, privileges, or immunities secured by the Constitution and laws of the US

Circuits are split on whether this is a permissible avenue

* + 1. Title VI § 602: Directs each agency receiving federal funding to prevent unintentional discrimination
       1. Carries a less stringent burden of proof

**RCRA**

1. **RCRA**- forward looking comprehensive framework for hazardous and nonhazardous solid waste (can be liquid, solid, or gas)🡪 A cradle-to-grave tracking and management system for hazardous waste
   1. Exclusions🡪 not considered solid waste under subtitle C of RCRA
      1. **Hazardous wastes regulated under other statutes are excluded from RCRA regulation, ex- Pt source CWA covered material**
      2. **Sewage-** any dissolved or solid material in domestic sewage
         1. Untreated sanitary wastes that pass through POTWs
         2. Industrial discharges subject to NDPES permits under CWA
      3. **Nuclear Materials-** regulated by NRC and Atomic Energy Act
      4. **Energy Development-** Exploration, development, or Production of crude oil, natural gas, or geothermal energy
      5. **Agricultrual Waste-** returned to the soil as fertilizers and irrigation return flows
      6. **Household Waste-** politically motivated, municipal waste facilities lobby
      7. **Mining waste-** not removed from the ground
      8. **Raw materials** become subject to hazardous waste regulation, when it exits the unit in which it was generated
   2. **Other Unregulated or Minimally Regulated Wastes**
      1. **Small- Quantity Generators**- EPA exempts hazardous wastes generated by small-quantity generators from Subtitle C regulations
         1. Less than 100 Kg/mo and never more than 1,000 kg
      2. **Delisting**- individual can petition EPA to exclude waste at a particular generating facility from RCRA regulation
         1. Must demonstrated that the waste produced by the facility does not have any characteristics that ordinarily identify waste as hazardous
         2. *Exclusion only applies to specific facility subject to the petition*
      3. ***Temporary Accumulation-***generators may accumulate wastes on site for 90 days without being subject to all of the requirements for treatment, storage and disposal facilities🡪 but must be clearly labeled as hazardous waste and note the date accumulation begins
      4. ***Satellite Accumulation-***of 55-gallons or less of any hazardous waste at or near the point of generation, once 55-gallon limit is reached, waste must be moved to 90 day temporary accumulation area
   3. **RCRA Analysis**
      1. **Does it meet the definition of “Solid Waste”**
         1. **Has it been discarded?**
         2. **Is the material excluded from Subtitle C of RCRA regulation b/c it is not considered solid waste**
            1. **Exclusions listed above**
            2. **Or is it being recycled-** wastes that are safely stored for immediate re-use (within 90 days) in an ongoing process (in the same process) on the same site they were generated
      2. **Is it hazardous?** 
         * 1. **Is it a solid waste excluded from the definition of hazardous waste?**

**Household waste, wastes generated from agriculture**

* + 1. **Is it a characteristic or list waste?**
       1. **TCLP test – method used to characterize wastes as hazardous or non-hazardous**
  1. RCRA PROCESS-STRUCTURE
     1. Identification and listing – EPA develops criteria
     2. Generators- record keeping, manifests of their waste (know where it is at all times)
     3. Transporters- manifests
     4. TSD Facilities
        1. Standards to ensure safe handling, land ban, min. tech. requirements, corrective action for any releases
        2. Best demonstrated available (BDAT) before land disposal
        3. Permits to ensure compliance with standards
     5. EPA base criteria which states must comply with when developing their solid waste management plans
     6. Enforcement
        1. Federal- admin, civil, criminal penalties
        2. Citizen suit authorization against violators or EPA
        3. Suits by EPA to enjoin if “imminent and substantial endangerment to health or environment”
     7. Underground Storage Tanks (UST)- notification, detection & prevention, & cleanup of leaks
     8. Health-based regulation, but uniform if hazardous waste
  2. Structure: RCRA is divided into two major parts
     1. Subtitle C: regulatory program covering *hazardous* **solid wastes**
        1. EPA is required to regulate:
           1. Generators of hazardous waste §3002
           2. Transporters §3003
           3. Facilities that treat, store, or dispose of hazardous waste §3004
        2. Operating standards for TSD facilities are to be implemented through a permit system
     2. Subtitle D: Largely non-regulatory program to encourage states to improve their management of **nonhazardous solid wastes**
  3. Solid Wastes
     1. *Solid Waste Definition*: §1004(27)- 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 agricultural operations, and from community activities
        1. Does not include solid or dissolved material, irrigation return flows, or industrial discharges from point sources that are covered by CWA
        2. CFR rules it has to be discarded, or abandoned, or considered inherently waste-like
           1. Abandoned means it has been disposed of, burned, or incinerated, accumulated, stored or treated
     2. **Recycling ≠ Waste *American Mining Congress v. EPA*** (1987), ***EPA does not need to regulate spent materials that facilities recycle or reuse in an ongoing manufacturing or industrial process, b/c these materials do not represent part of waste disposal problem***
        1. **Held**: EPA has exceeded its regulatory authority in seeking to bring materials that are not discarded or otherwise disposed of within the compass of “waste.”
           1. Case turns on the definition of “and other discarded material”
           2. In light of the language and structure of RCRA, the problems animating Congress to enact it, and the relevant portions of the legislative history, Congress clearly and unambiguously expressed its intent that **“solid waste” be limited to materials that are discarded by virtue of being disposed of, abandoned, or thrown away**
        2. **Dissent**: EPA’s interpretation of solid waste is completely reasonable in light of the language, policies, and legislative history of the RCRA
     3. **Immediate Recycling ≠ Waste*: AMC v. EPA II- Ct limited AMC I’s holding to materials that are destined for immediate reuse in another phase of the industry’s ongoing process and that have not become part of the waste disposal problem***
        1. **Issue:** Whether sludge stored in a surface impoundment should be considered RCRA solid waste b/c it was being held for potential re-use despite the fact that in the meantime the wastes might overflow or leak?
        2. **Held:** Yes. Recycling exemption only apples to wastes that are safely stored for immediate re-use (within 90 days) in an ongoing process (in the same process)
     4. ***American Petroleum Institute v. EPA*- *Recycling must be on-site at plant and reused within 90 days.*** 
        1. once waste arrives at a reclamation facility it remains solid waste because it has already become part of the waste disposal problem, even if it undergoes the exact same process it would have undergone at the original facility
        2. **Distinction:** Byproducts processed on-site at a plant for reuse within 90 days are unregulated by RCRA, yet the identical treatment at an off-site reclamation facility is highly regulated
     5. **Battery Recyclers v. EPA-** which held that an EPA rule could not establish that the use of unapproved storage methods between generation and reuse made the material in question “solid waste”
     6. 2008 Amendments to definition of Solid Waste
        1. Generator Controlled Exclusion- excludes hazardous secondary materials that are legitimately reclaimed under the control of the generator
        2. Transfer Based Exclusion- Exempts material transferred to a 3rd party for recycling or reclamation
  4. **Hazardous Wastes**
     1. Hazardous waste definition- a solid waste or combination of solid wastes, which b/c of its quantity, concentration, or physical, chemical, or infectious characteristics may
        1. Cause or significantly contribute to an increase in mortality or an increase in serious irreversible illness; or
        2. Pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed
     2. RCRA identifies two categories of hazardous wastes
        1. **Listed wastes**- substances that EPA has determined routinely contain hazardous constituents or exhibit hazardous qualities- in CFR
           1. **Mixture rule-** any mixture of a listed waste with another solid waste is still considered a hazardous waste (w/exception for municipal solid waste)

**Contained in principle-** if soil has hazardous waste in it, we are going to assume soli is hazardous until you prove otherwise

Even though soil is not considered a solid waste it falls under the mixture rule

* + - * 1. **Derived from rule-** requires that wastes derived from the treatment of a hazardous waste also be treated as a hazardous waste, such as sewage sludge or incinerator ash
        2. **Delisting-** administrative petition claiming particular sludge from this site is not hazardous
      1. **Characteristic Wastes**- identifies wastes by their characteristics
         1. A waste may exhibit one of the four hazardous waste characteristics

Corrosivity

Reactivity- if you drop or hit there will be an explosion

Toxicity- TCLP test

Ignitability, above 140 degrees

* + - * 1. Waste can be considered “acutely toxic” based on studies showing it is fatal to humans
        2. *Characteristic wastes are NOT subject to the mixture or derived from rule*
        3. Burden of identifying listed wastes falls on EPA
        4. Burden of identifying characteristic wastes falls on the waste generators
    1. Covered by Subtitle C of RCRA
       1. EPA is required to regulate:
          1. Generators of hazardous waste §3002
          2. Transporters §3003
          3. Facilities that treat, store, or dispose of hazardous waste §3004
       2. Operating standards for TSD facilities are to be implemented through a permit system
    2. Subtitled D of RCRA covers landfills
       1. **Chicago v. Env. Defense Fund- *combustion ash is not exempt.* Ash can be hazardous, even if the product from which it was generated was not, b/c ash is new medium**
          1. Majority holds that RCRA exempts ash from incineration of household waste, but not if the incinerator (such as this one) burns anything in addition to household waste (nonhazardous industrial waste).
          2. Moreover, the *household waste-burning facility gets the exemption, not the waste (ash) it generates.* Therefore, generation of toxic ash is not exempt.
    3. **Shell v. EPA-** there was a procedural problem (notice and comment) the EPA did err in its administrative procedures, but the promulgate rule still survives
       1. Shell was unsuccessful in shooting down the rule, ct said EPA had a lot of discretion
    4. **Generators**
       1. Largest universe of hazardous waste handlers
       2. Key exemption
          1. 90-day storage
          2. small quantity generators, conditionally exempt SQGs
          3. Recycling
          4. Product tank exemption
    5. RCRA Transporters
       1. Least regulated part of hazardous waste chain
       2. Key requirement- manifesting and exception reporting
       3. Limited storage and transfer station authorization
       4. Under DOT and HazMat separate regulation
       5. International shipments
  1. TSDF’s
     1. Hazardous Waste Fills
        1. Large cell liners, groundwater monitors
        2. Staging treatment areas
        3. Highly controversial
     2. Incineration Facility
        1. Most efficient method of destroying hazardous wastes up to the six 9’s (99.9999)
           1. Ash must also be managed
     3. Injection Wells
        1. Smallest footprint
        2. Very expensive, even more so than landfill/incinerator
     4. Treatment technologies
        1. Vitrification, waste-to-energy, plasma furnaces, stabilization
        2. Residue and staging
           1. Waste classification (derived from rule)
           2. TSD requirements for staging
           3. Limits on use of resulting material, energy costs
     5. Regulation of TSD’s
        1. TSDs fall under strict regulations
        2. Emergency response plans
        3. All units-storage tanks, etc have extremely detailed management requirements for TSD’s that don’t exist for generators
        4. Has to monitor air emissions
        5. Monitor ground-water
        6. Corrective action- when you become TSD, you have to clean up all the waste on your land before getting your hazardous waste permit- even if it wasn’t yours or got there before RCRA existed
        7. Land ban- land disposal treatment procedures, most complex part of RCRA
           1. Hazardous waste can’t be put in the ground unless it has been treated by very rigorous standards, which EPA has no control of
           2. For every hazardous waste there is a particular treatment you must follow before putting it in the ground
        8. Considerations when putting a chemical into the land
           1. Is it a tank or container?
           2. Where is it coming from?
           3. Is it on the same facility as where the waste is generated
           4. How long is it being stored for
           5. Does it meet the parking lot test- is the container holding the waste strong enough to stand on its own
  2. **Avoiding TSD Status** – Stoll Article-because TSD standards are very burdensome, companies go to great lengths to avoid being caught in subtitle C.
     1. Material – argue it’s not a “waste” or not “hazardous”
     2. *Obtain feedstock from others’ wastes* – spent materials are wastes even if reclaimed. However, while generator and transporter would be subject to subtitle C, user of the spent waste can be exempt as ‘recycler’ as long as they don’t store (go directly into reclamation tank).
     3. *Reclaim your own feedstock without a closed loop* – Generally, you can only generate and then reuse listed wastes within a closed loop to avoid TSD status. But you can store listed waste in drums for less than 90 days. So you can be a generator, but not a TSD facility as long as < 90 days. You can also treat it.
     4. *Recycle your own hazardous wastewater*

**CERCLA**

1. CERCLA-
   1. Definition of CERCLA- **Release of hazardous waste from a facility into the environment creating response costs that are consistent with the national contingency plan**
      1. **Release** is broadly defined- Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment
         1. Including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant
         2. No quantitative threshold
      2. **Hazardous waste** is broadly defined
         1. References and incorporates the definition of almost every dangerous substance in every other federal statute
            1. **EXEMPTIONS**: Petroleum, including crude oil and natural gas are exempt from CERCLA’s definition of hazardous waste
            2. No Statute of Limitations
      3. **Facility**- any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located
         1. Facility = Virtually any place where hazardous wastes have been dumped or disposed of
      4. **Response costs**
         1. Short term removal- designed to deal with emergencies
         2. Long Term Remediation
            1. Serious risks that do not pose immediate threat to human life
         3. Kinds of Costs
            1. Overhead and Oversight- EPA can recover supervisory, administrative, investigatory, and oversight of private clean up expenses
            2. Medical monitoring- generally nto recoverable although they seem to be contemplated by language of §101(23-24)
            3. Property losses and relocation Costs- generally not recoverable, BUT property destruction as a result of clean up is recoverable
            4. Attorney’s fees- hard for private party to recover, easier for government
      5. **National Contingency Plan**- NCP provided the guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants.
   2. **Clean Up: Standards and Costs of Removal and Remediation**
      1. EPA’s National Contingency Plan recognizes two types of responses
         1. **Short term removal** actions designed to alleviate immediate dangers to public health or the environment
            1. Less than 2 years and
            2. Less than 2 million dollars
         2. **Longer-term remedial** actions designed to provide a permanent remedy to the maximum extent practicable
      2. **Process proscribed by NCP**
         1. Preliminary assessment/ site investigation
            1. Analyze the danger by giving Hazard Ranking Score
         2. Based on that you decide to either do a Removal action, or add it to the National Priority List for a remediation action
            1. Removal OR Remediation
         3. If Remediation, then Remedial investigation is followed by a feasibility study
         4. Issuance of proposed plan, public comment
         5. Record of decision- actually decide what to do
            1. Implementation of the decision,

What technology to use for cleanup

* + - 1. Delist- when remedy is complete
    1. EPA’s 2 principle criteria that drive clean up decisions
       1. Protecting human health and the environment
       2. Meeting ARARs §121(d) specifies degree of cleanup to be required
          1. Basically must meet federal standards in a timely manner
    2. EPA’s Procedural Options
       1. EPA can clean up site itself and seek reimbursement from liable parties
          1. Only if the site is on NPL
       2. Issue 106 administrative order for liable parties to clean up
       3. Reach a settlement and enforce via a consent decree from the court
       4. Pursue direct civil action
       5. Use RCRA pg 794
          1. EPA can use §7003 to file civil suit for injunction to stop polluting and to clean up
          2. BUT, RCRA does not have superfund $$, so harder to get $ back
  1. Potentially Responsible Parties
     1. **Present owner or operator**
        1. Trustees are legal owners of property in their control and liable up to amt of trust
        2. Corporation parent can be an operator if they are involved in the daily operation and control of the facility
        3. *NY v. Shore Realty Corporation*-
           1. **Facts**: Shore purchased property where tenants continued to pollute until he evicted them
           2. **Held**: 107(a)(1) ***unequivocally imposes strict liability on current owner of a facility w/out regard to causation***
           3. **Rational**: if a current owner could avoid liability merely by purchasing the site after dumping had ceased waste sites certainly be sold to new owners who could avoid liability required by CERCLA
        4. **Lender-** historically lending alone was enough to get you liability, but congress created an exception
           1. As long as there is no participation in management outside what is customary
     2. **Past Owner or Operator of facility**
        1. *US v. Brighton*- ***Must exercise “actual control” over the activities, as opposed to ability to control***
        2. ***US v. Gurley*- Individual employee can be operator if** 
           1. Had actual authority to determine whether and method of hazardous waste disposal
           2. Actually exercised authority by disposing or directing others to dispose
        3. *US v. Bestfoods-* ***A corporate parent will only be liable if it actively participated in, and exercised control over operations of the facility itself***
           1. Then parent itself may be directly liable in its own right as the operator of the facility
           2. Critical Q is not whether parent operates subsidiary, BUT whether it operates the FACILITY and that operation is evidenced by participation in the activities of facility

Need to preserve 2 hats principle

* + 1. **Generators of hazardous waste that arrange for disposal or treatment**
       1. ***US v. Aceto****-* 8th Cir. 1989 holding a **manufacturer of pesticides liable as an arranger because hazardous releases were an “inherent part” of the product’s use.** 
          1. There is some point at which the mere handling of materials makes party an arranger
          2. Manufacturers were aware it was occurring
          3. Fact specific inquiry as to whether it was a sale/manufacturing or just disposing of part/paste

What is the interval service doing exactly

* + - * 1. Does it matter that A had ownership of chemicals the whole time?

Yes, b/c statute states “hazardous substances owned or possessed by”

* + - 1. ***Chalmers v. FPL*- Entity not liable as arranger merely for selling new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination**
         1. Less clear- cases in which seller has some knowledge of the buyer’s planned disposal or whose motives for the “sale” of a hazardous substance are less than clear
      2. ***BNSF v. US* - Must have intent to dispose to be held liable as arranger**. Shell’s mere knowledge that spills and leaks continued to occur is alone is insufficient grounds for proving that an entity “planned for” the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.
         1. For Shell to qualify as an arranger, it must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer process by one or more methods described in 6903(3).
         2. **Dissent** (Ginsburg): Shell’s sales necessarily and immediately resulted in the leakage of hazardous substance.

Given the control rein held by Shell over the mode of delivery and transfer- their position was greater than that of just “mere knowledge” and made Shell an arranger.

* + - * 1. **Fact intensive inquiry that looks at whether transaction is disposal or sale and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA**
    1. **Transporters of hazardous waste**
       1. Must have control over selecting disposal site
  1. **Strict, Joint & Several liability-** no need to prove negligence, “Polluter Pays”
     1. Generally
        1. Main determination is whether they are a PRP, once established
           1. No causation analysis as long as response costs incurred
           2. Burden of proof is on ∆ to disprove
     2. Retroactive liability
        1. Applies to activities before CERCLA, even if legal at the time
     3. **Joint and Several liability**
        1. Mixing of wastes almost always results in JS liability- don’t have to worry about who is guilty and for how much
           1. PRP must prove his wastes did not contribute to harm
  2. **Liability: Amount and Allocation**
     1. Standards and Costs of Removal Remediation
        1. Determined by EPA’s NCP analysis
     2. **Determining How much you are Liable for**
        1. **Divisibility - *Apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm***
           1. Volumetric approach takes into account the relative involvement of the parties at the Site and their contribution to the harm created
        2. BNSF Factors:
           1. % of surface area
           2. % of operation

**Apportioning Liability**

* + - * 1. % of material
      1. Gore factors for apportioning joint and several liability:
         1. Ability of parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished
         2. The amount of hazardous waste involved
         3. Degree of toxicity of the hazardous waste
         4. The degree of involvement of parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste
         5. Degree of care exercised by the parties with respect to the waste concerned, taking into account the characteristics of such waste
         6. Degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment
    1. **Apportionment Case Law**
       1. **BNSF**-Held the District Court’s ultimate allocation of liability is supported by the evidence and comports with the apportionment principles outlined above,
          1. Reversed the COA’ conclusion that the railroads are subject to joint and several liability for all response costs arising out of the contamination of the Arvin facility.

Ct interposed an intent requirement for arranger liability

* + - * 1. **Rationale**: ***Apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm***. The court finds that the facts contained in the record reasonably supported the apportionment of liability

Factors in calculating allocation of damages

% of surface area

only 10% of tainted land actually belonged to BNSF

% of operation

% of material

The defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists

Equitable factors don’t matter in joint/several

* + 1. **Allocation of Liability**
       1. ***PRPs can avoid being held liable for the entire cost of clean-up, even when CERCLA imposes joint and several liability***
          1. De minimis settlement provision 122(g)

Seeks to encourage prompt settlements between the government and PRPs that contributed small amounts of substances

* + - * 1. Statutory contribution provision 113(f)

This section bars contribution from parties who have settled wit the government for matters addressed in the settlement

A PRP that believes it has paid a greater than fair share of the cleanup costs brings suit to shift some of the costs to others

A court hearing such a contribution suit is authorized to “allocate response costs among liable parties using such equitable factors as the court determines appropriate.”

|  |  |  |
| --- | --- | --- |
|  | Seek recovery costs  under §107(a)  (Reimbursal) | Claims for contribution/  apportionment under § 113(f) |
| Generally | These more akin to a plaintiff’s  suit for indemnification; allows  private parties to go after other  PRPs for clean up costs incurred | Cleanup costs are apportioned  between all parties, including  the plaintiff- equitable in nature  🡪 civil action is a prerequisite |
| Type of liability | Contrast with joint and several  liability of §107 | Under 113(f) allocation is to be  equitable allocation among PRPs |
| Statute of Limitations | SOL for §107 actions is three to  six years from completion of  removal work or initiation of remediation work | SOL is three years from the date of judgment or settlement |
| Settlement Protection | No settlement protection | Settlement protection exists only  for §113(f) actions |

* + 1. ***A Civil Action is a prerequisite to any §113(f) CERCLA contribution action*** *Cooper Industries v. Aviall Services* (2004)- ***is the necessity that the private-party plaintiff have either***
       1. § 106 Suffered prosecution for liability from the federal government
       2. § 107 entered a judicially or administratively approved settlement of such dispute with the government
    2. ***PRP engaging in voluntary clean up, may use §107 as cause of action to recover costs from other PRPs*** *US v. Atlantic Research Corporation* (2007)- Ct ruled unanimously that PRP could use 107 for recovery costs in voluntary clean up cases
       1. Ct relied on the plain language of statute: PRP is liable for
          1. “all costs of removal or remedial action incurred by US or state and
          2. any other necessary costs of response incurred by any other person consistent with NCP”
       2. A more narrow interpretation would render 107a functionless
       3. Court explained that its interpretation would not result in improper overlap between §113f and §107a
          1. A party can sue another PRP for contribution under 113(f), which necessitates an equitable apportionment of costs among liable parties
          2. But the party can only sue under section 107a for reimbursement of its own clean up costs

Parties cannot take advantage of

* + - * 1. If you voluntarily clean up on your own, prior to EPA action, then you can utilize 107
    1. ***Akzo Nobel Coatings v. Aigner Corp*** (7th Cir. 1999)- Allows the settler of a CERCLA claim with the EPA to obtain contribution protection from the government, to extinguish its liability to the government and to obtain contribution protection against claims by other private party non-settlors (Applies UCATA)
       1. It leaves non-settlors liable for any remaining unpaid orphan shares attributable to other PRPs
  1. **Defenses and Exemptions**
     1. **107b: Act of God, act of war**, or acts or omission of a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship of the ∆
        1. To meet the defense, ∆ must show:
           1. He exercised due care
           2. Took precautions against foreseeable acts/omissions
     2. **Unrelated 3rd Party Defense**
        1. If ∆ can show the release was caused by an unrelated 3rd party, cant be employee, agent, or contracting party, and
        2. ∆ establishes by a preponderance: exercised due care w/ respect to the substance and took precautions against foreseeable acts or omissions
     3. SARA Revisions added
        1. Bona Fide Prospective Purchasers &
        2. Innocent Purchaser defense
     4. **Bona fide Prospective Purchasers-** limits clean-up liability for prospective purchasers that KNOW about the Brownfield
        1. In addition, to qualify as a bona fide prospective purchaser you must also comply with EPA’s continuing obligations for bona fide prospective purchasers, which require that you:
           1. not contribute to the contamination at any time, stop continuing discharges and prevent threatened discharges;
           2. not have any affiliation with persons potentially liable for response costs at the property;
           3. comply with any environmental land use controls imposed by the state;
           4. take reasonable steps regarding the contamination (e.g. install fencing, if needed to protect public health); and
           5. cooperate with those cleaning up the property, comply with information requests and provide any legally required notices.
     5. **Innocent Purchaser Defense:** Innocent land purchasers who can establish
        1. They did not have actual or constructive knowledge of the presence of hazardous substances at the time the land was acquired
           1. Purchaser must have undertaken at the time of acquisition all appropriate inquiry (AAI) into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability
           2. In 2005, EPA established standards for satisfying AAI, but still difficult to satisfy and people seek more clarity
        2. The are government entities acquiring the property through involuntary transfer, or
        3. They acquired the land by inheritance or bequest
     6. **Passive Owner Liability**- courts are split on whether owners who engaged in no active conduct relating to disposal themselves, but who owned land at a time when wastes deposited on the land before their ownership continued to leak or spill onto the land
        1. *Nurad v. Williams*- 4th Cir. Upholds liability
           1. Owner could be idle while env. Hazard festers of property
        2. US v. CDMG Realty- 3rd Cir. Rejects such liability
  2. **Solid** **Waste & Municipal Landfills**
     1. *Philadelphia v. New Jersey*
        1. Trash is commerce, so it is regulated by ICC, so attempts by states to make facially discriminatory laws are going to be prima facie invalid
           1. But, you can fight the claim that there is only an Incidental burden on ICC and that we have a huge local benefit from it
           2. Pike test- requires the ordinance's benefits to the county to be weighed against its effects on interstate commerce
        2. Flow control regulations (requiring garbage to go only to in state landfills) also pose constitutional concerns- Carbone and Haulers

**AIR**

1. Air
   1. **Clean Air Act Break Down**
      1. **Six Titles of Clean Air Act** – like mini acts
         1. I- Ambient air pollutants: NAAQS
            1. **Standard**- *adequate* margin of safety
         2. II- Mobile source- Congress by statute said automakers have 5 years to come up with pollution reducing technology
            1. Technology fiat
         3. III- Hazardous air pollutants (HAPs), regulates things like benzene
            1. **Standard**- *Ample* margin of safety
            2. MACT- maximum
         4. IV- Acid rain- market approach, set a cap and then let them trade among themselves, you get pollution reduction at much lesser cost
         5. V- requires federal permit
         6. VI- ozone depleting substances- includes some market provisions that allow trading
      2. 6 criteria pollutants under Title I
         1. CO, VOCs, NOx, Pb, SO2, and PM
   2. **TITLE i of the CAA: General Overview**
      1. **EPA Sets Standards**
         1. §108 EPA must identify criteria pollutants= pollutants that have been identified as harmful to human health and welfare
         2. §109 EPA must establish NAAQS for the criteria pollutants that must protect the public health with an adequate margin of safety
         3. §111 EPA sets New Source Performance Standards (NSPS) for new sources and major modifications of existing sources
      2. **New Source in an Attainment or Non-Attainment region?**
         1. Attainment Region
            1. **NSPS & PSD**
            2. Subject to BACT
            3. Incremental increase in emissions allowed, but increment analysis is required

**New Sources**

* + - 1. Non-attainment Region- Currently not meeting NAAQS
         1. **NSPS & NSR**
         2. Subject to LAER
         3. Pre-construction permitting
         4. Must be permitted under Title V
         5. Offset new sources with reductions elsewhere for a net reduction
         6. Show reasonable further progress (RFP) toward attainment
    1. **§110 Existing Sources**- States must come up with State Implementation plan (SIP) to assure that air in state meets NAAQS
       1. Cooperative federalism
       2. EPA review and approval
       3. EPA can call for revisions of the SIP (SIP Call)

**Existing Sources**

* + - 1. If state does not prepare an adequate SIP EPA will establish Federal Implementation Plan (FIP)
         1. Subject to Reasonably available control technology (RACT) in NA regions
      2. **New or Major Modified Source: Triggers New Source Review**
         1. Must be permitted under Title V
         2. Offset new sources with reductions elsewhere for a net reduction
         3. Show reasonable further progress (RFP) toward attainment
         4. Subject to lowest achievable emission Rate (LAER) technology
    1. **Are you a Mobile Source: Title II?**
       1. National uniform emissions standards for autos, all states pre-empted except CA
       2. Fuel standards
       3. Does not cover ships and aircrafts
  1. **NAAQS**
     1. **Establishing NAAQS: *EPA does not have to show that pollutants are “clearly harmful” to regulate→ CAA is preventative, Lead Industries***
        1. §109- EPA must set NAAQS at level “based on (the ambient air quality) criteria and allowing for an adequate margin of safety” to protect public health
           1. Primary standard- protect human health
           2. Secondary standards- protect public welfare, broadly defined to include effects on animals, wildlife, water and visibility
        2. *Lead Industries v. EPA*- In setting NAAQS for lead, EPA chose vulnerable target population (inner city children). Ct held that EPA had discretion in determining an adequate margin of safety.
           1. EPA does not have to show that pollutants are “clearly harmful” to regulate🡪 CAA is preventative

Precautionary principle- based on the idea that you need to regulate things before get too bad

Court upholds based on the precautionary principle that an ample margin of safety where you can regulate at the level that has subclinical effects

* + - * 1. NAAQS levels must be based solely on health considerations, NOT economic or technical feasibility
      1. *EPA v. Whitman Trucking* re affirmed Lead decision- that EPA is required to base the NAAQS on health and *NOT cost*
    1. **Revising NAAQS**
       1. §109 EPA must complete thorough review of criteria and NAAQS and make revisions as may be appropriate
          1. EPA reluctant to revise b/c enormous administrative burden to make change and all states must then revise SIPs
  1. **Attaining and Maintaining NAAQS🡪 SIps**
     1. Implementation and Compliance
        1. **SIPS**: Once EPA sets NAAQS nationwide, each state has the responsibility of setting emission standards that will result in attainment and maintenance of those standards.
           1. Each state is required to submit a SIP that demonstrates how NAAQS will be achieved by deadline dates established in the statute
           2. Determine existing and projected levels of criteria pollutant
           3. Determine what reductions necessary to meet NAAQS
           4. Inventory sources and project future growth
           5. Decide on control strategies and allocate burden of reductions
           6. Demonstrate to EPA that SIP will attain and maintain NAAQS
        2. **Most States choose categorical emission limits based on technology and economics**
           1. *Economic incentives allowed- fees, marketable permits, auction of emission rights*
        3. **EPA approval of SIPS**
           1. ***States have flexibility:*** *NRDC v. Train-* SCOTUS approves EPA approval of SIP w/ variance procedure for sources that couldn’t immediately comply; as long as SIP provided for overall attain and maintain
           2. EPA can and does approve SIPS with no real chance of attaining NAAQS
           3. EPA can issue conditional approval w/time to cure defects
           4. If EPA finds deficient, it must issue FIP within 24 months

FIP’s are really expensive, so lots of partial approval/disapprovals submitted

* + - 1. ***Tough SIPS will be upheld, regardless of technological or economical******infeasibility****- Union Electric v. EPA-* MO adopted SIP requiring substantial SO2 reduction. SCOTUS agrees with EPA that SIP approval/disapproval should have nothing to do with economic or technological infeasibility.
         1. Harsh, but technology forcing
         2. Variances are often still available, rather than forcing tech
      2. *Virginia v. EPA*- ***EPA cannot condition approval of a SIP on a state’s adoption of a particular control strategy*** 
         1. **Facts**: EPA required states to adopt CA’s vehicle emission program and in effect set the numerical emissions limitations and mandated the means for the states to achieve the necessary emissions reductions

The EPA rule req’d several states to reduce ozone precursors by a particular program and only allowed states to implement a more stringent program as an alternative or substitute

* + - * 1. **Held**: that EPA’s approach exceeded its authority under §110 because each state retains the authority to determine in the first instance the necessary and appropriate control measures needed to satisfy §110’s standards
    1. **Evolution of Programs to Achieve and Maintain NAAQS**
       1. **Attainment and Non-Attainment Areas**- Purpose to protect and enhance air quality means that EPA has to regulate areas with better air quality than NAAQS, and prevent deterioration
       2. **Non-attainment areas that do not meet current NAAQS**
          1. Preconstruction review is much more stringent
          2. Major source defined as one that emits at least 10-100 tons of regulated pollutant
          3. Regulation requires different technology to lower current emissions rate
  1. **New Sources** *§111* ***New Sources and major modifications of exiting sources*** *that fall into categories that the EPA has found generate air pollution “which may reasonably be anticipated to endanger public health or welfare” are required to install federally established new source performance standards (NSPS)*
     1. **What is a new source under §111**
        1. New Source, or
        2. Major modifications of existing sources- *any physical or process change that increases the emission of a criteria pollutant by more than the de minimis amount*
           1. Consider what is the additional pollution compared to the threshold amount, does it put you near the limit
           2. “physical change in method of operation that increases the amount of any air pollutant

Is it routine maintenance?

Overall emissions change? Individual change?

Are operating hours changing?

* + 1. **All New Sources subject to NSPS**
       1. **NSPS Standard-** Cost and Technological feasibility may be considered
       2. **NSPS**- When EPA establishes NSPS based on previously unregulated pollutants, the EPA then establishes procedures whereby states are required to regulate existing facilities in the same category
          1. Contrast with existing sources that are regulated through the SIP process and states retain wide discretion
    2. **New Sources in Attainment areas are subject to the PSD** permitting program
       1. In attainment areas, the PSD allows incremental increases in emissions
          1. Major source defined as one that emits at least 100-250 tons of regulated pollutant
       2. Class I- Nat’l parks, forests, etc- stringent controls
       3. Preconstruction Review- all new major stationary sources in a PSD area (including major modifications of existing sources) that have the potential to emit significant amounts of criteria pollutants
          1. Determine if preconst. Review is needed for new source
          2. Calculate baseline for how much incremental increase can be allowed
          3. Air modeling to assess impact of new source
          4. Determine what BACT is for new source
    3. **New Sources in Non-Attainment Regions subject to NSR** permitting program
       1. Requires:
          1. **LAER**- the installation of the lowest achievable emission rate
          2. **Emission offsets**- Offsets are emission reductions, generally obtained from existing sources located in the vicinity of a proposed source which must (1) offset the emissions increase from the new source or modification and (2) provide a net air quality benefit.
          3. Opportunity for public involvement
    4. ***Defining Modification:*** *Environmental Defense v. Duke Energy Corporation*- ***EPA need not interpret "modification" in PSD regulations the same way the term is interpreted in NSPS regulations.***
       1. Facts: Energy corporation made capital improvements to facility’s boilers, which resulted in an increase in hours of operation without obtaining PSD permits
          1. EPA claims this triggers PSD regulations for “major modifications”- defined as any physical change or change in the method of operation of a major stationary source that results in increase or net emissions subject to regulation under the Act

An increase in hours of operation or production rate do not generally constitute a physical change

* + - * 1. Issue (1) Does the Clean Air Act require the EPA to interpret the term "modification" consistently in its Prevention of Significant Deterioration (PSD) provisions and New Source Performance Standards (NSPS) regulations?

**Held**: the Court ruled that the EPA need not interpret "modification" in PSD regulations the same way the term is interpreted in NSPS regulations.

The Court held that "EPA's construction should fall within the limits of what is reasonable, as set by the Act's common definition."

The Court concluded that differing circumstances involved in regulating under the PSD provisions as opposed to the NSPS provisions may well necessitate giving a different meaning to the term "modification" as it appears in each.

* + - * 1. Issue (2) Whether the increase in emissions is determined in terms of hourly rate or the actual, annual discharge of a pollutant?

**Held**: EPA’s interpretation rules- annual is fine b/c reasonable (Chevron deference)

* + 1. **Ways to avoid NSR review**
       1. **Relocation**- moving criteria pollutants emitted by the source outside the non-attainment area
       2. **Bubbling**- focused on idea that you can take a facility and reduce emissions on one source significantly
          1. Over comply and over reduce at one source

X(10) X(10) Y(5)

* + - 1. **Netting** - add new source, reduce existing sources so that you don’t trigger NSR review
         1. X(7) X(7) Y(10)
         2. Designed for facility that is expanding
      2. **Offsets**- designed fro facility in non-attainment, if I want to make a change or add new facility, I reduce at another plant/facility and it doesn’t have to be yours

**Avoiding NSR Review**

* + - * 1. Part of permitting process
      1. **Existing Source can argue modifications fall under RMRR Exemption** Duke energy corporation argued that their capital improvements were exempt b/c fell under the routine maintenance, repair, or replacement (RMRR) category and therefore did not constitute a “physical change” which resulted in increase of emissions
         1. The modifications should not trigger NSR
         2. RMRR exemptions are analyzed on a case-by-case basis, with a fact intensive analysis
         3. Critical Question: Whether the capital improvements are routine, prevalent, or commonplace for the specific unit being evaluated?
      2. **Existing Source can argue modifications fall under New Equipment Replacement Rule (ERP)** New Brightline Rule
         1. Capital project at an existing facility was exempt from NSR if

The project replaces existing equipment with identical ones that serve the same purpose

Project costs do not exceed 20 percent of current replacement value of the entire unit

Project does not alter the basic design of the unit or cause it to exceed any applicable emissions limitation that applies to the unit

* 1. **Acid Deposition**
     1. Cap and trade program-
        1. Begins with nationwide cap on emissions
        2. Potential for trading is created by allocating pollution allowances to sources based on their past emissions and fuel consumption
           1. Certain positive actions are rewarded with bonus allowances
  2. **Air Toxics**
     1. Federal
        1. NESHAPs
        2. Title III of Clean Air Act Amendments of 1990
     2. Key Elements
        1. 189 new air toxics
        2. MACT, Hammers
        3. Expanded EPA authority to add new categories
     3. Who gets regulated?
        1. Major Source
           1. 10 tpy of any HAP
           2. 25 tpy combined HAP
           3. “once in, always in”
           4. Area sources- like dry cleaners, setting operational standards they must comply with
     4. Source Categories (166 major, 8 area)
     5. **MACT (Maximum Achievable Control Technology)**
        1. 12% best performing existing units becomes the new floor and the other 88% need to reach that level
           1. ratchets up the standard
           2. rewards large operators who can afford to test new technology
        2. **Residual Risk-** EPA goes back and reevaluates current level to see if good, then can ratchet up even more, based on collective emistions still posting a residual risk, despite all individuals being in compliance w/ standards
     6. **State Level🡪 Effects Screening levels (ESL)-** looks at what is the fence line, line which can harm the community
        1. Relies heavily on scientific data (which can be questionable)
        2. New guidelines Nov. 2006
           1. External scientific peer-review panel of international experts
           2. Two rounds of public comments
        3. Used in air permitting and for evaluating air monitoring data
        4. Currently, 28 ESLs have been derived using the new process
     7. Benzene-look at where emissions are above the ESL, which then triggers Env. police
        1. Risk-driver for Texas and US
        2. Wide variety of emission sources
        3. Representative of other chemicals
           1. butadiene
        4. In 2008, no monitors in Harris county were above the long-term ESL for benzene
           1. All monitors in Houston region showed a decrease in avg benzene concentration from 2005-2008
           2. 87% of monitors statewide showed a decrease in avg benzene concentration from 2005-2008
     8. Air pollution watch list
        1. Currently there are 12 APWL areas in 11 counties
        2. Over the last 2 years, 6 pollutants have been removed
        3. 7 more pollutants in 5 APWL areas are proposed to be removed later this year

1. **Multi-State Air Quality Problems**
   1. Laws Currently in Place
      1. **Good Neighbor provision of Clean Air Act**
         1. §110(a)(2)(D)(i)(I) Each SIP had to prevent emissions that contribute significantly to nonattainment in, or interfere with maintenance by any other State with respect to any such national primary or secondary ambient air quality standard
            1. This provision applies only to states that contribute ***significantly*** to nonattainment in downward states
         2. §126(b) Petition against another state to reduce impact on my state b/c a major source or group of sources is emitting air pollutants in violation of §110a
            1. allows EPA to go after specific actors
      2. **Ozone Transport Commission** (OTC) 12 Northeastern states that with the EPA are charged with studying the ozone problem
         1. By majority vote, OTC can develop recommendations for additional control measures that are necessary to bring any region within the OTC into attainment §184
         2. OTAG- larger geographical area
   2. *Michigan v. EPA*-***EPA invoked §110(k)(5), (a NOx SIP call) and told 22 States that they needed to reduce their ozone and NOx emissions*** by installing all controls that would cost less than $2k to prevent each ton of NOx emitted \*\*\*\* None of the parties challenged trading in this case
      1. **Issue 2: New agency interpretation inconsistent with past precedent is given Chevron deference** 
         1. Court found that there was nothing in the text of §110 to stop EPA from interpreting "significant" in a different method than they had done in the past, b/c statute was ambiguous,
      2. **Issue 1: Considering Cost is permissible, b/c no clear manifestation congressional intent bars agency from considering costs**
         1. EPA had to focus on pollution that contributes "significantly", and that the word could be interpreted to mean "cost effectively." The Court wondered how EPA was to determine what was and wasn't "significant" if they didn't consider costs.
            1. The Court looked to an OSHA Statute that had interpreted "significant" as meaning "what can be achieved cost-effectively."
            2. **Ct states that only where there is “clear congressional intent to preclude consideration of cost” that we find agencies barred from considering costs”**
         2. Compare this ruling to Whitman v. American Trucking Ass'ns (531 U.S. 457 (2001)), in which industry argued that EPA erred when they did not consider costs in coming up with their NAAQS.
      3. **Issue 3: NOx Budget program does not infringe on States’ right to develop SIP** 
         1. Ct held that the NOx budges do not fall within the realm of impermissible SIP call regulation as defined in *Virginia* and *Train*
            1. EPA reasonably interpreted §110 as providing it with the authority to determine a state’s NOx significant contribution level and that the EPA budget plan does no more than project whether states have reduced emissions sufficiently to mitigate interstate transport

EPA does not tell states how to achieve SIP compliance, but merely provides levels to be achieved by state-determined compliance mechanisms

EPA accommodates *Virginia’s* mandate by allowing reasonable control alternatives and allowing states to focus reduction efforts based on local needs or preferences

* + - 1. ***Federal government cannot infringe on State’s right to develop SIP Program:*** *Virginia v. EPA*-EPA required states to adopt CA’s vehicle emission program and in effect set the numerical emissions limitations and mandated the means for the states to achieve the necessary emissions reductions
         1. Ct Held that EPA’s approach exceeded its authority under §110 because each state retains the authority to determine in the first instance the necessary and appropriate control measures needed to satisfy §110’s standards
  1. **CAIR** Clean Air Interstate Rule aimed at further reductions in SO2 and NOx in order to help achieve lowered NAAQS for ozone
     1. CAIR is a SIP call directed at 28 states in response to §126
        1. EPA is under a mandatory duty to act when presented with a meritorious §126 petition
     2. *It gives these states the option of participating in a cap-and-trade program* for fossil fuel fired electrical generating units or else selecting other options for achieving the required SO2 and NOx reductions
        1. If a state’s SIP was found to be inadequate, then they would be forced to adopt the FIP developed by the EPA
           1. The FIP would implement the cap and trade provisions that are set forth in the CAIR as a state option
     3. ***CAP and TRADE program struck down:*** *North Carolina v. EPA*- Court rejected EPA’s broad trading system CAIR b/c it fails to meet the requirements of §110(a)(2)(D)(i)(I) because it doesn’t measure each state’s significant contribution from sources within the individual state to downwind nonattainment, nor does it require those sources to make the reductions necessary to mitigate downwind state compliance.
        1. Though CAIR clearly would make improvements in overall air quality in the Eastern United States, thus meeting several of the overall goals of the CAA, it fails to do so in the way that takes account of all values at issue in the CAA.
        2. As North Carolina correctly noted, the CAA not only requires overall air quality to be improved, but mandates improvements in specific areas that are being harmed by out of state sources.
        3. Judge Sentel seems to be suggesting that you only go after other states through 126 orders
           1. Instead of invalidating entire rule, someone should have argued a 126 order as supplement to the CAIR package, and then the Act may have survived

**WATER**

1. **Water**
   1. **Sources of Pollution**
      1. **Direct**- discharge from pipe, outfall, or ditch at facility
         1. New Performance standards can be much more stringent
      2. **Indirect**- routed to a centralized waste water treatment facility
      3. **POTWs- Storm water and sewer discharges**
      4. **Non-point** source solution
   2. **Clean Water Act** (passed 1972) *reverses the approach of the CAA, instead of setting ambient water concentrations and working backwards to determine individual emission levels, the CWA starts with effluent levels of individual point sources*
      1. **Key concepts** 
         1. Set ambitious national goal: elimination of pollutant discharges into navigable waters by 1985
         2. Primary Tools
            1. Water quality standards
            2. Wastewater treatment standards + Permits for discharges
            3. Wastewater treatment financing
         3. Control Mechanisms
            1. Point sources
            2. Permits
            3. Effluent standards
         4. Types of pollution
            1. **Toxic**- 126 chemical substanes specified by Congress, as well as any other pollutant EPA determines to be toxic based on pollutant’s

Toxicity,

Persistence,

Degradability, AND

Impact on organisms

* + - * 1. **Conventional**- pollutants that commonly pollute waterways
        2. **Non-conventional**- everything else, heat, ammonia, choloride, color, iron, and nitrate
      1. Water quality, not supply
      2. **NPDES Permit system** §301, § 402
         1. Required for any discharge of a pollutant from a point source into navigable waters
      3. **Indirect Discharges**- pretreatment orders
      4. **Discharge Standards**- §301, §306, §307 (NSPS, toxics) set by technology limits provided for entire industry sector
      5. **Total Maximum Daily Load-** standards for water quality attainment §303d)
      6. **Dredge and Fill-** §404 Wetlands
    1. **Implementation** of CWA
       1. State delegation for implementation and enforcement, with EPA oversight
       2. Citizen Suits (§505)
       3. Non-point source pollution planning requirements
    2. Other Federal Laws
       1. Oil Pollution Act of 1990
       2. Ocean Dumping Act
       3. Coastal Zone Management Act
    3. State laws- extremely important additional source of pollution control obligations
       1. May be more restrictive than federal law
    4. Impact and Results of CWA
       1. Much cleaner water ways in US
          1. Discharge of organic wastes from POTWs reduced by almost half
          2. Industry discharges of organic wastes down 98%
          3. Rate of wetlands loss declined by 90% since 1970s
    5. Remaining Challenges for CWA
       1. Data shortage
          1. Only 16% o US rivers and streams assessed and 44% impaired
       2. TMDL process for water quality attainment
       3. Nonpoint source regulation (including air deposition)
       4. Interplay of water supply and water quality

1. **Regulating Point Sources: NPDES Permit Program for Point Sources**: **Jurisdictional Boundaries** (p. 130)
   1. Under **CWA § 301 (§1311)** – discharge of any pollutant is illegal
      1. Exception for pollutant discharged pursuant to a NPDES permit issued under **CWA § 402**
         1. Narrative- depends on basic facts of situation (less fun)
         2. National- specific class of pollutants
   2. 4 elements of discharges under NPDES permitting jurisdiction **CWA §§ 502**
      1. addition
      2. of a pollutant
      3. from a point source
      4. into a navigable water (definition raises issues concerning scope of congressional power under the Commerce Clause)
   3. **Addition of a Pollutant**
      1. Need to discuss and analyze whether there was an “addition” and whether there was a pollutant
      2. §**502/§1362(6) defines “pollutant”** 
         1. **Very broad** – includes rock, sand, and heat
      3. *National Mining Association v. Army Corps of Engineers- whether incidental fall back from dredging = addition (No)*
         1. **Background**: In N. Carolina v. Tulloch, the court passed the Tulloch Rule- Corps changed the definition of “discharge” to cover “any addition of dredged material, including redeposit of dredged material, into the waters of the US.”

**Does Action Trigger CWA?**

* + - * 1. The New rule covers incidental fallback
        2. Gave the USACE the authority to control virtually all excavation and dredging performance in wetlands
      1. **Held**: that Corps exceeded their authority under the CWA
         1. The Corporation’s interpretation of the phrase “addition of any pollutant to navigable waters” to cover incidental fallback is “unreasonable” –fails step 2 of Chevron

Not a discharge and not covered under CWA

Rivers and Harbors Act already covered dredging, so Congress probably didn’t intend for the CWA to cover it also

* + 1. **RULE NOW:** **EPA determines on a case by case basis whether incidental fallback requires permit**
       1. In 2001, Corps issued new regulation that clarified types of activities likely to result in a discharge of dredged materials requiring a permit under §404.
       2. Rebuttable presumption exists if using earth-moving equipment to land clear, ditch, channelize, etc then there is a discharge. Unless evidence shows that the activity causes only incidental fallback
    2. Aerial dispersal of pesticides can constitute an addition of pollutants
  1. From a Point Source,
     1. **CWA § 502(14)** 🡪 “discernible, confined and discrete conveyance including pipe, ditch, . . . concentrated animal feeding operation (factory farms), or vessel or other floating craft, from which pollutants are or may be discharged. . . .
        1. **Excluding agricultural storm water discharges and return flows form irrigated agriculture”**
        2. Mines can be point sources
     2. *NRDC v. Costle-* ***EPA must regulate all point sources***
        1. Facts: FWCPA required EPA to regulate point sources of pollution, b/c impractical, EPA issued regulations that exempted certain categories of point sources of pollution from the permit requirements of §402 Fed. Water Pollution Control Act, before the CWA
        2. Held: FWPCA does not authorize EPA to exclude any class of point sources from the permit program
           1. Legislative intent was clear- EPA could lower requirements rather than exclude
     3. *US v. Plaza Health Laboratories-* ***Person is NOT Point Source***
        1. **Facts**- Owner of Lab dumped vials of human blood into the Hudson River
        2. **Held**: Person is not a point source, otherwise 1311(a) “the addition of any pollutant from any point source by any person” would read “from any person by any person”
           1. Law focuses on industrial and municipal sources of pollution
           2. Rule of Lenity – statutory ambiguities are resolved in favor of a ∆ in a criminal case to ensure that ∆ has had fair warning concerning what behavior is criminal.
        3. Dissent: term point source has been construed to include a wide range of polluting techniques, so there should be no problem construing it to include people
           1. Purpose of CWA was to prevent pollutants from entering waterways
        4. RCRA does not cover infectious medical waste
  2. **Into Navigable Waters-** “navigable waters” means the waters of the US, including the territorial seas
     1. *US v. Riverside Bayview Homes (*SCOTUS 1985)
        1. **“navigable waters” includes wetlands adjacent to open water and is covered by CWA jurisdiction**
           1. congress intend to give the agency broad power and authority under the act🡪 Chevron Deferences
           2. ∆ is required to have a permit to place fill materials on his property as part of preparation for construction of housing development
           3. functionality
     2. *SWANCC (Solid Waste Agency of Northern Cook County) v. US Army Corps* (SCOTUS 2001)
        1. Facts- Company wants to convert an isolated wetland, but used by migratory birds, into a landfill
           1. Aggregate effect
        2. ***Narrow: CWA does not extend jurisdiction to isolated wetland used has habitat for migratory birds***
        3. **Broad: CWA does not extend jurisdiction to isolated wetlands generally** 
           1. Agency exceeded authority even if migratory birds cross state lines in their migrations
     3. *Rapanos v. United States* (SCOTUS 2006) Plurality
        1. **Facts-** ∆ was convicted of criminal violations of §404 for filling wetlands in open defiance of both a state cease and desist order and EPA compliance order
        2. **Scalia- Isolated wetlands are not navigable waters. Corp’s expansive interpretation of statute was unreasonable and failed step 2 of Chevron**
           1. Waters of US only apply to “relatively permanent, standing or flowing bodies of water”
           2. Congress needs to say it, not Chevron Deference here
           3. Must be difficult to determine where water ends and where wetland begins- direct surface between the two
        3. **Kennedy- Wetlands that are not adjacent to open water, must have a significant nexus with an open body of water to fall under CWA jurisdiction**
           1. Covers more Wetlands than Scalia’s test
           2. The nexus is satisfied if the wetland as a significant effect on the water quality of navigable waters

1. Regulating Point Sources: **Industrial Point Sources**🡪 Technology Based Effluent Limitations
   1. **Regulation of Point Sources-** technology-based effluent limitations are applicable to all point source dischargers and implemented through enforceable permits🡪 effluent limits are uniform for similar point sources w/similar characteristics (not as flexible as individualized approach)
      1. **NPDES Permits**
         1. Point sources are required to obtain an NPDES permit before discharging their wastes into a waterway
         2. Good for 5 years, then needs renewal
         3. Point sources must report discharges on regular, monthly basis to EPA or state
      2. **POTWs and the Pretreatment Program**
         1. POTWs regulated separately from industrial point source dischargers (separate effluent limitations).
         2. Many industrial discharges go to sewer to POTW (NPDES only applies to discharges to surface water).
         3. Sec. 307 requires pretreatment of discharges to sewer to control pollutants that are not susceptible to treatment by POTWs.
         4. *Ark Poultry Fed v. EPA* (8th Cir 1988) – Indirect discharger may be penalized only when their actions cause violations of permit at POTW.
      3. **Industrial Point Sources**
         1. CWA does not require the point source to use a particular technology, government instead decides on numeric effluent limitation, based on what specific technology can accomplish
      4. **Existing Point Sources-** 
         1. Technological standard will depend on whether the pollution being released by the source is
            1. Toxic- BAT
            2. Conventional- BCT (very similar to BPT), but if new source then need to meet new performance standards
            3. Non-conventional- BAT, but CWA permits EPA to waive or modify the BAT requirement where justified
      5. **New Point Sources**- new industrial point sources receive tighter effluent limitations
         1. “greatest degree of effluent reduction which EPA determines to be achievable through application of best available technology (BCT)”
         2. Cost does not play explicit role in selection of BCT
         3. BCT can include end-of-tail-pipe technology and changes to facility’s processes and operation
   2. **EPA issued industry-wide effluent limitations** which applied to categories and classes of dischargers 🡪 means uniform geographically, but industry-specific
      1. Types of Controls
         1. (BPT)
            1. First stage of effluent limitation
            2. Minimum standard for each class of industry emitting pollution
         2. (BCT)
            1. For conventional or traditional pollutants
         3. (BAT)
            1. BAT limits are for dischargers of toxic and nonconventional pollutants
      2. EPA set numerical limits for different industries based on analyses of capabilities of alternative pollution control technologies
         1. Can set standards for a sub-category
         2. Allows EPA to ignore condition of company
         3. FDF Variance- allows individual permit applicants an opportunity to request a variance for factors fundamentally different from those considered by EPA
   3. **§ 304 -Technology-based standards**
      1. setting effluent standards is an incredibly resource-intensive and complex process.
      2. End result is a regulation setting a numerical standard limiting pollutant discharge:
         1. by industry source category, based on:
            1. technology available in the industry to treat wastewater
            2. cost of achieving the standards
         2. Also have subcategories (e.g., various ways of making paper).
      3. Limitations are in terms of (regardless of individual measurement):
         1. daily maximum
         2. 30-day average
      4. Guidelines translate into **permit limits** (must be at least as stringent as guidelines, can be more strict if necessary).
         1. Permit is the binding obligation on the discharger.
         2. Cooperative federalism – permits are administered and enforced by the states.
         3. So permit limits come from EPA’s assessment of what the BAT is; but permit holder is free to employ any treatment technology they chose in order to meet the permit limit.
            1. end-of-pipe treatment is usually the focus
            2. could also change feedstock or process
            3. BAT could be zero discharge
      5. *Du Pont v. Train* (SCOTUS 1977***) affirmed EPA’s industrial approach and stated industry-wide BPT regulation was permissible, as long as allowance is made for variance***
   4. Effluent Standards for Toxic Pollutants
      1. Flannery Decree- EPA promulgated guidelines, pretreatment standards, and new source performance standards- for “priority pollutants”
   5. **Variances**
      1. SCOTUS has said that EPA requirements for industry categories are ok (do not have to be facility-specific). EPA need not consider an individual facilities’ ability to afford BPT requirements. See *EPA v. Nat’l Crushed Stone* (US 1980).
      2. FDF (“**Fundamentally Different Factors**”) variance = discharger could request variance from normal industry effluent limit.
         1. BUT - § 301(l) – Says that permit limitations for toxic pollutants can’t be modified.
      3. *Chemical Manufacturers Association v. NRDC (SCOTUS 1985)-* ***Court permits FDF variance that ‘modifies’ the toxic pollutant permit requirements***.
         1. SCOTUS defers to EPA interpretation, that FDF variances can be given despite § 301(l).
         2. The fact that EPA is setting a limit based on “fundamentally different” factors means that the variance process is essentially *setting* a permit limit for a ‘new’ subcategory, not *modifying* the limitation.
      4. *I*n practice, EPA has granted very few FDF variances.
2. **Total Max Daily Loadings (TMDL) (684)**
   1. TMDL = max amount of pollutant that can be discharged to a water w/o violating the WQS; provide a comprehensive assessment of what reductions are necessary to achieve WQS.
   2. § 303 requires:
      1. states identify waters for which effluent limitations for non-toxics are “not stringent enough” to achieve WQS.
      2. states establish TMDLs necessary to achieve WQS
      3. EPA review, and approve or establish TMDLs itself.
   3. states establish implementation plans to achieve WQS, with fed funding; but no independent req’t for implementing or enforcing § 303 plans.
   4. Big Issue: ***EPA may require state to list waters that are impaired by point and non-point sources to the achievement of TMDL*** 
      1. ***Pronsolino v Nastri*** (9th Cir. 2002) This case represented an expansion of how EPA interpreted the §303(d) TMDL limits. Prior to this case, EPA had made a distinction between point source and non-point source pollution and had not enforced TMDLs on bodies for water solely polluted by non-point sources.
         1. **Facts**: Pursuant to §303(d), California proffered a list of TMDLs. EPA rejected the list because it omitted 16 bodies of water than were being polluted solely by non-point sources. California complied with EPA. They were sued by a variety of agricultural groups from the Garcia River valley.
         2. **Held**: COA upheld the TMDLs and found that EPA did not exceed its authority (ct applied Chevron/Skidmore deference).
            1. Most other parts of the Clean Water Act distinguish between point sources and non-point sources, but the Appellate Court found that §303(d) should be read to include both.
         3. **Reasoning**: The Court noted that in the CWA, point sources and non-point sources are treated differently for many purposes, but not all. Since §303(d) makes no such distinction, a distinction should not be inferred by reading other parts of the Act.
            1. **In fact, §303(d)(1)(A) explicitly requires that waters be listed if they are impaired by a combination of point and non-point sources.**

**How could EPA be required to list waters impaired by non-point sources of pollution without having the ability to regulate those sources under §303(d)(1)(C)?**

* + - 1. The Court did not buy the argument that because EPA had not enforced the TMDL in this manner in the past, that doesn't mean that they were *estopped* from enforcing it now.

**Wetlands**

1. **Wetlands**
2. Structure of §404 Program
   * 1. **All dischargers of dredge and fill to waters of the US must obtain USACE permit.**
        1. dredge – material excavated or dredged from waters of the US
        2. fill – material used for the purpose of changing bottom elevation of a body of water, or replacing aquatic area w/ dry land.
        3. Normal farming, ranching, and forestry operations are exempt.
     2. **Guidelines for obtaining permit** available on pg 757
        1. Applicant must show:
           1. Market Entry Theory- there is no practicable alternative to the proposed discharge which would be less damaging to the aquatic environment
           2. proposed activity will not cause or contribute to significant degradation of the waters of the US;
           3. appropriate steps have been taken to minimize potential adverse affects;
           4. proposed activity will not violate WQS, toxic standards, ESA, or MMPA.
        2. *Bersani v. Robichund*- held ***EPA can veto the issuance of §404 permit b/c there is a practicable alternative available which would be less damaging to the aquatic environment*** (market entry theory)
           1. Purpose was to create incentive to developers to avoid choosing wetlands when alternative upland site available
     3. Under Section 402 of the Act, the EPA may issue permits for the discharge of all other pollutants, subject to the effluent limitations prescribed under Sections 301 and 306 of the Act.
     4. In 2002, after notice and comment, the EPA and the Corps jointly promulgated a regulation defining the statutory term "discharge of fill material" to include "*tailings or similar mining-related materials."*
   1. Wetlands delineation – What’s a Wetland?
3. areas inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and normally do support, vegetation typically adapted to saturated soil conditions. (1977)
4. consider
   * + 1. wetlands hydrology
       2. wetlands vegetation
       3. wetlands soil conditions
5. an ecosystem depending on constant or recurrent, shallow inundation or saturation at or near the surface of the substrate. (1989)
   1. ***Coeur Alaska v. Southeast Alaska Conservation Council-*** ***Court gave an Internal Memorandum Chevron Deference and held discharge of fill material fell under the Corps 404 authority and not the 402 EPA authority.***
      1. Pursuant to its authority under Section 404 to grant permits for the discharge of "fill material," the Corps granted Coeur a permit to deposit certain mine tailings in a lake.
      2. **Issue**: Whether the *discharge from Coeur Alaska's Kensington Gold Mine constitutes "fill material*," and thus is regulated by § 404 permits issued by the Army Corps of Engineers, or whether the discharge is subject to the EPA’s effluent limitations and is governed under § 402 permit program.
      3. **Held**: that the Corps and not the EPA had authority to grant permits allowing Coeur to discharge processed wastewater into a lake in Alaska.
         1. Mining materials clearly fall under the agreed upon definition of “fill material” by the EPA and Corps.
            1. Therefore §404 authorizes the Corps to grant permits for these discharges
      4. **Concurrence**: Breyer says you can’t use an Internal Memorandum to wire around the requirements of the Act. The IM was only given Chevron deference in this specific circumstance under these facts, will not apply to everyone
      5. **Dissent**: Ginsburg argued that the relevant inquiry should have stopped at the determination that Coeur failed to meet EPA performance standards by discharging its wastewater in an Alaska lake
6. **“No Net Loss,” Mitigation Banking, and the Future of Wetlands Protection**
7. EPA agreement on mitigation – Proposed development should avoid wetlands loss by (in order of priority):
   * + 1. Avoiding wetlands
       2. Minimizing wetland losses
       3. Compensating for unavoidable adverse effects
8. No Net Loss – endorsed by last 3 Pres as nat’l policy.

Pushes aggressive restoration efforts to lessen effects of new development.

Nat’l Aquatic Ecosystem Trust Fund

Bush: Go farther – increase wetland area

1. **Wetlands Mitigation Bank –**

**Wetland area that has been restored, created, or enhanced and then set aside to compensate for future losses of wetlands from development activities.**

**Developers buy acres to be preserved as wetlands, in exchange for their permits to build on other wetlands**.

Critics Say:

Wetland benefits are site-specific can’t be replaced by wetlands somewhere else.

Program creates certain (cheap) types of wetlands and doesn’t account for more complex system loss.

Allows wetlands to be developed even though practicable alternatives do exist.

1. **Future Directions in Water Pollution Controls**: Nonpoint Sources, Watershed Protection, and Effluent Trading (703)
   * 1. Federal efforts to control nonpoint sources
        1. Originally, the only CWA point directly addressing non-point sources was to define AFOs and CAFOs as “point sources” requiring permits.
        2. Sec. 208 – Required “area-wide waste treatment management plans” that included identification of non-point sources, and establishing feasible control measures.
           1. State Plans, Federal planning funds
           2. Dept Ag share cost of ‘best management practices’ w/ farmers.
           3. Widely viewed as a failure.
        3. 1987 Amendments
           1. Mandate controls on municipal and industrial storm sewers – brought storm-water discharges into NPDES permit system.
           2. Sec. 319 –

Requires State Assessment Reports – identify waters that cannot reasonably be expected to meet WQS because of non-point sources.

Requires State “Management Programs” that include best management practices to control significant non-point source pollution.

EPA review and approval.

But EPA is not playing hardball with approvals.

* + - 1. 1990 Amendments – Coastal Nonpoint Pollution Control Program
    1. Watershed Approach
       1. Key to the future of water pollution control
       2. Collaborative effort by federal, state, and local gov’ts and privates to restore and protect watersheds.
          1. Unified watershed assessments
          2. Restoration action strategies
          3. Federal Funding
       3. Effluent Trading
          1. Now voluntary program
          2. NPDES permits may allow effluent trades
          3. Ex: POTW pays into fund for best management practices to control non-point pollution on farmlands, in exchange for higher effluent limits at POTW.

1. **Allocating Disaster: Env. Legal issues arising from Deepwater Horizon Spill**
   1. Gulf of Mexico
      1. Physical features
      2. Ecological role
         1. Fisheries
         2. Waterfowl and migratory birds
         3. Coral, tropical and deepwater
         4. Beaches and estuaries
      3. Economic Value- $230 billion
         1. Tourism
         2. Ecotourism
         3. Mineral development
         4. Wind power
         5. Fishing
   2. Key Questions in the Aftermath
      1. Should we allow further oil and gas drilling in the gulf? How do we decide? What trade offs, if any, might apply?
         1. If Yes how?
            1. Regulatory mandates and directives
            2. Economic liability and property rights
            3. Criminal sanctions
         2. If Yes, who decides?
            1. Federal, state, or local
   3. **Oil Pollution Act and its classes of liability**
      1. **Removal costs**
         1. Unlimited liability (no cap); strict liability (no fault) (J&S?)
         2. Statutory Defenses
            1. Acts of God, War and 3rd parties
            2. 3rd party defense limited if contractual relationship; must be SOLE cause
            3. No liability for claim if claimant grossly, negligently, or had willful misconduct
         3. Contribution Actions
         4. Caveats
            1. No preemption of state laws

TOSPRA

Different limits and liabilities

* + - * 1. Scope of removal costs
    1. **Damages**
       1. What & Who:
          1. Include

Natural resource damages

Damage to real or personal property, including economic loss

Subsistence use

Revenues, including tax and royalties

Profits and earning capacity

Net costs of additional public services

* + - * 1. For damages, the responsible party for offshore facility again is the lessee or permittee
      1. How Much
         1. Unlike Removal Costs, OPA caps damages

For responsible party, $75 million for offshore facilities (effect of waiver?)

$500 million for natural resource damages from any single incident

$1 Billion overall for any single incident

* + - * 1. No cap for gross negligence, willful misconduct, or violation of applicable federal safety or operating regulation
        2. Strict liability
        3. Caveat

Look to state laws

* + 1. **Tort Damages and Personal Injury:** What and Who
       1. Who’s liable? Any person who violated a duty in a way that proximately injured the plaintiffs
       2. Expressly not preempted by OPA
       3. Multi-district litigation maneuvering
       4. Limitation of Liability Act, Sedco; interplay with OPA
    2. **Civil Penalties and Criminal Liability**
       1. Civil penalties
          1. $32,500 per day per violation, or $1,100 per barrel
          2. if gross negligence, $4300 per barrel
          3. recovery of economic benefit of non-compliance
       2. Criminal Liability
          1. Enormous distraction- much higher stakes
          2. Lowered standards of culpability in environmental laws
          3. BP already under prior criminal plea agreements

Clean Air Act §112(r)

Probation terms

* + - * 1. Exxon-Valdez by comparison
    1. Contractual Allocation
       1. Despite OPA’s confusing language, parties can allocate liabilities between themselves, but not to government
       2. Effect of gross negligence
       3. Insurance coverage

1. **National Environmental Policy Act (NEPA),**
   1. Intro
      1. Purpose **-** To mandate the ***consideration*** of environmental issues in the administrative decision making process. NOT a pollution control law; doesn’t directly protect the environment.
      2. Key Requirement **– Environmental Impact Statement prepared by federal agencies for major federal actions significantly affecting the human environment.** Requires & generates information!
         1. Works through procedural provisions and NOT substantive provisions
         2. Creates a public record of the impact & therefore makes it harder to do “bad” stuff
         3. Provides more information for planners to consider issues they had not considered
   2. **Threshold Issue: Must an EIS be prepared? (p. 91)**
      1. **Required for** “major federal actions significantly affecting the quality of the human environment”
         1. Must figure out when triggering mechanisms have been met!!
      2. **First, does NEPA even Apply?**
         1. Generally, NEPA applies to every Federal Agency, but they must determine if EIS required
         2. **Categorical Exclusions p.85**
            1. “A category of actions which do not individually or cumulatively have a significant effect on the human environment”
            2. Agencies allowed to decide that such a category is not covered by NEPA (CEQ reg’s)
            3. Provides clarity and reduces the number of disputes trying to require an EIS
            4. Internal Agency documents and rule only – even if listed as a CE, this is not law that the thing is removed from requiring an EIS
         3. **Explicit Exemption**
            1. Some bills/statutes are explicitly exempted by Congress
         4. **Implicit Exemption**
            1. When no matter what information is produced by the NEPA process, it cannot affect the agency’s actions (when agency has no discretion based on act of Congress)
            2. **“**Rule of Reason”
      3. **Environmental Assessment (“EA”),** p.89
         1. Determines whether a full EIS is necessary for the specific action (individualized decision)
         2. “Concise public document” which provides sufficient analysis and evidence for determining whether the agency should:
            1. Prepare a Finding of No Significant Impact (FONSI)

A document that briefly presents the reason an EIS is not necessary

* + - * 1. Determination of Significance – an EIS is required
        2. Prepare a Mitigated FONSI

If the proposal is changed or mitigated, there would be no significant impact

* + - 1. Requirements to be included in the EA
         1. Need for proposed action
         2. Alternatives to the proposed action
         3. Environmental impacts of proposed/alternatives
         4. List of agencies/persons consulted
         5. Public review mandated – but must include public, other applicants, and other fed agencies to extent practicable
    1. **Is it a Major Action?** (p.91)
       1. “Action” – anything carried out, funded, or approved by a federal agency
       2. *Kleppe v. Sierra Club*
          1. Department of the Interior considered allowing private parties to begin extracting coal from federal lands located across four states 🡪 would such a plan require a cumulative EIS 🡪 must the agency consider the effects of the individual permits in the aggregate?
          2. Found there was no “action” related to the regional development. There was no regional development plan, so Interior did not want to do a regional EIS.
          3. When several proposals for federal actions that will have “cumulative or synergistic environmental impact” upon a region are pending before an agency, their environmental consequences must be considered together.

Creates an “action” for the regional study because agency can’t hide head in the sand.

In this case, court holds this has not happened

* + - * 1. When EIS req’d generally?

Contemplation of certain action is not sufficient to require an EIS

EIS req’d at time which the agency makes a recommendation or report on a proposal for federal action

* + - * 1. Necessity of a Comprehensive EIS?

May be req’d in where several proposed actions are pending at the same time

Cumulative environmental impacts are what require comprehensive EIS

However, the measuring of the cumulative factors requiring that the agency be given a lot of deference

EX. can’t consider a road built to provide access to timber separately from the harvesting of the timber accessible by the road 🡪 if future timber sales are certain enough to justify building a road, they are certain enough to for the environmental impacts to be analyzed along with the road. *Thomas v. Peterson*.

* + - * 1. Standard of Review

Must show agency acted arbitrarily and capricious

* + 1. **Is it Federal?** (p. 101)
       1. *Winnebago Tribe of Nebraska v. Ray*, p.101
          1. Whether an EIS was required when corps of engineers granted a permit to build a power line across the Missouri river and through the Winnebago tribe lands.

Corps only looked at the 1.25 mile stretch where the line crossed the river and not the impact it would have on the tribal lands.

The “federal” part of the action must be “big” enough to trigger an EIS requirement

* + - 1. **General Rule: if the *federal part of the action* is a small piece of the overall project, then it typically is not enough to warrant the inclusion of an EIS covering the entire project. However, if you add two or more agencies to the mix, then you typically have enough to require an EIS.**
      2. **Must have necessary federal nexus,** 
         1. Maybe fed license or funding, etc
         2. 4 typical categories (40 CFR § 1508.18(b))

Adoption of official policies, such as rules and reg’s

Adoption of “formal plans . . . which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.”

Adoption of “programs, such as a group of concerted actions to implement a specific policy or plan” or “allocating agency resources to implement” a statutory program or executive directive

Approval of specific projects such as “actions approved by permit or other regulatory decision as well as federal and federally assisted activities”

* + - * 1. Federal Funding (when NEPA apply)

Project funding – yes

Preliminary study – no b/ c no final action

Block grant – maybe

* + - * 1. Federal Permitting

Generally – permits trigger NEPA

“Small Handle Problem”

NEPA target the total affect of the effect on environment w/in federal jurisdiction

(67 mile local power line with permit necessary for 1.25 mile stretch where crossed a river 🡪 insufficient)

* + 1. Is it a major federal action **significantly affecting the environment** (p. 106)
       1. “major” reinforces but does not have any meaning independent from “significant” 🡪 significant is more often litigated
       2. Significant – imposes a threshold test of environmental impact that must be met before a federal agency is required to prepare an impact statement on a major federal action
          1. Can challenge a finding of no significance (FONSI) in court
       3. *Hanly v. Kleindienst* (p. 106)
          1. 2 issues

question of law – meaning of word “significantly”

question of fact – whether proposed action will have significantly adverse env. impact

* + - * 1. Standard of Review – arbitrary, capricious, abuse of discretion
        2. What does significant mean? **🡪** 2 factors agency must consider on the record

Comparative (Contextual Harm) - The extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it (where new action conforms to existing uses, adverse consequences will be less significant than when it represents a radical change)

Absolute (Total Harm) - The absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area (sometimes even a slight increase in adverse conditions forming the existing environment may cause significant harm)

* + - 1. *Grand Canyon Trust*, p.107
         1. Whether FAA was required to consider the cumulative impact of the relocation of the airport to a location near the national park.
         2. Airport only increased flights over park by 2% & FAA did not look at this impact in addition to the existing noise issues in the park, which in total could have been significant.
         3. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.
  1. **Is the EIS Substantively Adequate?**
     1. **Environmental Effects**
        1. The EIS MUST include
           1. Purpose and need for the proposed action
           2. A description of the proposed action and alternatives
           3. Description of the affected environment
           4. Description of the environmental consequences of each proposed or alternative action
        2. Environmental concerns is broad and includes:
           1. Health and public safety
           2. Impact of social services
           3. Impact on the “character” of the area
           4. Impact on community develpment
        3. *Robertson v. Methow Valley Citizens Council*, p. 114
           1. Issue was to what extent the forest service had to prepare an EIS for proposed ski area
           2. NEPA **does NOT require** agencies to include in EIS

A fully developed mitigation plan OR

A “worst case” analysis of potential environmental harm if relevant info concerning significant environmental effects is unavailable or too costly to obtain

* + - * 1. Forest Svc may issue a special use permit for recreational use of nat’l forest land in the absence of a fully developed plan to mitigate environmental harm
        2. NEPA’s action-forcing purpose – impact considered B4 action 🡪 served by prep of an EIS

Ensures that the agency, in reaching its decision, will have available and will carefully consider detailed info re significant environmental impacts

Guarantees 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

* + - * 1. NEPA req’s a detailed statement on “any adverse environmental effects which cannot be avoided should the proposal be implemented” 🡪 EIS must discuss extent to which adverse effects can be avoided
    1. **Alternatives Consideration**
       1. An agency must consider every reasonable alternative, including a “no-action” alternative
       2. An EIS is inadequate by the existence of a viable but unexamined alternative
       3. How you define the scope of the study is CRITICAL
          1. If too broad, then the number of alternatives can easily get out of hand
       4. Remember, even if an alternative is “better,” the developer may still do the original project.
          1. NEPA is procedural, not substantive
          2. NEPA prohibits uniformed rather than unwise agency decisions
    2. **Mitigation**
       1. *Methow Valley*, p.123
          1. 9th Cir says the agency had to take the mitigation actions prior to
          2. Supreme Court: There is a difference between a requirement that mitigation be discussed in sufficient detail to ensure the environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.
    3. **Substantive Requirements** of an EIS (*Sierra Club v. Marita*)
       1. 2 issues
          1. Whether there are analytical requirements that agencies must satisfy before an EIS is adequate
          2. Whether the environmental analysis in an EIS is adequate
       2. **5 analytical requirements**
          1. Rigorous analysis of alternatives
          2. Agency must insure the professional integrity, including scientific integrity, of the discussions and the analyses in EIS’s
          3. Analyses must take an interdisciplinary approach
          4. Consideration of ecological effects

Ecological effects- the effects on natural resources and on the components, structures, and functioning of affected ecosystems

* + - * 1. High-quality environmental information must be made available to public officials and citizens before decisions are made and before actions are taken

Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA

* + - * 1. (analysis of unavoidable environmental effects 🡪 discuss possible mitigation)(see sub-§ E)
      1. NEPA does not mandate particular results
  1. **State Environmental Policy Acts (p. 125)**
     1. Unlike NEPA, SEPA’s apply the environmental review process to local land use planning and land use decisions.
        1. Environmental Review of building permits when discretionary rather than ministerial (mandatory)
     2. SEPA’s can have substantive content 🡪 denial of building permits based on negative environmental effects even though the building was a permitted use under zoning ordinances

**Endangered Species Act**

**I.      Overview**

A.   The ESA is designed to protect endangered species and their habitat

B.    First, there is a determination that a species will be LISTED (*Chevron* Deference)

C.    Once Listed, the ESA protects the species via two substantive provisions

1.     §7 Applies to Federal Agencies and requires them to further the conservation of listed species

🡪***Federal agencies cannot take any action that would jeopardize the continued existence of an endangered species or materially alter the species’ “critical habitat,” no matter how valuable the action would be to society***

2.     §9 Applies to Individuals and prevents them from “taking” a member of a listed species

***🡪 property owners cannot use their land in a way that would appreciably reduce the likelihood that the species will survive and recover, no matter how valuable the land use***

D.   Citizens may file suit to enforce the act - §11(c) and (g) or to challenge the listing of a species

**II.    Listing Decision**

A.   Key Definitions

1.     §3(4) Endangered Species are “in danger of extinction throughout all or a significant portion of its range.  It does not include insect pests.

a.     Are there major geographical areas in which it is no longer viable but once was?

2.     §3(20) Threatened Species are “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range

3.     §3(16) Species includes any subspecies and any distinct population segment that interbreeds

a.     A *distinct population segment* is discrete in relation to the rest of the species and significant to the species to which it belongs

b.     *Discrete* = markedly separate from other populations of same taxon or delimited by international governmental borders

c.     *Significant* = persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; evidence that a loss of the discrete segment would result in a significant gap in range; evidence the discrete segment represents the only surviving natural occurrence; or evidence the discrete population differs markedly from other populations

4.     *NOTE:* Defendants may want to challenge listing as arbitrary and capricious based on any definition

**B.    Process to List**

1.     §4(a)(1) the Secretary is required to identify endangered and threatened species.

a.     **Factors**: 1) present or threatened habitat destruction, modification, or curtailment of range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) inadequacy of existing regulatory mechanisms 4) other natural or manmade factors affecting its continued existence.

2.     Define the “Critical Habitat”

a.     Areas occupied by the species at the time of listing that are essential to the conservation of the species and may require special management considerations

b.     Not as important as listing decision – only provides additional protection for the species when government action may adversely affect that habitat (as opposed to the species directly)

3. Develop “Recovery Plans” §4(f)

4.     Interested persons can petition for a species to be listed

5.     REMEMBER – listing and critical habitat determinations must follow *notice-and-comment*

**III.    §7 Protections –Review of Federal Actions**

A.   ***Every federal agency MUST further the conservation of listed species***

1.     Agencies can take action to protect a species and avoid taking action that will jeopardize a species

B.    Formal Procedural Requirement – ***triggered*** whenever an agency takes an action!! (issuing permits)

1.     First: Agency must determine if there is a listed species in the area and if the proposed action is *likely to affect a listed species* or its habitat

a.     If NO, then done

2.     Second: Determine if a **Biological Assessment** is required

a.     If listed species or critical habitat are in the are and the action would have physical impacts on the environment sufficient to require an EIS under NEPA, the agency must make a Biological Assessment (BA)

i.      If BA concludes the action is not likely to have an adverse effect, then done.

b.     If BA not required, then agency may engage in “informal consultation” to determine if “formal consultation” is required

3.     Third: If BA or Formal Consultation determines is likely to affect the species, then prepare a **Biological Opinion** with three possible outcomes:

a.     Will not jeopardize species – action can continue

b.     Will jeopardize the species and cannot be avoided or mitigated

i.      Agency action is DEAD, no matter what the cost.  *Snail darter* case stopped a dam

c.     *Will jeopardize the species but effects can be avoided or mitigated by a reasonable and prudent alternative.  This may result in an* ***“incidental take”***

C.    MUST FOLLOW THE PROCESS EXACTLY

1.     Failure to follow is not de minimus – it is a violation and can result in enjoining the action

2.     If agency follows all the steps and gets a favorable Biological Opinion, then it is given much discretion and will be very difficult for a group to challenge

1. **Case Law**
   1. **TVA v. Hill- Held**: The Court held that pursuant to the Act's explicit provisions, the survival of the snail darter population required the permanent halting of the dam project*. The Court noted that Congress intended* [*endangered species*](http://en.wikipedia.org/wiki/Endangered_species) *to be afforded the highest of priorities and to halt and reverse the trend toward species* [*extinction*](http://en.wikipedia.org/wiki/Extinction) *because the value of endangered species was "incalculable."*
   2. **Thomas v. Peterson-** *Appellate Court issued the injunction to stop US forest Services from building a road through a forest housing endangered wolves*
      * 1. The Appellate Court found that once an Agency is aware that an endangered species is present, the **ESA** requires that they prepare a biological assessment to determine if their proposed actions are likely to affect the species.
           1. USFS did not do this, and did not ask FWS to do it for them.
           2. The Appellate Court likened this to a failure to prepare an Environmental Impact Statement (required under **NEPA**), and so there should be similar sanction.
        2. The Court found that Agencies couldn't bypass the **ESA** by 'segmenting' a project to make it seem smaller. When deciding if action under the **ESA** is required, the Agency has to consider all foreseeable consequences of the project, not focus solely on the project itself.
           1. For example, if you are intending on cutting down an entire forest, you can't split the project up into a million individual projects each cutting down a single tree, and then claim that each of those projects won't harm the environment because the loss of one tree is unimportant.
   3. **National Association of Home Builders v. Defenders of Wildlife**
      1. By a 5-4 vote the Court reversed the Ninth Circuit and ***sustained the FWS's determination that Section 7(a)(2) of the Endangered Species Act applies only to discretionary actions of federal agencies.*** 
         1. EPA's transfer of CWA permitting authority was a nondiscretionary action, so the EPA needed only to consider the nine criteria in the Clean Water Act. The majority opinion held that Section 7(a)(2)'s provisions for protecting endangered species do not establish a "tenth criterion" for the EPA to consider before transferring permitting authority. By this interpretation the Court sought to "harmonize" the ESA with the CWA, in keeping with the Court's interpretive principle that a statute should generally not be interpreted to repeal an earlier statute unless the more recent statute has explicit language to that effect.
            1. Because the Court found that the decisions of the EPA and FWS consistently and reasonably interpreted both statutes, it deferred to the views of the administrative agencies.

**E. Endangered Species Committee Exception - §7(e)**

1.     “God Squad” – this is the only way to exempt a federal action once a determination of jeopardy has been made.  The committee can grant an exception when:

a.     No reasonable and prudent alternatives

b.     Benefits of action clearly outweigh alternative courses of action

c.     No irreversible or irretrievable commitment of resources

**IV.   §9 – Protection against Private action**

A.   §3(19) definition of ***“Take” = harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in such conduct***

B.    “Harm” means an act which actually kills or injures wildlife.  Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

C.    The takings prohibition places a duty on ALL INDIVIDUALS to avoid takings or habitat modification that harms a species unless he first obtains a §10 permit

D. ***Babbitt v. Sweet Home Chapter of Communities for a Great Oregon****-*

1. **Ct gave deference to Department of Interior’s (DOI) interpretation of the word 'harm' as an expansion of the word "take in the Endangered Species Act (ESA), to include habitat modification and degradation that kills or injures wildlife.**
2. (6-3) Stevens held that habitat modification is a legitimate application of the word "harm." Deference to agency action.
   * + 1. First, the Court found that the Court of Appeals was incorrect in assuming that the words in the definition of "take" only apply to actions involving direct contact with endangered animals.
       2. Then, based on the Act itself, the Court determined that the ordinary meaning of harm would in fact include changes in habitat that hurt the endangered animals.
       3. Also, the Court held that the intent of the Act to give broad protection to endangered species must include even actions that may have minimal or unforeseeable effects.

**V.    §10 Habitat Conservation Plans and Incidental Takings-** I have land with ES on it, I can enter into a plan with the government, where I agree to do something to protect, then I can develop/use the rest of my property

A.   Lessens harshness of §9 by allowing individuals (private parties) to apply for a permit allowing incidental takings of the species

B.    §10(2)(A) lists the elements of a Conservation Plan

C.    Remember, this permit process is subject to NEPA

D.   No Surprises/Assurances Policy, p.654

1.     Once a HCP is approved, no new financial requirements for subsequently listes species will be required except in extraordinary circumstances

VII. **Candidate Conservation-** I will do something to protect and not list animal as endangered species; this is preventative measures before something is listed as ES