**Environmental Law**

**Johnston**

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**INTRODUCTION**

A. General Concepts

Preservationism v. Conservationism (non-use values v. use values)

* + - Conservationism prevailed because money
    - Both focused on federal lands

Common law still plays a large part in environmental remedies

Currently have same statutory framework as 1990 since the last amendments to the CAA – legislative gridlock since

**Cooperative federalism:** federal statutes create the floor, states must enact statutes at least = to the federal level, but can go beyond

**“Command and control” statutes**: establish nationally-applicable regulatory requirements backed up by federal sanctions

B. The Constitution and Environmental Law

No grant of authority in the Constitution for the government to protect the environment

Environmental laws typically find basis in the Commerce Clause, Spending Clause, Property Clause, Necessary & Proper Clause, or some combination

* + - Property: least problematic; read broadly; government has ability to regulate federal land
    - Spending: Can provide incentive ($) – no environmental statutes to date have had coercion issues
    - N & P: usually in conjunction with Treaty clause (think migratory birds case from con law I)
    - **Commerce:** **most common/important** (CWA, CAA, NESHAP)

C. Hodel Surface Mining cases

Was regulating land for surface mining allowable under the commerce clause?

Yes, because the land being unusable in the future impedes economic activity (relying on aggregation doctrine from *Wickard v. Filburn*)

Alternative rationales:

* + - Protecting the concerns of states with high environmental standards with federal floors so they don’t lose all of their mining business to states with lower standards
    - “Race to the bottom” = depletion of land resources; don’t want states to compete for business by giving in to every industry whim
    - Mining may have effects on land & water = **transboundary effects** – important rationale /constitutional basis for regulation

**THE CLEAN WATER ACT (CWA)**

**I. Overview**

A. General Concepts

Modern CWA stems from Federal Water Pollution Control Act (FWPCA, 1972)

Goal: to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters

Main issue: regulatory gaps

Main justification for federal CWA regulations = Transboundary effects: one state is not doing anything and another state is doing the most, but feeling the effects of the shitty state, this is unfair

Jurisdiction for §402 (NPDES) & §404 (Wetlands program)

* + - §301(a) = jurisdictional trigger – prohibits the “discharge of any pollutant” except as in compliance with other sections of the act, mainly §§ 402 and 404 for our purposes
    - §502(12) defines “discharge of any pollutant” to include “any addition of any pollutant to navigable waters from any point source” – this gives three elements to complete the jurisdictional trigger for the CWA: (1) **addition** of a pollutant; (2) to **navigable waters**; (3) from a **point source**.

B. “Navigable Waters”

Now termed “waters of the United States” §502(7) and defined as:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate “wetlands;”

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce . . .;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. . .

* *US v. Riverside Bayview Homes* (SCOTUS, 1985, White): whether the CWA allows the Corps to require landowners to obtain permits before discharging material into wetlands adjacent to navigable bodies of water and their tributaries.
  + Held: Yes, they can
  + Reasoning: is the regulation itself a valid construction of “navigable waters” – yes, under (f) = adjacent waters; Congress’ intent was to define broadly; also, look at the overarching goals of the act, are they furthered by this mandate? Yes, “preserve integrity” – wetlands my “serve significant natural biological functions … for aquatic species”
  + Settled the question whether wetlands could be “waters” of the United States, upheld the Corps’ interpretation that adjacent wetlands could be
* ***SWANCC*** (SCOTUS, 2001, Rehnquist): the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA.
  + Issues with part (c) of definition – said that this part not totally valid because isolated ponds/wetlands are not included as waters of the US because too attenuated hydrologic connection and they are not really navigable waters
  + Post-SWANCC, most courts have said that if groundwater flows into navigable waters it is covered by CWA/NPDES – but need to have some real connection to navigable waters
* Wetlands
  + Adjacent wetlands - covered because of presumed hydrologic connection; proof of actual hydrologic connection is not required (*Riverside Bayview*)
  + Isolated wetlands – (non-adjacent) are not covered because too attenuated hydrologic connection (***SWACNCC***)
    - Under the “old rule,” which is operative right now, the Agencies assert jurisdiction over all “other waters,” including wetlands, where they can show, on a case-by-case basis, that the use, degradation, or destruction of those waters may affect interstate commerce.
    - Invalidated the “Migratory Bird Rule.” Whether the Agencies can or will assert jurisdiction based on other impacts on commerce is unclear.
    - In the new rule, which is stayed, the Agencies shifted to a test based on case-by-case demonstrations of a significant nexus with TNW. The Agencies have since proposed to withdraw this rule.
* Tributaries
  + ***Rapanos v. US*** (SCOTUS, 2006, Scalia): Plurality concluded that there should only be jurisdiction if the tributaries were permanent streams and if the adjacent wetlands had continuous surface connections with these streams – wanted a restrictive test. (Remanded for more facts)
    - Kennedy (writing for himself, in the context of a 4-1-4 split) agreed remand was needed but rejected plurality’s restrictive approach; indicated the test for both non-navigable tributaries and the wetlands adjacent thereto should be whether the relevant aquatic area has a significant nexus to a downstream, TNW.
    - Thus far, the appellate courts are unanimous that all waters meeting Justice Kennedy’s test are jurisdictional.
  + Waters adjacent to traditional navigable waters: *Riverside Bayview* says these wetlands are covered.
  + Waters adjacent to tributaries: Kennedy most concerned, but said the Agencies could still regulate wetlands adjacent to tributaries where there is a significant nexus with downstream TNWs. Now Agencies are saying they can categorically regulate all waters adjacent to tributaries.
* “***Rapanos*** Guidance”
  + Categorical: the agencies will assert jurisdiction over:
    - Traditional navigable waters
    - Wetland adjacent to traditional navigable waters
    - Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (~3 months/yr.)
    - Wetland that directly abut such tributaries
  + Case-by-case basis: the agencies will decide jurisdiction based on a fact-specific analysis to determine “significant nexus” with TNW:
    - Non-navigable tributaries that are not relatively permanent
    - Wetlands adjacent to above
    - Wetland adjacent to but do not directly abut a relatively permanent non-navigable tributary
  + Agencies generally will not assert jurisdiction over:
    - Swales or erosional features
    - Ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.
  + Agencies will apply the significant nexus standard as follows:
    - Assess the flow characteristics and functions of the tributary to determine if they significantly affect the chemical, physical, and biological integrity of the downstream TNW
    - Include consideration of hydrological and ecological factors
* Obama Administration 2015 Rule – jurisdiction includes:
  + Traditional navigable waters
  + All tributaries, defined by “require bed, bank, and ordinary high-water mark” (otherwise excluded)
  + All waters adjacent to either of the above (neighboring = within 1500 ft.)
  + All other waters with significant nexus to TNWs, for most waters this went to 4000 ft.
  + Excluded most ditches & groundwater
* Aftermath of ***Rapanos***
  + Some circuits have deemed Kennedy’s opinion controlling because they view it as the narrowest and least damaging to the pre-existing doctrine
  + Others have rejected this and have found that CWA jurisdiction should be found where either Kennedy or the plurality would have found it
  + Others have avoided choosing sides by saying they should find jurisdiction at least where Kennedy would, and finding that he would in the relevant case (avoiding issue of determining whether they would find jurisdiction where the plurality would but Kennedy would not)
  + No appellate court has found that Scalia’s plurality opinion has any legal effect to the extent it would apply CWA jurisdiction more narrowly.
  + EPA and the Corps operate on the assumption that Kennedy’s opinion is controlling.

C. “Addition” of a “Pollutant”

* What is a “pollutant?”
  + Defined by CWA §502(6): “the term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . .”
  + Exclusive definition with exceptions – typically not too much debate as to what is considered a pollutant because the list is explicit, but gets a little fuzzy toward the end (“…chemical waste, biological materials… industrial, municipal, and agricultural waste…”)
  + *National Cotton Council v EPA* (6th Circuit, 2009): EPA issued a “Final Rule” concluding that pesticides applied in accordance with FIFRA are exempt from CWA permitting requirements
    - Environmentalist and industry petitioners challenge rule as exceeding EPA’s interpretive authority, claiming pesticides clearly fall under “chemical wastes” and/or “biological materials.”
    - EPA contends that pesticide residue is not subject to the NPDES permitting program because “at the time of discharge to a water of the United States, the material in the discharge must be both a pollutant, and from a point source.”
    - “Chemical waste” = agency discretion
    - Biological materials: EPA must regulate biological pesticides under this – “The term “biological materials” cannot be read to exclude biological pesticides or their residuals.”
      * EPA’s interpretation excluding them is “contrary to the meaning of the CWA”
      * “Adding biological pesticides undeniably alters its biological integrity”
    - The fact that it wasn’t a pollutant when released doesn’t matter – biological pesticides always a pollutant – “there is no requirement that the discharged chemical, or other substance, immediately cause harm to be considered as coming from a “point source.”
      * “Injecting a temporal requirement to the “discharge of a pollutant” is not only unsupported by the Act, but it is also contrary to the purpose of the permitting program”
  + Note: definition of “pollutant” uses “means” rather than “includes” – does this mean the list is exhaustive?
* What is an “addition?”
  + Not defined in the CWA
  + Issue: transferring water between waterways
  + SCOTUS recently determined that pollutants discharged from one part of a waterway to the very same waterway through dams or other structures is not an addition, for the purposes of NPDES jurisdiction
  + Courts were unanimous in saying when someone transfers or otherwise discharges polluted water from one waterway into a completed different waterway this was an addition
  + EPA complicated this by promulgating the “Water Transfers Rule”
    - Excluding “water transfers” from NPDES jurisdiction; it defines these transfers as those activities that convey or connect waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.”
    - Legality has thus far been upheld by two out of two circuits
    - Substantive legal issue regarding the rule involves both steps of *Chevron* – both have found “addition” to be ambiguous as applied to water transfers
    - 11th Circuit frames issue as: “whether ‘addition . . . to navigable waters’… refers to waters in the individual sense or as one unitary whole.”
    - Issue with interpretation compared to wetlands context – courts there have upheld that dredge & fill in the same waterway is regulated – the word “addition” applies differently to different programs? Is this okay? Court has upheld that a word can mean two different things in two different contexts of a statute, but the word is only used once in this definition.
    - Can’t require that “addition” come from outside – this would remove “dredged material/spoil” altogether which by definition comes from the water itself.
      * *Deaton* (4th Cir.) also points out that the effects of dredged spoil are no more or less harmful when discharged into the same body of water than another – would contravene the purpose of the CWA to exclude
      * *Borden Ranch* throws a wrench in this concluding that redeposits can almost never be “additions” – 9th Cir said “deep-ripping” effects were additions, SCOTUS 4-4 (Kennedy recused himself)
* De minimis Exceptions
  + The definition of “pollutant” contains no regulatory thresholds or de minimum exceptions.
  + Two exceptions:
    - Agencies generally have implied power to create de minimis exceptions to their regulatory programs
      * *Alabama Power*: EPA has the implied authority to create de minimis exceptions to the permitting requirements under
      * EPA does not appear to have ever invoked this authority
    - “Incidental fallback” in wetlands context – otherwise “everyone who picks up an anchor might trigger §404 – *Tulloch* rule/cases – discussed further in wetlands section.

D. “Point Source”

* Defined as: “any discernible, confined and discrete conveyance, **including but not limited to** any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”
  + Framed non-exclusively; EPA maintains non-exclusive orientation
  + Requires a “discrete conveyance”
* *CARE v****. Southview Farm*** (2nd Cir., 1994): manure from farm draining into waterways – central picot irrigation system, hose, & tractors for spreading manure over the fields
  + Issue: is this considered discharge “from a point source?”
  + Holding: yes
  + Reasoning: the definition of point source is to be broadly interpreted; “the liquid manure was collected and channelized”
  + 5th circuit has held: a defendant is not relieved from liability simply because it does not actually construct the conveyances “so long as they are reasonably likely to be the means by which the pollutants are ultimately deposited into a navigable body of water.”
  + Exemptions don’t apply – jury determined the discharge was due to oversaturation, not “rainy day” or something the sort as is the case for storm water runoff – court said this finding was reasonable
  + Dividing line between point & non-point sources from *Southview*: “at the least, an organized means of channeling and conveying industrial waste in quantity to navigable waters is a “discernible, confined and discrete conveyance.”
* *Plaza Health*: ridiculous case where hand did not count as point source – terms in the definition of “point source” “evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waters.”
  + Was also a weird exception because the “Rule of Lenity” applied due to its criminal nature – tie goes to the defendant (must be proven guilty)
  + No court has ruled on whether or not the human hand is a point source
* Non-point source mainly refers to runoff, unless it is sufficiently channelized

**II. NPDES Program**

A. The Federal/State Relationship

**Cooperative Federalism**: gives the states a meaningful role in new programs & recognizes, preserves, & protects states’ rights & responsibilities under the CWA

Empowers states to assume primary responsibility for NPDES

Reserved states primary role in establishing water quality standards

Two steps:

* + - State authorization
    - EPA oversight

Note: fed regulations set the floor, the states are free to go above and beyond.

1. How States become Authorized

* CWA §402(b) establishes the minimum requirements a state must meet if it choose to become “authorized” as the primary implementer of the NPDES program within its boundaries.
* EPA must approve authorization
* To be authorized, states must:
  + **Meet substantive (tech & water-based) standards of the federal floor**
  + Requirements relating to states’ investigatory powers – equivalent to EPA
  + State’s ability to bring enforcement actions – civil and criminal (equivalence to federal standards is not required – minimum is set, but the minimum set for states is below the EPA’s)
  + Allow for judicial review of their permitting decisions
    - Legality still up for debate
    - SCOTUS ruled ESA standards could not be considered/added because not provided for in §402(b) – this technically isn’t either, but it hasn’t been challenged.
* *NRDC v. EPA* (DC Cir., 1988): Citizens for a Better Environment (CBE) attacks the standards for minimum public participation at the state level. NRDC complains of the absence of state authority to impose a given maximum penalty.
  + Both arguments rest on the idea that state standards must mirror federal standards, but this is not the case for either of the issues raised.
  + State-level citizen suits are not commanded & there is no reason to require the Administrator to afford them
  + Maximum penalties are set by the federal government – need some uniformity balanced with the state sovereignty
* EPA will never disapprove a program because it is too strict

1. EPA Oversight

* §402(d)(1): state must provide EPA with copy of permit with respect to specific discharges
* §402(d)(2): precludes state from issuing a permit if EPA denies within 90 days
* EPA retains full investigatory powers
* Must notify EPA of all non-compliance issues
* Reviews how state is implementing its program
  + Inspection strategies
  + Permit changes – ability to revoke state authorization if they are no longer meeting standards
* Overall reserve the ability to second-guess all state action
* §402(k): “permit shield” – State-issued permit is seen as the being the equivalent of compliance with the CWA and therefore must maintain such standards
* *NRDC v EPA* (DC Circuit, 1988) (part II): challenging EPA’s reserved power to veto & reasons why
  + As longs as veto power is used “judiciously” then it is in compliance with the principles of federalism
  + Veto power is reasonable and upheld by *Chevron*
  + “Best professional judgement” (BPJ) up to EPA

B. Substantive Standards

* “Direct dischargers”: industrial dischargers that discharge directly into our Nations waters
* “Publically owned treatment works” (POTWs): sewage treatment plants
  + “Secondary treatment” standards – numerical values for BOD, suspended solids, and pH
* “Pre-treaters”: industrial dischargers who discharge into POTW systems rather than into the nation’s waters
  + Not subject to NPDES because they do not discharge into nation’s waters
  + Roughly the same tech-based standards, but imposed directly through regulations since no permits
  + Two regulatory “wrinkles”:
    - Barred from introducing pollutants that would “pass through” POTW or “interfere” with its operation
    - “Removal credits” program – receive credit for treatment provided by POTWs, reducing pre-treater’s treatment requirements
  + Primary regulators = POTW into which they discharged – less threat of enforcement compared to state or EPA

1. Technology-based Standards for Direct Dischargers

* Main Standards:
  + **BPT:** Best Practicable Control Technology – existing sources
  + **BAT:** Best Available Control Technology – existing sources
    - Not always “best available”
    - Can require lower standard because of cost efficiency & non-environmental impacts
    - Note: do not have to do a cost-benefit analysis for the permits – only need to take cost into account along with other factors to determine if the technology is achievable for the industry as a whole.
  + **BADT:** Best Available Demonstrated Control Technology – new sources
    - Often more stringent than BAT
    - Building a plant from scratch – plan for environmental impacts from the beginning
    - §306(a)(1) = standards
* Variances (exceptions/slight case-specific modification to standards):
  + Fundamentally different factors – given facility is so “fundamentally different” than those it is expected to align with §301(n)
    - If you can show you’re “nothing like the model plant”
    - Steps: (1) identify yourself during public comment; (2) if EPA agrees, they’ll set a special BAT
  + Affordability §301(c)
    - If you can show the transfer from BPT to BAT would put you out of business or at least sufficiently injure you, you can get an interim standard
    - Still cannot get standards less than BPT by any means
  + Purpose of variances is to keep old companies in business – not so lenient on new companies (basically comply or don’t bother trying to build your business)
  + **Note:** no variances allowed for toxics or new sources
* EPA has the power to set industry-by-industry effluent limitations
* Exiting Dischargers
  + BPT by 1977, BAT by 1989
  + Cost plays only a limited role in the BPT analysis, and even less of a role under BAT. In the latter context, the only real question in this regard is whether the industry as a whole can afford the relevant technology.
  + EPA gets a lot of latitude
  + *Weyerhaeuser v Costle* (DC Circuit, 1978): discusses BPT standards that have been long replaced by BAT, but relevant for discussion of issues involved in the establishment of technology-based standards
    - How must EPA take into account receiving water capacity when creating these standards?
      * Subcategorize within industries
      * Court ruled for EPA – statutory language and legislative history do not allow to take this into account
    - To what extent must EPA do an “incremental analysis?”
      * Comparison factors: “consideration” of totally costs to implement in relation to effluent reduction benefits (essentially a cost-benefit analysis/limited balancing test)
      * When an incremental analysis has been performed by industry and submitted to EPA, it is worthy of scrutiny by the Agency, for it may “avoid the risk of hidden imbalances between cost and benefit.”
      * EPA has discretion as to when to do them/how much weight to give them
      * This was a non-issue here, the incremental analysis done didn’t show any “hidden imbalance”
    - To what extent must EPA take other statutory factors into account?
      * Consideration factors: “take into account” the age of equipment & facilities, the process employed, the engineering aspects of the application of different types of control techniques, process changes, non-water quality environmental impacts, & other such factors
      * Gave EPA discretion to decide how to account for these and how much weight to give each
      * All EPA is required to do is be aware of these things & reach their own express conclusions about them.
    - Note distinction between “consideration” & “comparison” factors
    - Overall: EPA fully investigated and did not ignore the alleged “hidden imbalance” – therefore EPA did its job reasonably

1. Water-quality Standards

* Standards generally consist of designated uses of the waters and the water quality criteria necessary to protect those uses. States have lead role.
* CWA has three authorities’ relative to the process:
  + §304(a): develop criteria for water quality reflecting latest scientific knowledge regarding the adverse effects of pollutants
  + §303(c)(3): oversight role to review State standards or any revisions to standards; identify deficiencies and give State opportunity to cure & promulgate federal standard if state does not cure
  + §501: gives EPA the authority “to prescribe such regulations as are necessary to carry out [its] functions under this chapter.”
* §501 used to promulgate regulations fleshing out how EPA will judge state standards – several key components:
  + Require states to designate uses that qualify as “existing used” or that are “attainable” in that waterway.
    - “Use Attainability Analysis” (UAA) required if designated uses that do not include all of the uses specified in §101(a)(2)
      * Rebuttable presumption that all §101(a)(2) uses are attainable unless State proves otherwise
      * State must show: (1) not an “existing use” and (2) meets one of several other narrow requirements, e.g., substantial and widespread economic and social impact
    - “Existing uses”: any use attainted since 1975 can’t be removed
    - “Designated uses”: usually broadly defined – “swimmable” etc. – makes it unlikely that sufficient criteria will be promulgated “Tier 1” of the “anti-degradation policy” fills this gap (see below)
  + States must adopt adequate criteria to protect the designated uses based on sound scientific rationale
  + States can designate uses unless EPA determines it is neither an existing use nor attainable without widespread economic harm
* “Traditional” WQS: designated uses and the criteria set to protect them
  + In theory result in standards that protect many aquatics uses
  + States can back off of designated uses if they later on discover they are not attainable
  + Typically set in narrative criteria rather than numeric ones (except toxics – Congress limited in 1987)
* Principles of Anti-Degradation (referred to as ‘Tiers 1-3”)
  + State must protect existing uses by setting criteria for standards
  + If water is cleaner than needed to protect public uses, should keep that level unless it is shown that some degradation would have a social and/or economic benefit (should go through public process and explain)
  + If a State has a designated a body of water as a “outstanding natural resources” degradation is barred entirely
  + Note: “anti-degradation” policy not codified explicitly in CWA, but consistent with goals and purposes of the Act
* WQS for Point Sources
  + §301(b)(1)(c) of the CWA indicates that permits must ensure compliance with water quality standards – more stringent where necessary.
    - Permit issuance precluded “when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.”
    - Where otherwise in doubt, this section requires permit conditions that ensure compliance with WQS
  + New sources: can’t get permit if discharges will cause or contribute to existing WQS violations. Permit precondition showings:
    - Whether or not relevant water body already exceeds standard
    - If State has performed “pollutant loads allocation”
  + Determine whether any permit applicant’s discharge “will cause, have the reasonable potential to cause, or contribute to an excursion above any State WQS, including State narrative criteria for water quality.” If so, the permit must include conditions ensuring compliance.
  + Applied with varying degrees of rigor (both States and EPA) – best-case scenario = **“total maximum daily load” (TMDL)** analysis
    - Can happen without formal TMDL procedures
    - TMDL transcends point source context so discussed later – note (1) permit issued determines how much of a particular pollutant the relevant water body can assimilate in a day (=”tmdl”), then (2) considers all inputs into that water body, & (3) divide up maximum daily load into “fair shares” for each source
  + TMDL is a resource intensive process – two potential shortcuts:
    - Analyze impacts of applicant’s proposed discharges in isolation in determining impact on water quality; Issue: does not serve regulatory prohibition on contributions to existing violations
    - Use narrative prohibitions to the exclusion of numeric requirements
  + Case law regarding shortcuts:
    - *Trustees for AK v. EPA* (9th Cir., 1984): regulators have an obligation to establish numeric water quality-based permit conditions where feasible
    - *Northwest Environmental Advocates v. City of Portland* (9th Cir., 1995): citizens may enforce narrative there permit conditions in citizen suits under §505
    - ***Arkansas v. Oklahoma*** (SCOTUS, 1992): City in AR applied for NPDES permit for new sewage treatment plant – flow passes through creeks and then enters IL river 22 mi upstream of AR-OK border – challenge that this violates OK WQS (“no degradation shall be allowed in the upper IL River” bc already in violation)
      * **Held:** not in violation
      * **Reasoning:** *de minimum* impacts; lower states can’t hold upper states “hostage” to their controls
  + Other WQS implementation devices for point sources:
    - §304(l): essentially a mini-TMDL program for toxics – identify stream segments not in compliance, identify contributing point sources, and develop “individual control strategies” to achieve standards within 3 years (relates only to point sources and has aggressive statutory deadlines)
    - “Mixing zones”: implementation devices designed to allow for consideration of a water body’s assimilative capacity in determining whether a particular discharge will cause or contribute to violations of WQS
  + Note: AR v. OK was an exception – SCOTUS reads §304(b)(1)(C) to require compliance with downstream states if it is more than *de minimum*. Takeaway: new or expanded discharges are prohibited if:
    - The river already violates WQS for a given pollutant
    - The new or increased load will result in detectable increases of that pollutant
    - Could be argued that this is limited to interstate pollutants and that intrastate pollutants cannot be allowed even if they are *de minimis*
    - WQS violation does no as a matter of law automatically prohibit permit issuance to a new source

**III. Other WQ-based Programs Under the CWA**

A. §401 Certifications

* §401(a): applicants for a federal license/permit, if its activity will result in a discharge into the navigable waters need State approval that the discharge will comply with CWA WQSs.
* Jurisdictional trigger: “discharge” into the navigable waters
* Transcend NPDES world (e.g. issued under wetland program or FERC/FPA)
* ***PUD No. 1 of Jefferson County v. WA Dept. of Ecology*** (SCOTUS, 1994): proposal to build a dam – must obtain state certification pursuant to §401
  + Concerns about discharge from dam, decreased water flow & fill material to build the dam itself having an effect on salmon migration (designated use)
  + **Issue**: whether minimum stream flow requirement that the State imposed is a permissible condition of a §401 certification under the CWA
  + PUD argues (1) the Act regulates discharge, not removal & (2) only get to set standards for quantitative elements/criteria
  + **Held:** for State
  + **Reasoning:** Ensuring compliance with§303 is a proper function of §401 certification, even if not explicitly stated.
    - State may require that a permit applicant comply with both the designated uses and the water quality criteria
    - WQS has two components: designated use & water-quality criteria – proposed project must be consistent with both
    - Provision is very states’ rights-positive – if the state doesn’t approve, federal cannot preempt it
    - Correlation between water quality and quantity – artificial distinction
    - So long is there is triggering discharge, the State may consider any effects of the permitted activity – within state power to control anything that might affect the water
    - Can use a “designated use” to justify a regulation even if there is no “standard” pertaining directly to that use (can implement narrative standards)
  + Implications of ***Jefferson County*** (assuming §401 only relates to point source discharges) 4 elements added to State control beyond NPDES:
    - State control where NPDES and §401 do not apply (i.e. where there is a discharge that does not involve an addition of pollutants)
    - Ensures authorize states have opportunity to protect WQS where EPA is issuing NPDES permits
    - Gives states oversight role in §404 permits
    - Empowers States to address water quality impacts not necessarily associated with the discharge itself

B. §§ 208 & 319

* Encourage States to address area-wide water quality planning in a manner that address nonpoint pollution
* §208: required identification of various categories of nonpoint source pollution and development of “procedures and methods” to control those sources “to the extent feasible” (“best management practices” or BMPs)
  + “Feasible” suggested tech-based approach rather than WQS to BMP selection
  + No numeric, WQ-based effluent limitations were included
* §319: required new lists of waters impaired by nonpoint sources of pollution, and new statewide plans to redress that pollution, but added little rigor
  + General requirement: states develop new programs on a watershed-specific basis “to the maximum extent practicable.”
  + Did little to remedy the lack of precise requirements to match specific management practices with the degree of control necessary to meet WQS
* Lack of federal “teeth” has limited effectiveness of these sections – all EPA can do if states do not implement these nonpoint source requirements is withhold the money they would receive to implement them

C. The TMDL Program

* **“TMDL”: total maximum daily load** = “waste-load” allocations for point sources and “load allocations” for nonpoint sources
* Basically: how much can it handle and how do we divide it up
* §303(d)(1)(A): states must identify waters for which BPT & secondary treatment are not stringent enough
* §303(d)(1)(C): states must establish TMDLs in accordance with priority ranking – based on severity and uses – need EPA approval – per-pollutant basis
* TMDLs considered unnecessary if:
  + BPTs & secondary treatment is adequate (statute)
  + Compliance can be achieved through any tech-based standards
  + More stringent states/local standards will achieve WQS
  + Any other pollution control requirements would be adequate
  + Note: last 3 are EPA expansions; EPA views TMDL as last resort
* Three-step process:
  + Establish total amount of pollution that the waterbody could assimilate each day while remaining in compliance with WQS
  + Allocate that load to known sources – “waste-load allocations” for point sources and “load allocations” for nonpoint sources
  + Translate allowable waste-load for each point source into an end-of-pipe, concentration-based permit limit
* States must demonstrate “good cause” for not meeting standards
* Main problem is speed because so resource-intensive
* Must account for growth with margin of safety
* Biggest difference is accounting for nonpoint sources – dynamic encourages state to develop mechanisms to hold nonpoint sources accountable
  + EPA’s leverage: withdraw state authorization; deny money to state under §303(e); beat up on point sources if nonpoint sources are improperly regulated
* ***American Farm Bureau Federation v. EPA***(3rd Cir., 2015): EPA published TMDL of N, P, and sediment that can be release into the Chesapeake Bay
  + AFB allege all aspects of the TMDL that go beyond an allowable sum of pollutants exceed the scope of EPA’s authority to regulate – intrude on state’s traditional role to regulate land use
  + TMDL interpreted by EPA to require publication of comprehensive framework for pollution reduction in a given body of water – AFB is challenging this interpretation
  + Entitled to *Chevron* deference – meaning of “total” in “tmdl”
    - AFB argued “total” is just a number
    - Court: read this way, would make “total” “maximum” redundant; also Congress explicitly requires EPA to establish tmdl, but nowhere proscribed how to do so
  + Takeaway: upheld that TMDL applies to nonpoint sources & can establish a timeline & “reasonable assurance” requirements in addition to the allocations
* Note: Water Quality Trading Policy (2003)
  + CWA has no language expressly prohibiting or allowing “trading” or “offsets”
  + WQTP embraces the use of offsets as a way of permitting new discharges in impaired waters, even in the absence of a TMDL
  + Concept: when coupled with a corresponding offset, the new source will not be “contributing” to the violation
  + 9th Circuit rejected this interpretation – need TMDL & existing dischargers must be subject to compliance schedule

**IV. The Wetlands Program (§404 Program)**

A. Overview

* “Section 404 Program” / “dredge & fill program” / “wetland program”
* Different from §402 because it applies specifically to a subset of discharged pollutants – “dredges or fill material” – defined by EPA & Corps through regulations:
  + “Dredged” material: material that is excavated or dredged from waters of the United States
  + “Fill” material: materials placed in waters of the US that have the effect of:
    - replacing water with dry land or
    - changing bottom elevation of any portion

B. What Activities are Covered?

1. “Addition”

* Generally, EPA and Corps have taken a much different approach to this definition than in §402
* Tulloch Rule: effectively subjected all mechanical digging or earth movement in a wetland to be an “addition” – alters preexisting regulatory framework by removing the *de minimis* exception and by adding coverage of incidental fallback
* ***National Mining Association v. US Army Corps of Engineers***(DC Cir., 1998): challenging the Tulloch rule
  + **Issue:** is “fallback” considered an “addition” under §404?
  + **Held:** no
  + **Reasoning:** incidental fallback does not “add” anything new to the water
    - That reading would contradict the meaning of “discharge”
    - “Addition” is not an ambiguous word; no *Chevron*
  + Concurrence: could be if it is moved far enough away
  + Takeaway: overruled the Tulloch Rule – outruns Corps statutory authority
  + EPA Response: rulemaking – exempted incidental fallback, but added new paragraph making distinction between “incidental fallback” and other fallback; incidental fallback defined as “the redeposit of small volumes…”
    - New rule was immediately challenged & invalidated (“Tulloch II”); Court said the EPA improperly relied on the volume of the fallback when the volume was irrelevant; instead, should rely on:
      * Time the material is held before being dropped to earth; &
      * The distance between the place where the material is collected and the place where it is dropped.
    - Congress response: fine, work it out in the courts on a case-by-case basis since no definition we give satisfies you
* ***United States v. Deaton*** (4th Cir., 200):issue with “sidecasting” (process of dredging and dumping a few feet away) – said sidecasting is the “addition of a pollutant”; once removed, became “dredged spoil” which is a “pollutant” – this is the addition of a pollutant where there was not one before, doesn’t matter that it is not technically new material. – circuit split?
* ***Borden Ranch Partnership v. US Army Corps of Engineers*** (9th Cir., 2001): followed “pollutant” logic of *Deaton* regarding “deep-ripping” (rip up layer causing wetlands to drain); SCOTUS split decision because Kennedy recused himself

1. What is “dredged of fill material”?

* Overarching issue: what is regulated under §404 as opposed to §402
* Defined in Overview ^; must meet these definitions to be regulated by the Corps
* Old test: “primary purpose” 🡪 mountain-top mining challenge; people would get away with evading permits because the “purpose” wasn’t to dredge or fill, it was to mine coal, even though the mountain top would be dumped into the adjoining valley, inevitably covering streams and watersheds
  + Evolved in “primary effects” test
  + Added “overburden from mining or other excavation activities” to list of examples of “fill material”
  + Changed exclusion of “waste” to “trash or garbage”
* ***Coeur Alaska v. Southeast Alaska Conservation Council*** (SCOTUS, 2009): case involving the discharge of goldmining wastes in a “slurry” into a lake
  + Corps granted permit to allow CA discharge processed wastewater from goldmines into a lake; SEACC argued this was beyond the Corps’ authority, 9th Cir. agreed, said that defining the characteristics of “discharge” was beyond the Corps’ authority, but were of a nature that was explicitly prohibited by the CWA.
  + **Issue:** Does the CWA give the Corps or EPA authority to issue a permit for slurry discharge? Was this permit given in accordance with the law?
  + **Held:** The Corps is the appropriate agency and the permit is lawful.
  + **Reasoning:** “slurry” is defined as “fill material” by regulation so it is the Corps’ jurisdiction under §404 & lawful because EPA’s NSPS program does not apply to §404, only §402
    - The Corps and the EPA agree that slurry meets their regulatory definition of “fill material” (specifically defined the phrase to include “slurry, or tailings, or similar mining-related materials”) – entitled to *Auer* deference given it is a long-standing, agreed upon interpretation of their own regulation
    - EPA reviewed it and did not veto, effectively deferring to the Corps’ discretion; EPA even issued its own permit for the discharge from the lake into the downstream creek
    - “If the Corps has the authority to issue a permit for a discharge under §404, then EPA lacks authority to do so under §402” (§404 and 402 permits are mutually exclusive)
  + **Dissent:** Relevant inquiry should’ve stopped at the determination that CA failed to meet EPA performance standards; leaves loophole for polluters to just release so much it’s then considered “fill”

1. What is a “point source”?

* Defined term in the CWA; still requirement for jurisdictional trigger
* Most equipment used for dredge & fill (bulldozers, backhoes, and deep ripping machines), are not so obviously “conveyances” might be said that to the extent that it moves (conveys) the earth from one place to another. Neither EPA nor the Corps has attempted a regulatory definition that goes beyond the statutory definition.

C. Exceptions from the Permit Requirement

* §404(f): specific exemptions
* Most controversial are those related to farming (plowing, cultivating, “minor” drainage,” harvesting, etc.)
* “Recapture provision”: places limits on the “normal farming” exemption

D. The 404 Permit

* Can be individual or general – we focused on individual
  + General: Cover activities that are “so similar in nature” and which will have minimal impacts viewed both individually and cumulatively
  + Individual: case-by-case basis
* Require NEPA & ESA assessments (if applicable) & a §401 permit stating the activity will not impair the state’s water quality
* Two substantive standards must be met:
  + §404(b)(1) Guidelines – developed by EPA
  + “Public interest” evaluation imposed by the Corps on itself
* Permits granted by Army Corps of Engineers or by authorized state
  + EPA retains oversight authority (veto power) and was charged with creating Guidelines (discussed below)
  + Limited version of cooperative federalism – states can become authorized, but authorization in limited and they don’t receive any extra funds and therefore aren’t really incentivized to do so
  1. The §404(b)(1) Guidelines
* Set of regulations EPA wrote, pursuant to §404(b)(1) of the CWA
* Three overarching principles:
  + Practicable alternatives
  + Mitigation requirement
  + Prohibited if they will cause violation or contribute to an existing one, regardless of mitigation (Significant Degradation Test §401)
* Practicable Alternatives Test
  + No discharge is permitted “if there is a practicable alternative to the proposed discharge which would have a less adverse impact…”
  + Interpreted as “reasonableness” test – don’t need to go through literally every single alternative
  + Presumption is that there are practicable alternatives
    - Presumption is heightened if the proposed project is not “water dependent” based on its purpose
    - Permit applicant has burden of proof to show there aren’t any – if not “water dependent,” standard is “clearly demonstrated otherwise”
  + **“Practicability”:** alternative must be available to the applicant and capable of fulfilling the “basic project purpose”
    - Looking for the **“LEDPA”**: Least Environmentally Damaging Practicable Alternative
    - Two main components: (1) basic project purpose & (2) availability

**a. “Basic Project Purpose”**

* + - Makes sense to analyze first because it will inform the “availability” analysis
    - Don’t allow developer to fully determine – would make it so narrow it would have no practicable alternatives; **Corps must make its own determination**
    - Multi-purpose projects: in order to bundle together multiple things at one site, you must show that they have to be bundled together to serve the purpose
    - *Louisiana Wildlife Federation v. York* (5th Cir., 1985): six permits granted by Corps to convert 5200 acres of wetlands (designated as “special aquatic sites” = higher protection according to guidelines); basic purpose: increase soybean production (non-water dependent activity); takeaway: must consider applicant’s definition of “basic purpose,” just not as gospel
    - **Plantation Landing Guidance**
      * Emphasis is on “basic” – but how do you tell the difference between an incidental feature and a necessary component? – Corps focuses of feasibility
      * Must comply with EPA
      * No unnecessary destruction or degradation
      * Corps responsible for controlling every aspect of the process
      * Applicant proposes a fully-integrated, waterfront, contiguous water-oriented complex
        + Corps must determine that each one of these three things is necessary as part of the alternatives analysis
        + These can’t be the “purpose” themselves or presumed as necessary for any reason
      * Can consider cost of alternatives but this cannot be the determinative factor – “cannot control or unduly influence”
      * “Water-dependency” test
        + Determine whether each component of the project is water dependent in light of its basic purpose
        + Presumption of upland availability for non-water-dependent components; must be rebutted with “clear and convincing evidence”
    - Plantation Landing/*LWF v. York* Takeaway:
      * Corps will not change the applicant’s business plans, but will not defer to highly-particularized plans
      * Where there are multiple business goals, burden of proof is on applicant to show they must be fully integrated/continuous
      * Basic test for practicability is whether the project would still be viable at a different site or with different configuration
      * Applicant is not entitled to a site that is profit-maximizing – may be steered to a less profitable plan so long as Corps determines it is “viable”

**b. “Availability”:** if available to the actual applicant & capable of being done after taking into consideration cost, existing technology, and logistics of overall project purpose

* + - Viewed from the applicant’s perspective, not the public (public – I can go somewhere else to get that service)
    - Site doesn’t have to be owned by the applicant **–** sufficient that it can be reasonable obtained, utilized, expanded, or managed
    - Cost is taken into account by comparing the cost of siting the project at the upland location with the land costs that are typically associated with projects of the same type (not necessarily just v. wetlands cost because wetlands are usually always cheaper
    - *Bersani* illustrates that availability is determined as of the time the applicant entered into the market with the proposed project, not at the time of the permit application (“market entry test”)
      * If developer rejected a site when it purchased, could be considered “available” even if at time of permit, the site is no longer for sale
      * Creates strong incentive for developers to fully evaluate sites at time of market entry
* If the Corps determines there are PAs, it must then undertake an environmental analysis to determine whether any of the alternatives would have a “less adverse” impact than the proposal
* If there is a PA that does not involve discharges into wetlands, the presumption is that they will be less environmentally harmful as well, unless “clearly remonstrated otherwise”
  + If and only if there are found to be to PAs, turn to mitigation
* Mitigation
  + MOA between EPA & Corps regarding mitigation with three main requirements: (1) avoidance, (2) minimization, (3) compensation; must be done in that order
  + **Avoid** to the maximum extent practicable
    - Harkens back to alternatives analysis
    - Understand that avoidance is limited to the practicability analysis
  + **Minimize** to the maximum extent practicable
    - Closely related to avoidance, but goes further in attempting to control the filling and effects of filling if it is going to happen
    - Can include specifying types of fill material they can use, require certain engineering features, etc.
  + **Compensate**
    - MOA: “appropriate and practicable compensatory mitigation is required for all unavoidable adverse impacts which remain after all appropriate practicable minimization has been required
    - Preference for restoration>creation of new wetlands, particularly in-kind (same habitat); can occur on or off-site; preference for mitigation banking and in lieu fee arrangements
      * Mitigation banking: creation or restoration or wetlands as an investment; banker demonstrates wetland features have taken hold, can sell credits to developers
      * Not enough bankers have stepped forward to show full benefits and risks
  + Ultimate test: whether mitigation replaces the functions and values displaced through the filling activities to the maximum extent possible
  + Issues with mitigation:
    - Corps has often seen its job as “facilitating” rather than “protecting”
    - This leads to less stringent mitigation requirements and lack of enforcement (checking back in, etc.)
    - Can get a permit without perfect mitigation
  + To the extent you have unmitigated wetlands – might need to comply with NEPA/ESA (FONSI? EIS?)
* Substantive Environmental Tests
  + Mainly focused on water-quality standards
  + Corps have typically relied on relevant state’s §401 permit issuing – states can include conditions, must be included in permit issuance
  + Issue: states are free to waive certification prerogative simply by not exercising it
  + Corps has independent duty to preclude “significant degradation of the waters of the US” – issue is what does “significant degradation” mean? – has rarely, if ever, been the sole basis of permit denial
* Public Interest Review
  + Superimposed of the Guidelines – Corps in its regulations asserts that the authority to deny permits if they are not in the public interest
  + Presumption is that there is no problem – Corps has burden of proof to make an affirmative negative finding
  + Factors (not exhaustive): effects on wetland, economics, fish and wildlife values, energy needs, general public welfare.
  + Can only be used to deny where Guidelines are met – not to grant where Guideline would otherwise deny
  + *Fox Bay Partners v. Corps* (IL District Court, 1993): permit denied because of public interest & degradation; Fox Bay argued it was arbitrary & capricious; court said this is a narrow standard and the judgement of the court cannot stand in for the judgement of the Corps
  + ***US v. Alaska*** (SCOTUS, 1992):Nome, AK applied for permit to build port facility; Corps placed limit, “only if it does not alter federal/state boundaries because of public interest
    - AK argued Corps cannot place limitations on/with regard to non-water quality issues
    - Court upheld Corps’ public interest authority
    - Secretary has discretion in permit approval/denial as well as attaching conditions; “…**may** issue permits” = can issue permits if Guidelines are met, but doesn’t **have** to

**THE CLEAN AIR ACT (CAA)**

**I. Overview**

* Arose out of increasing consciousness regarding air pollution
* Combines robust cooperative federalism system with tech-based requirements
* Addresses both “toxic air pollutants” and “criteria pollutants”
* Regulates “**air pollutants**”; defined broadly: “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive…substance or matter which is emitted into or otherwise enters the atmosphere.”
* Each CAA program requires further EPA action before it can be regulated
  + Some require an endangerment finding (NAAQS, NSPS, etc.)
  + Some only apply to “major” sources (PSD, NSR, etc.)
* Thus, a substance’s classification as an “air pollutant” is only a preliminary step to facing actual CAA regulation
* “**Criteria Pollutants**”: more common, related to the combustion of fossil fuels
  + Has become the focus of the CAA today
  + Three Parts in original CAA (1970):
    - Required Administer to establish health-based standards (NAAQS)
    - Senate had to establish State Implementation Plans (SIPs) –how health-based standards are to be reached and enforced
    - Establish tech-based processes or standards for control at the source
      * Intervene directly in pollution control
      * Divided into stationary & mobile sources
* Last significant amendments occurred in 1990
  + Concerns the original Act did not adequately protect places with cleaner air
    - Divided air sheds into groups based on whether or not they had achieved NAAQS
    - PSD program created for those above NAAQS to “keep clean air clean”
  + Imposed compliance by mandating very particular requirements for those that were not in attainment
  + Established programs for “Acid Rain” – SO2 trading provisions
  + Created permitting requirement similar to that of the CAA – required permitting of all major sources of air pollution
* Overarching issues:
  + Overly complicated regulatory landscape which leads to issues with consistent application due to overlapping regulations
    - States don’t know how to apply or lack resources to enforce
    - Regulated entities do not understand how to comply
    - Concerned citizens face challenges in attempting to participate in regulatory decisions and actions they feel violate the law
  + Grandfathering rules that exempt existing facilities from meeting modern pollution control requirements
    - Expected exemptions would only last for a short period of time (i.e. they would have to make improvements/modifications eventually), but some have remained exempt for 40+ years
    - Also, further increases the confusion

**II. National Ambient Air Quality Standards (NAAQS)**

A. Establishing NAAQS

* EPA must list pollutants as “criteria pollutants” if they “may cause or contribute to an endangerment to public health or welfare
* NAAQS must be established for each criteria pollutant
  + Primary NAAQS: protect the public health with an adequate margin of safety
  + Secondary NAAQS: protect the public welfare
  + Criteria Pollutants:
    - Sulfur dioxide (SO2)
    - Particulate matter (PM)
    - Nitrogen oxide (NOx)
    - Carbon monoxide (CO)
    - Ozone
    - Lead (Pb)
  + Theoretically, these standards are set without regard to health or feasibility – are meant to be strictly health-based standards (***Whitman v. American Trucking***SCOTUS, 2001) – level to protect the most vulnerable
  + *NRDC v. EPA* (2nd Cir., 1976): established that once an endangerment finding is made (aka a particular pollutant meted the definition of a “criteria pollutant”), EPA as a non-discretionary duty to list & regulate that pollutant
    - §108(a)(1) requires EPA to designate as a CP “each air pollutant –”
      * emissions of which, in his judgement, cause or contribute to air pollution which may reasonable be anticipated to endanger public health or welfare
      * the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and …
    - Once a pollutant has been listed under §108(a)(1), §§ 109 and 110 are automatically invoked (EPA must issue air quality standards)
    - Note: SCOTUS has never ruled on this issue so not black letter law just yet
  + ***Mass v. EPA*** (SCOTUS, 2007):established that EPA has the not only the authority to regulate GHGs under the CAA, but the obligation to do so if an endangerment finding is made
    - Issue #1: do they have the authority?
      * “Air pollutant” is broadly defined (dissent says too broad it’s ridiculous to assume this literally means “any”)
      * Regulatory flexibility and updates with scientific development were intended in the act, otherwise would become obsolete too soon
    - Issue #2: “unwise to do so” even if they do have authority
      * This has no basis in the statute
      * “Judgement” is not a roving authority to deny statutory requirement
      * Required to regulate once endangerment finding is made; if not, must provide reasonable explanation as to why it is not exercising its discretion; lack of adequate explanation = a & c
* Note: also challenged for violating non-delegation doctrine – Court ruled that “protecting the public health and welfare” was a good enough intelligible principle

B. State Implementation Plans (SIPs)

* Once EPA sets NAAQS, all regions of the country must meet them
* Separated into “Air quality Control Regions” (**AQCR** or “air sheds”), typically by political boundaries
* Cooperative federalism (need EPA approval to have the force of law) approach to the implementation of the CAA
  + States have the primary responsibility of enforcing NAAQS (§110)
  + States get first shot at classifying areas
    - Have one year after promulgation of NAAQS to give designations
    - EPA can re-designate based on air-quality considerations
  + Need EPA approval – must make showing that regulations are stringent enough to bring an area into attainment and keep it there
  + Note: EPA sets the standards that states must meet, but states can always go beyond the “federal floor”
* Have developed to include the broader authority to regulate sources and pollutants for which no NAAQS exist
  + Pre-1970 stationary sources
  + Strategies regarding public transportation, ride-share programs, old car by-back programs, etc.
  + Any new sources that are not covered by NSPS, NESHAPS, NSR, or PSD
* SIPs must include:
  + Emissions limitations
  + Schedules and timetables for achieving these limitations
  + Enforcement plan (SIPs are federally enforceable as well)
  + Contingency plans for non-attainment areas if initial strategies don’t work
* Air sheds classified on pollutant-by-pollutant basis as being
  + “Attainment” – meets NAAQS
  + “Nonattainment” – doesn’t meet NAAQS
  + Stringent permit requirements
  + Limits on new development
  + Possible fines & sanctions
  + Unclassified” if not enough information is available
  + “Maintenance” – interim after being in non-attainment; monitor closely for 20 years (2 successive 10-yr plans) to show attainment was not an anomaly
    - If an area falls into non-attainment, state must revise its SIP to show how it plans to achieve attainment
    - Can only re-designate to attainment if:
      * EPA has determined it meets the standard
      * EPA has fully approved SIP as it applies to that area
      * EPA determines improvements are due to “permanent and enforceable reductions in emissions” resulting from SIP
      * EPA has approved a maintenance plan
      * State has met all §110 requirements
* §172 provides that NAAQS be attained as expeditiously as practicable, but no later than 5 years after designation of an area as being in non-attainment
* Basic approach for achieving attainment:
  + **RACT:** (reasonably available control tech) for all existing facilities
  + “Reasonable further progress” must be made through, among other things, NSR for all major new sources & major modifications
  + Sanctions for missing attainment deadlines
    - §179 provides two mandatory sanctions: highway fund cutoff & 2 to 1 offset requirements
    - EPA has mandatory duty to promulgate a FIP two years after a SIP is found to be incomplete or is disapproved
  + Specific strategies can very – states have considerable latitude in determining how specific standards will be met
    - “Variances” often allowed in SIPs that allow emitters to exceed applicable limitations if EPA finds NAAQS will still be achieved
    - If SIP will achieve NAAQS, EPA should approve
* Interstate Pollutant Transport
  + States are required to ensure that in-state sir pollution sources no not “contribute significantly to non-attainment in, or interfere with maintenance by, any other state with respect to any such NAAQS”
    - Referred to as the good neighbor” provision
    - Difficult to measure/enforce
  + Left unregulated, upwind states can achieve economic benefits while downwind states bear the harm
  + ***EPA v. EME Homer City Generation***(SCOTUS, 2014): In general, if an upwind state contributes more than 1% to a NOx of SO2 nonattainment problem (including PM and ozone) to any air shed in a downwind state, the sources in that state have to eliminate all of their emissions that can be eliminated at a price of $500 per ton
    - Two-step approach to determining when upwind states contribute significantly to non-attainment:
      * “Screening”: excluded as *de minimis* any upwind state that contributed less than 1% of the NAAQS
      * Remaining states: “control” analysis; generate cost-effective allocation of emissions reductions among upwind states
    - Lots of deference to agencies
* SIP Enforceability
  + Once EPA approves SIP, it becomes federal law
  + EPA response to noncompliance
    - CAA amendments imposing more stringent requirements and guidelines for states that have not met NAAQS
    - Reasonably Available Control Technology (**RACT**): existing sources in nonattainment areas
    - Lowest Achievable Emissions Rate (**LAER**): major new sources in nonattainment areas
  + CAA has citizen suit provisions

**III. Direct Controls on Sources**

A. Introduction to Stationary Controls

* Direct controls require specific installation of equipment or process changes to the sources themselves – not up to states to decide the best way to do it
* Can be similar to BAT/BADT CWA standards
* “**Standard of Performance**”: a standard for emissions achievable through the application of the best system of emission reduction adequate demonstrated (taking into account cost and any non-air quality health and environmental impact and energy requirements
* **MACT** (maximum achievable control tech): NESHAPs
* **BACT** (best available control tech): new sources in attainment areas (PSD)
* **BART** (best available retrofit tech): existing sources contributing to visibility degradation
* **RACT** (reasonably available control tech): existing sources in non-attainment areas
* **LAER** (lowest achievable emissions rate): new sources in non-attainment areas (NSR)

B. New Source Performance Standards (NSPS)

* Applies to new or modified “stationary sources” which include “any source of any pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a non-road engine or non-road vehicle.” (i.e. factories, power plants, & other immovable facilities)
  + Rarely applies to existing sources (CPP), but may become more prevalent in the climate change context
  + Routine maintenance, repairs, and replacements are exempt (case-by-case)
  + Bubbling does not apply here
* Implementation Procedures
  + EPA creates list of categories of sources after cause or contribute & endangerment findings are made
  + Within two years, must assign standards
  + Every 8 years, must review and revise

1. “New (or Modified) Source”

* ***WEPCo v. Reilly*** (7th Cir., 1990): EPA said company’s proposed renovations would subject the plant to NSPS, WEPCo claims they were returning plant to original capacity/prolonging its life = routine repair/renovation & that EPA’s examination of cost, magnitude, & nature of the project was arbitrary & capricious
  + Court ruled for EPA – not arbitrary & capricious
  + “Modification”: any physical or operational change to an existing facility which results in an increase in the emissions rate to the atmosphere of any pollutant to which a standard applies; does the change increase the facility’s hourly emissions rate
  + Case-by-case determinations weighing nature, extent, purpose, frequency, and cost of change for common sense finding – all properly considered here
  + Note: no bubble allowed in NSPS

2. Performance Standards

* Standards based on **BADT**
  + Different technology standards for different industries
  + Must consider any “non-air quality health and environmental impacts”
* Typically limit rates or concentrations of pollutants rather than the total amount of emissions
* May set design, equipment, work practice, or operational standards if EPA decides it is not feasible to proscribe or enforce standard of performance
* Subject to arbitrary & capricious standard of review – strong agency deference
* Applies prospectively – if a source begins construction before a standard is set, that source is exempt until it makes a modification
* *Lignite Energy v. EPA* (DC Cir., 1999): Lignite challenged EPA’s determination of BADT and said it was unreasonable (arbitrary & capricious)
  + Takeaway: agency gets a ton of discretion in making these determinations
  + Lack of information does not negate ability to use standard; can use standard’s use in other sectors as justification for use (*Weyerhaeuser*)
  + EPA’s choice will be sustained unless costs are exorbitant
* Basic disputes regarding NSPS are constant:
  + Whether EPA has correctly determined the technology has been “adequately demonstrated”
  + Whether EPA has appropriately considered costs, non-air quality health and environmental impacts

C. New Source Review (NSR)

* NSR refers collectively to PSD (areas in attainment) & NNSR (non-attainment NSR)
* Expensive, strict requirements
* Arose out of economic advantage of grandfathering – need to make up for not being able to control them
* Jurisdiction: applies to **“major,” “new or modified,”** **“sources”**
  + “Major”
    - NNSR: emit or potentially emit 100 tpy of a criteria pollutant
    - PSD: emit or potentially emit 100 tpy (28 categories) or 250 tpy (other) of any regulated pollutant (criteria + others, but not HAPs)
  + “New or modified”
    - Same definition as NSPS context incorporated (1. Change 2. Increase)
    - RMRR exemptions still apply
    - Much of the same litigation spurs from it/cases often have both components (e.g. *WEPCo* also had a significant PSD component)
    - Bush admin: two rules changing the defining measurement baselines to determine “increase in pollutants” and “physical changes”
    - *NY v. EPA* (DC Cir., 2005): Challenged EPA’s definition of “modification resulting increase in emissions”; EPA new procedure for calculating “increase” based on new method for calculating baseline; CAA silent on how to calculate “increases” in emissions and therefore Court said *Chevron* deference is appropriate here
  + “Source”
    - “Source” defined differently because bubbling applies here
    - **Bubbling**: applies to modifications; can the source keep its net increase beneath the triggering threshold?
      * Reduce emissions somewhere else on the same site to make it so that your net increase does not trigger NNSR, you can be exempt
      * Still have to follow NSPS, but still a huge cost difference
    - ***Chevron v. NRDC*** (SCOTUS, 1984): NRDC challenging EPA’s construction of the term “stationary source” as unreasonable/arbitrary and capricious for including bubbling/plant-wide definition of “stationary source”
      * Court said agency is to get deference in defining the term as long as it was reasonable, which here it is
      * Court’s job is not to decide if an agency’s interpretation is “correct,” but rather just that it is “reasonable”
      * §111 defines “stationary source applicable to NSPS; §302(j) defined “major” but not “source”; therefore, Congress has not directly spoken on the issue
      * Note: this is NNSR context; bubbling still not ok for NSPS
* Substantive Requirements
  + Both require re-construction/modification permit & technology-based emissions limitations that are set on a case-by-case basis

1. Non-attainment New Source Review

* Applies to new or modified major stationary sources
* Exemptions for routine maintenance, repair, and replacement
* Naturally, lots of litigation flows from trying to fit in these exceptions
* Generally, the question is whether the new source or modification will emit or have the potential to emit more than 100 tons of a pollutant for which the air shed is in non-attainment for each year
* Once triggered, 5 requirements:
  + **LAER**: set on a case-by-case basis
    - Must be as strict as the more stringent of either:
      * whatever has been achieved in practice or
      * what is required by SIP (unless facility can show the latter is unachievable)
    - \*no regard to cost (theoretically more stringent than BACT), but costs often creep into the “availability” assessment
  + **Offsets**: emissions reductions that effectively negate or reduce the increased emissions from the proposed facility
    - Generally, more than 1:1, usually 1.1:1 or 1.2:1
    - Depends on the pollutant and the degree of non-attainment
    - States have developed offset registries and trading programs
  + Compliance demonstration
  + SIP implementation (in compliance)
  + Public interest review (show benefits > social/environmental costs)

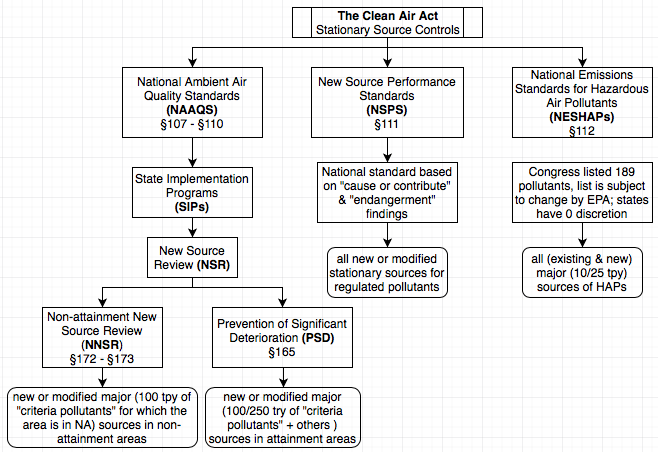
2. Prevention of Significant Deterioration (PSD)

* + Program for attainment areas – keep clean, clean (essentially the equivalent of the non-degradation principle in the CWA)
  + Applies only to “major sources” (100 tpy for 28 categories/250 tpy for others)
  + Requirements:
    - Pre-construction review/permit
      * Must conduct a review of possible technologies, air quality analysis, and allow for notice & comment on air quality impacts, alternatives, technology requirements, and other considerations
    - Compliance with emissions limitations = **BACT**
      * 5-step process: (1) identify options; (2) eliminate infeasible options; (3) rank remaining options; (4) evaluate economic, energy, & environmental impacts & eliminate poor options based on this; & (5) select the best remaining option
      * Set case-by-case; can take cost into account
      * Can NEVER be less than NSPS
      * Issues:
        + How far can (or must) an agency go in setting BACT standards? – EPA has limited use if it would result in the permitting agency “fundamentally redefining” the project (i.e. proposed coal plant, can’t force them to be natural gas)
        + What role does EPA play? No express veto power, EPA typically gives discretion, but case law shows it has not released all control
    - Emissions monitoring to determine effect emissions have or air quality
    - Can’t exceed either NAAQS or the increments.
      * Applicant needs to re-determine the baseline that they are starting from with respect to the increments.
      * Increments: Certain amount of deterioration the state can allocate to sources – we want to put a cap on it and make the state careful of how to divide it out – after cap reached, all new sources need to get an offset after that
* NSR Summary
  + Highly complex
  + Lots of criticism for grandfathering rather than exposing existing sources to modern pollution controls and for inviting gaming by facilities eager to avoid BACT & LAER by changing definitions
  + Can overlap; one modification could trigger both programs (because an area may be in attainment for one pollutant and not another)

**IV. National Emission Standards for Hazardous Air Pollutants (NESHAPS)**

* Originally health-based standards meant to protect the most vulnerable – very difficult to set and enforce
* Under 1990 Amendments, Congress established an initial list of 189 **hazardous air pollutants (HAPs)**, which is subject to growing or contracting by EPA, and switch to technology-based standards
* Two-step process for regulating substances on the list:
  + Identify the sources by category; and then
  + Establish the **MACT** by category (set MACT floor, consider cost/environmental/energy impacts if it wishes to exceed floor)
* Types of Sources:
  + “**Major sources**”: emit or have the potential to emit more than 10 tpy of any single HAP or 25 tpy in the aggregate
  + “Area sources”: any stationary source that is not a major source
  + Common for source categories to include both
* Strict requirements and short timelines for compliance
  + Major sources have stricter requirements than area sources
  + New sources have stricter requirements than existing
* Applies to old and new sources and state has no discretion (only area of CAA where this is the case)
* Must also consider “residual risks”: after tech-based standards, develop additional standards to protect the human health
* Can apply even when EPA has not set standard
* ***National Mining Association v. EPA*** (DC Cir., 1995): case regarding what emissions were factored into the “major source” determinations
  + Issue #1: all emissions from a plant v. just those from the facilities in the “categories”; Court upheld EPA’s interpretation that it applies to all emissions in the aggregate (contiguous area, common control)
  + Issue #2: does it include “fugitive emissions”? Court: yes, reasonable interpretation, *Chevron* deference
  + Issue #3: Did EPA overstep its authority by permitting a source to reduce its “potential to emit” only with “federally enforceable emissions controls”? Court: yes – against EPA “potential to emit”: maximum capacity to emit a pollutant under its physical and operational design; Congress intended for the term to stand for effective controls, but not necessarily only federal
  + Note: Core issue, as in *NY v. EPA*, *Chevron,* and *WEPCo* is whether legal requirements apply to certain pollution sources and whether EPA has properly interpreted those legal requirements
* Requirements once NESHAP is triggered= **MACTs**:
  + Existing sources: at least as stringent as the best 12% or the average of the best 5 (for categories with <30 sources
  + New sources: at least as stringent as the best controlled similar sources
  + \*Cannot override more stringent standards set by other programs
* §112(i)(5): lower emissions by 90% of what they were in 1987, can get a 6-year extension on complying with MACT; highly successful program for early reductions

**Summary of CAA Stationary Source Controls**

* NSPS: imposes technology-based standards on **all** qualifying new or modified sources, irrespective of attainment status of the relevant air shed, on a pollutant-by-pollutant basis for “regulated pollutants”; separated into categories/sub-categories based on the type of source; standards tend to be more lenient than LAER or BACT
* NNSR + PSD = NSR: imposes technology-based standards on **major** (100 tpy for NNSR & 28 categories of PSD / 250 for other PSD) new or modified sources; programs separated based on attainment v. non-attainment of air shed
  + NNSR: pollutant-by-pollutant bases
  + PSD: major for one is major for all (get into SER after that for other pollutants that aren’t necessarily “major”)
* NSPS / NSR / NESHAPS often overlap; whenever a pollutant or category of sources is subject to more than one program, generally the more stringent requirements for each pollutant will trump the others
* States cannot opt out of NSPS or NESHAPs
* ****“Modification”: change that will result in the increase in emissions – RMRR exception is a vague, indeterminate standard

**The Resource Conservation and Recovery Act (RCRA)**

**I. Overview & Jurisdiction**

* Focus on Subtitle C governing those who generate, transport, or treat, store or dispose of hazardous waste
* Key jurisdictional trigger: **“hazardous waste”**
* Two primary topics (two-step inquiry):
  + Is it a solid waste?
  + If yes, is it hazardous?
* Subject to narrow exceptions, the term “hazardous waste” includes any discarded material that poses a substantial threat to human health or the environment when improperly managed

A. “Solid Waste”

* Under RCRA, “hazardous waste” is a subset of “solid waste,” therefore this is the first inquiry in establishing RCRA applicability
* §1004(27) defines “solid waste to include: “Any garbage, refuse, sludge from a waste treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semi-solid, or contained gaseous material.”
  + Does not necessarily have to be “solid”
  + Must be “discarded” \*\* issue we focused on most
* EPA’s regulatory definition focuses on when EPA deems materials to have been “discarded” (i.e. when is it “waste”)
  + Has historically been defined in a way that asserts jurisdiction over materials the SPA determines to have been “abandoned” or “recycled” in environmentally problematic ways
  + Some materials deemed to be “solid wastes” simply because they are “inherently waste-like”?
* Most controversy over EPA asserting jurisdiction over materials that are destined for recycling. EPA’s justification for this:
  + Statute & legislative history show Congress’s intent to support this
  + Many materials stored or transported to recycling present the same types of threats to human health and the environment as materials stored or transported prior to disposal.
  + Excluding materials destined for recycling allows materials to move through the hazardous waste management system depending on what any person handing them intends to do with them – contrary to “cradle to grave” goal regarding hazardous substances
* Pushback against this because subjecting certain types of recycling to regulation under Subtitle C may dramatically increase the cost of extracting further value from those materials
* EPA has determined that secondary materials can be deemed to have been “discarded,” when they are recycled in the following ways:
  + Recycling involving land disposal;
  + Recycling involving burning for energy recovery;
  + Recycling involving reclaiming the material; and
  + Recycling involving speculative accumulation
* Two main exclusions:
  + “Closed loop” exception: applies to “secondary materials that are reclaimed and returned to the original manufacturing process…in which they were generated” provided they involve only tank storage and “the entire process … is closed by being entirely connected with pipes or other comparable enclosed means of conveyance.”
  + Recycled substances being re-used as an ingredient or as an effective substitute for a commercial product or are returned to raw material substitutes to the original process from which they were generated without first being reclaimed
* Recycling through reclamation (#3 on list above) is by far the most complicated and controversial – 3 cases that led to 2 different EPA rulemakings:
  + “Reclaimed”: “A material is reclaimed if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents…”
  + ***American Mining Congress v. EPA (“AMC I”)***(DC Cir., 1987): Companies were re-using materials immediately/fairly soon as part of an ongoing manufacturing process – EPA considered this “recycling” and asserted jurisdiction
    - Decided against EPA on *Chevron* step 1 (unambiguous structure of the legislature and Congressional intent)
    - Ordinary meaning of “discarded” = “disposed of” / “thrown away” / “abandoned”
    - EPA took on a narrow interpretation of this opinion and continued to assert broad jurisdictional authority – “manufacturing processes (or other types of recycling) involving an element of discard which do not involve secondary materials passing through a continuous, on-going manufacturing process remain within the Agency’s jurisdiction.”
  + *American Mining Congress v. EPA (“AMC II****”)*** (DC Cir., 1990): Relying on *AMC I*, petitioners claimed that the possibility that they might reuse the sludge at some point precluded any determination that they had been discarded.
    - Court distinguished from *AMC I* on the grounds that the materials in *AMC II* were placed in waste treatment systems and were therefore part of the waste disposal problem
    - Was not an immediate re-use of an ongoing process
    - Upheld EPA’s narrow interpretation of *AMC I*
  + *Association of Battery Recyclers Inc. v. EPA* (DC Cir., 2000): DC Circuit appeared to go back to *AMC I* approach; rejected the idea that storage “for even a few minutes” would subject materials to regulation
    - EPA argued its right to regulate depends on the amount of time/how quickly you reuse it
    - Court said that when it said “immediate” in *AMC I*, it meant “the next logical sense” in the manufacturing sense
  + Led to Bush administration (2008) and then Obama administration (2015) to rethink and rewrite the rule
* The New Rules
  + 2008 DSW Rule: In response to *Battery Recyclers*, EPA issued a “revised definition of solid waste”
    - “Generator-controlled” exclusion: if company who generated the waste controlled the recycling
    - “Transfer-based” exclusion: Off-site recycler audited to ensure compliance
    - Allowed more recycling without triggering RCRA
  + DSW Rule (“Definition of Solid Wastes Rule” 2015): some changes, but still significantly more permissive than the 1985 original rule
    - Slightly stricter than the 2008 Rule, but still considerably less stringent than the original 1985 rule
    - Two main concerns: sham recycling & “toxics along for the ride”
    - Expanded definition of “legitimate” – should involve some kind of “recognizable benefit”
    - Replaced “transfer-based” exclusion with “Verified Recycler Exclusion”
    - Four Factors of Recycling to address these concern:
      * Provide a useful contribution to the recycling process
      * Must be a valuable product or intermediate
      * Managed as a valuable commodity
      * Comparable to legitimate product or intermediate
  + ***American Petroleum Institute v. EPA (“API III”)*** (DC Cir., 2017): DC Circuit upheld most of the rule, but rejected two aspects of it
    - “Toxics along for the ride: EPA required the product of the recycling process be comparable to a legitimate product or intermediate
      * Court rejected because under this provision, the firm must document, notify regulators, and keep documents and the regulatory status of a facility’s secondary materials could turn based solely on its failure to do this
      * Court believed EPA’s focus on the record/paper trail was arbitrary – vacated the 4th criterion (current rule has 3)
    - “Verified Recyclers Exclusion”: EPA’s requirement that off-site recyclers be pre-approved as “legitimate” recyclers by either EPA or relevant state
      * Court rejected saying EPA had no basis for finding that transferred hazardous materials carry an undue risk of discard, therefore EPA cannot give itself more power over it
      * Re-instated Bush-era “transfer-based” exclusion, which requires only that the generator make “good faith” efforts to ensure that the recycler is legitimate
      * Long and short, this is still a mess as to what it means
  + Very few states have actually picked up on the Bush or Obama rules, and it remains to be seen what they will do with this decision (2017)
  + As of now, the old rule (1985) still applies – states can always be more stringent than the national standards

B. “Hazardous Waste”

* Subcategory of “solid waste”
* §3001(b): EPA would promulgate regulations “identifying the characteristics of hazardous waste…” – Congress left EPA to decide what triggers Subsection C
* EPA created a two-prong approach:
  + Listed Wastes: certain waste streams = per se hazardous; may be listed according to the raw product that is being discarded or the process by which the waste is generated. So, for example, discarded trichloroethylene (if pure) is a listed hazardous waste, as is the sludge generated through electroplating processes. Four categories:
    - Industry-specific (K)
    - Transcend particular industry (F)
    - Dangerous chemical wastes (U)
    - Acute hazardous chemicals (P)
  + Characteristic Wastes: A solid waste is hazardous if it exhibits any of the following characteristics:
    - Ignitability – flash point of <140 degrees F
    - Corrosivity – pH <2 or 12.5<
    - Reactivity – unstable/explosive/etc.
    - Toxicity – is the waste inherently toxic?
      * Toxicity Characteristic Leachate Procedure (TCLP) test;
      * Hinges on whether toxic constituents may leach out of relevant waste stream at harmful levels under typical landfill conditions
* Rules regarding “listed” wastes:
  + The Mixture Rule – listed waste + anything else = hazardous; characteristic waste + anything else = hazardous waste only if the resultant mixture exhibits any of the characteristics that can render a waste hazardous in the first place.
  + The "Derived-From" Rule - As a general rule, wastes generated from the treatment, storage, or disposal of **listed** wastes must also be treated as a hazardous waste.
  + The "Contained In" Policy - Any soil, groundwater or debris that becomes contaminated through contact with a **listed** waste is a hazardous waste. Spill of listed waste, anything coming in contact (like a mop) if you can find any constituents that were of concern in listed waste, it is a hazardous waste
  + Note: The mixture and derived-from rules are often attacked and seen as over-regulation
* Note: household wastes not included

**II. The Regulatory Program**

* Deals with the generation, transportation, treatment, storage and disposal of HW
* These are all defined terms

A. Generator Requirements

* Generator: “any person whose act or process first produces a HW or whose act first causes a HW to become subject to regulation
* Three types subject to widely varying degrees of regulation
* Thresholds stated in the aggregate total of all hazardous wastes that the particular generator generates at its entire facility each month
* Requirements that apply to all 3 types:
  + “Waste Determination” requirement: must determine if waste is hazardous
  + Limited storage (varies based on type, but all are limited)
  + Responsible for their own paper trail

1. Fully-Regulated Generators

* Generate > 1000 kg of HW per month or > 1 kg of acute HW
* Highest category of regulation (2% of generators, make up 99% of waste)
* No permits; just regulation numbers – regulated directly under the relevant regulations (positive, no permit process; negative, lose “permit shield”)
* 5 main requirements:
  + Comply with “waste-determination” requirements
  + Comply with storage requirements (90-day limit)
    - Violation of 90-day limit turns “generator” into TSD and subjects it to a whole host of other requirements (discussed below), but EPA has been lax about enforcing this
    - “Cascading violations”: what happens if this is enforced because it is highly unlikely that the generator is in compliance with all TSD standards
    - Also list of procedures regarding storage within those 90 days, like contingency plans
  + Comply with manifest packaging requirements when sending off-site
  + Record-keeping requirements
  + Identify appropriate waste treatment standard (“land-ban” program)

2. Small-Quantity Generators

* Generate 100-1000 kg HW per month
* Slightly more relaxed requirements than fully-regulated (e.g. can store waste up to 180 days without becoming a TSD)
* Many who float on the 1000 line/have varying production per month comply with more stringent standards to be safe (i.e. have contingency plans in place)

3. Conditionally-Exempt Generators

* <100 kg HW per month; <1 kg acute HW per month
* Limited requirements
* Must comply with waste determination requirement
* Allowed to send their wastes to Subtitle D facilities, need not send them to authorized TSDs
* Cannot accumulate more than 1000 kg of HW at their facilities at any given time

B. Requirements for Treatment, Storage, and Disposal Facilities (TSDs)

* Two main types:
  + Treating, storing, and disposing of other’s HW
  + Some generators engaged in TSD themselves
* Two types of permits:
  + Full Permits: New sources are prioritized
  + Interim Permits: Existing sources = grandfathered to “interim status”; allow them to continue activities until EPA can process application
  + Both have conceptually similar requirements, but full permits have slightly more stringent standards
* All need permits – requirements much more extensive than operational requirements. 3 main, significantly expensive requirements for permit:
  + Groundwater Monitoring: Detection monitoring
    - Do not apply to all TSDs, only those that manage waste into surface impoundments, landfills, or land treatment facilities
    - Only if a potential release, secondary (assessment) monitoring.
    - Detection monitoring is much cheaper. If it detects a release, things get ugly, facility must characterize release, where it is going, what is in it, etc.
  + Closure and post-closure: Plan for how they are going to “close” the relevant units (may or may not coincide with closing od actual business)
    - TSDs can close individual units without closing their whole facility; can close all TSD units without closing whole facility
    - “Clean Closure”: All circumstances except landfills and significant releases, just means getting rid of hazardous waste and contaminated equipment as if it had never been there.
    - “Closure as a Landfill”: For landfill, must eliminate free liquids, stabilize, put a cap on it, monitor it, etc.
  + Financial Responsibility: two main requirements
    - “Financial Assurance Requirements”: designed to ensure they have the necessary resources to implement closure and post-closure plans (estimate costs & prove they have the money)
    - Financial Insurance: must have coverage for what are termed “sudden accidental occurrences”; designed to protect neighbors; land disposal facilities have coverage for “non-sudden” occurrences as well
* “Land ban” program: restricts land disposal of HW by requiring they first be treated in accordance with EPA standards; DC Circuit has upheld the implementation strategy
* “Corrective action”: If a release is detected/any need for eventual clean-up post-closure = CERCLA-style clean-up program (mandated by RCRA still)

**REGULATORY ENFORCEMENT**

**I. Overview**

* Applies to almost all programs (404, RCRA, CWA, CAA, ESA, etc.)
* Investigations
  + Permitted discharges: required to keep records and turn in with violations highlighted – self-reporting DMRs
  + Non-permitted discharges: EPA has the right to test/investigate
  + EPA typically has the ability to perform warrantless searches
    - Failure to give EPA access is a permit violation in and of itself
    - Can get ex parte warrant
    - Corporations have no right to “plead the 5th”
* Potential Enforcers:
  + EPA – retains authority in authorized states
  + State – must have own enforcement measures for pollution controls (SIPs)
  + Citizen suit provisions
* Enforcement options:
  + Do nothing (prosecutorial discretion)
  + Judicial Civil Enforcement Actions
    - Compliance
    - Civil penalties
  + Administrative Orders
    - Compliance orders
    - Administrative penalties
  + Criminal Enforcement
    - Misdemeanors
    - Felonies

**II. Enforcement Options**

A. Civil Enforcement

* Give government ability to seek judicial relief both compelling compliance and imposing penalties
* Within agency statutes – different procedures and penalties
* First step: prove violation
* In civil cases, principles of strict liability apply (government must just show violation, no need to show negligence or any other blameworthy mental state.

1. Injunctive relief

* Issue: what degree of discretion do courts possess in fashioning relief under these provisions?
  + Depends on wording of statute
  + Many statutes give broad power, question lies on the courts’ “duty” to do so
  + Power to order compliance v. power to establish how compliance is to be met if it is needed
* ***Weinberger v. Romero-Barceló*** (SCOTUS, 1982): naval base testing bombs in water; EPA considered this a “discharge”; called for injunctive relief of the permit; Court denied
  + Takeaway: Courts need not order immediate compliance in all cases
  + Statute allows court to figure out how to restrain violation or bring someone into compliance
  + District courts retain discretion to balance equities before granting an injunction, even where a source is continuing to violate a statute (here, CWA) – “the grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so”
  + The basis of injunctive relief has always been “irreparable injury and the inadequacy of legal remedies” – not to, “lightly assume Congress intended to depart from established principles”
  + Court deemed it significant that Navy had applied for permit –rebalance if it becomes clear they won’t get the permit but will continue activities
  + Not a lot of case law, but courts typically act as though their discretion involves timing and method, not whether a defendant needs to comply
* Courts’ exact level of discretion is unclear
  + *US v. Oakland Cannabis* (SCOTUS, 2001): courts have a lot of discretion, but only in how compliance is achieved, not whether it is required – that would be second-guessing legislation; cannot reject a balance Congress has expressed in statute (here, lower court took medical necessity into account as basis for declining to enforce CSA); court is limited to evaluating how such interest and conveniences are affected by the selection of injunctive relief over other forms
  + *Amoco Production Co, v. Gambell* (SCOTUS, 1987): environmental injury by its nature is often “irreparable” (i.e. not remedied by monetary damages and permanent). Favor injunction
* Takeaway: courts focus on how and when, not if/whether, compliance should be achieved

2. Civil Penalties

* Similar degree of discretion
* Most pollution control statutes = up to $25k/day of violation (past or present)
* Some statutes (CWA) provide factors to “consider” – how should courts apply?
* *US v. Union Township* (3rd Cir., 1998): factors listed for assessing civil penalties: seriousness of violation, economic benefit, history of non-compliance, good-faith efforts to comply, economic impact of the penalty, & “other such matters”; Dean Dairy claims court wrongly assessed “economic benefit” gained
  + Goal of civil penalties is to deter future behavior
  + **Bottom-up:** Fine them at least what the gained and then some based on consideration of other factors
  + **Top-down:** max penalty, then lowered by mitigating factors
  + Economic benefit is not defined or assigned a given weight = within court discretion
  + District Court judges have a lot of discretion

B. Administrative Enforcement

* Alternative to going to court
* EPA has the power here so it is often preferred
* EPA sets enforcement requirements & plan, but subject to JR

1. Administrative Compliance Orders

* Unilateral orders requiring recipients to comply with the law
* Advantages for EPA: speed & power
* Some statutes, like RCRA, provide respondents with the right to request and administrative hearing before the order becomes final
* Others (CWA) provide for no such hearing and are silent as to whether respondents may seek pre-enforcement JR
* Lower courts had unanimously agreed that there was no pre-enforcement review under the CWA, SCOTUS unanimously reversed this in ***Sackett v. EPA*** (SCOTUS, 2012): order asserts Sacketts’ property subject to CWA & that they had violated it by placing fill material on the property; order says they must immediately restore property pursuant to EPA work plan
  + Issue #1: was this a final agency action for which the Sacketts can bring suit? – yes: “the mere possibility that an agency might reconsider does not make it non-final”
  + Issue #2: Does CWA impliedly preclude pre-enforcement JR? – No; EPA claims this undermines the convenience of COs, Court said too bad so sad, nothing guarantees you this will be the most effective method and hardship to P matters ($ to comply, then $ to challenge, if they win, $ to redo, if they don’t comply $.... etc. no good option here for them)
  + Takeaway: compliance orders are final agency actions that are subject to pre-enforcement JR under the CWA; also applies in RCRA and CAA
* Warning letters are another option – not a final agency action (Scalia suggestion in *Sackett*)

2. Administrative Penalties

* EPA gets to make the decision, not the courts
* Administrative penalties = economic benefit + gravity-based portion
  + Economic benefit: put things back how they were; take away any economic benefit gained my non-compliance
  + “Gravity-based” portion: seriousness of the violation must be taken into account to decide the appropriate amount to deter future misconduct
    - Calculations: focus on amount of potential harm (dominant factor) & amount of potential deviation
    - Includes multi-day component for repeating violations
    - Then, consider factors like willfulness v. good will; ability to pay or threat of litigation; environmental projects to mitigate; history of non-compliance etc. to adjust up or down
* Supplement Environmental Project: Give a break if they do something good for the environment related to harm (nexus) and does more than mitigate
* Audit Policy: If voluntarily investigate/address own violations, will forgo punitive penalties (but not economic benefits)

C. Criminal Enforcement

* §309(c) establishes four categories of criminal violations:
  + Negligent violations (misdemeanor)
  + Knowing violations (felony)
  + Knowing endangerments (felony)
  + Knowing false statements (felony)
* Most significant legal issue is what constitutes “knowing” (i.e. did the person have to know they were polluting or know that that pollution was actually a violation?); *mens rea* / intent requirement
* ***US v. Weitzenhoff*** (9th Cir., 1993): Ds manage sewage plant – instructed to dump directly into ocean; claim they didn’t know the specific terms of the permit
  + Issue: does an individual have to knowingly engage in the action or knowingly violate the terms of the permit?
  + Rule: do not need “specific knowledge of the requirements of the permit” in order to be considered “knowingly” violating the permit
  + Criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit (***International Minerals****)*
* Public Welfare Offenses (PWOs): Some activities that put people on notice that they are closely regulated because they endanger the public welfare – if you don’t find out the regulation, you have violated (***International Minerals****)*
  + Where Congress has not expressed its intent, courts should not read regulatory crimes to require awareness of illegality in situations in which the relevant regulatory scheme involves dangerous materials in contexts in which the public would have difficulty protecting itself
  + Dangerous activities: presumption of illegality; do not have to prove awareness (known or should have known); *Staples* added activity must be uncommon in addition to danger/risk
  + “Innocent conduct”: must show awareness of illegality (*Liperota*)
* Over-filing: Feds can bring enforcement action in any state even if state already brought action; not common, but controversial when it happens

D. Citizen Suits

* If authorized state or EPA are not properly enforcing the law, citizens can pursue alleged violations
* Cause of action usually contained in relevant agency’s statute – some for violation, others include “failure to act” causes as well
* Two potential actions:
  + Against regulated entities violating standards (our focus)
  + Against EPA when it has failed to perform a non-discretionary duty
* Similarities to agency civil enforcement actions
  + Citizens may seek both injunctive relief and penalties
  + Citizens must make a prima facie case (P must prove relevant violation)
  + Very similar to overall EPA judicial enforcement because citizens are performing a quasi-public role
* 5 Differences between citizen suits and EPA enforcement actions:

1. Notice

* Typically, 60 days prior to filing, must provide state, violator, & EPA notice of intent to file suit
* Give them time to do their job
* This is a legal pre-condition; hurdle to get into court; not notice = dismissed
* “Pre-suit notice must “permit ‘the recipient’ to identify the relevant information regarding the alleged violation” – must be sufficient to allow the violator know what he’s doing is wrong

2. Standing

* *Lujan* standing analysis; typical injury and causation questions; environmental context:
  + How often do you have to use the area?
  + When will Court be convinced a plaintiff will actually go back and experience an injury? “actual or imminent” issue
  + What are the boundaries of the ecosystem nexus theory?
    - Scalia laughed at it
    - Lower courts have relied of Kennedy’s opinion where he said this was a bizarre case, but we shouldn’t foreclose the idea that a certain fact pattern may make this work
    - Upshot: courts may be willing to apply where the connections are proximate, substantial, and/or clear
* “Injury” is a big one – how close must the P be to the discharge?
* ***Friends of the Earth v. Laidlaw Environmental Services*** (SCOTUS, 2000): Laidlaw found to have violated daily limit on mercury discharges on 489 occasions – FOE filed citizen suit alleging noncompliance with NPDES permit seeking injunction & civil penalties
  + Rule #1 (injury): focus is on injury to the plaintiff(s), not the environment itself; here, didn’t show damage to river; Court said that’s fine, people can be harmed regardless of if river itself is harmed – aesthetic injuries are subjective, understandable why people wouldn’t want to go near river if they knew about the discharges; Scalia says this is ridiculous, how can the people be harmed if the river wasn’t
    - Incredible victory for citizen suit plaintiffs
    - **Key: Curtailed use based on reasonable concerns of exposure to dangerous pollutants**
  + “One-polluter case”: no apparent contention that other sources were contributing – cause interesting causation and redressability issues – *Powell Duffryn*: don’t need to show the pollution you saw came from D’s source, (“cause”), just that D is part of the problem
* Effects of ***Laidlaw* =***Gaston Copper.* (4th Cir., 2000): claims for injury were reduced consumption of fish, grandchildren’s access to water, and diminished property value; originally said that “mere speculation” was not enough, but upon rehearing after *Laidlaw*, unanimously reversed.

3. *Gwaltney* Doctrine (ongoing violation/mootness dynamic)

* The government can bring action against wholly past violations; citizen suits face hurdles with statutory interpretation, redressability, and mootness (rubric of the *Gwaltney* doctrine)
* Rule: CWA prohibits citizen suits for wholly past violations with the exception that claims of ongoing violations made in good faith may be maintained; at trial, must show post-complaint violation or likelihood of reoccurrence
* ***Gwaltney of Smithfield v. Chesapeake Bay Foundation*** (SCOTUS, 1987): Ps brought suit alleging D was violating discharge permits; D argues that provisions required D to be in violation at the time of the suit & last recorded violation was several weeks before
  + Statutory interpretation: most natural reading of “to be in violation” is that the violation is continuous
  + Interest of citizen Ps is primarily forward-looking; have to allow for suit for continuous or intermittent violations aka look at reasonable likelihood that a past polluter will be a repeat offender
  + Takeaway – Two-part test:
    - At the time of filing, P must make “a good faith allegation of continuous or intermittent violation” to survive SJ
    - As long P survives SJ, the case proceeds to trial on the merits, where P must prove the allegations to prevail. Show either:
      * Post-complaint violation (problem not solved) or
      * Adducing evidence that trier of fact believes more likely than not the violation will continue – has the root cause of the violation been eliminated?
  + Used on a parameter-by-parameter basis – courts should recognize that a facility may have solved some problems but not others by the time the complaint is filed; should treat each problem separately for purposes of determining whether the violations were wholly past
* Article III concept regarding standing/mootness: “the doctrine of standing is set in a time frame the requisite personal interest that must exist at commencement of litigation (standing) must continue throughout its existence (mootness)
* Redressability issue: money goes to the treasury, P doesn’t get any. P gets benefit of future conduct being deterred, is that enough to satisfy “redressability”? – Court says no in *Steel Co.*
  + Court in *Gwaltney* addressed the effect of the wholly-past nature of violations solely on statutory grounds (only mention of standing was in the mootness context)
  + This raised the question of whether Congress could “fix” the *Gwaltney* result by amending the citizen suit provisions to authorize citizen actions with respect to wholly past violations
  + *Steel Co.*: constitutionalized *Gwaltney*; absent ongoing violations, payment to the treasury does not = redressability
* Mootness: how difficult is it for a citizen suit defendant to show that it is “absolutely clear the alleged wrongful behaving could not reasonably be expected to reoccur?” – if they can show this, what is the effect (i.e. moot only injunctive relief and still have to pay or moot entire case)?
  + Most courts favored plaintiffs, emphasizing the difficulty of establishing the “voluntary cessation” (underlying root of the problem, “a good day is not a state of compliance”)
  + ***Laidlaw*** Part 2: a controversy will only be deemed moot on the grounds of voluntary cessation by the defendant if the defendant proves there is no reasonable chance it could resume the behavior
    - Defendant has a high burden of proof to show this
      * Fact intensive inquiry
      * Subject to varying results based on tried of fact
    - Laidlaw did not satisfy their burden in this case
* Summary of *Gwaltney*/*Steel Co.*/*Laidlaw*:
  + Penalties **for** **wholly past** violations **do not** support constitutional standing (money goes to treasury does not = redressability for Plaintiff’s injury), whereas penalties **for ongoing** violations **do** support constitutional standing (sufficient deterrence of conduct)
  + The imposition of penalties generates a sufficient amount of deterrence to support redressability in situations in which the defendant is still in violation when the lawsuit begins (***Laidlaw***), but not where the defendant has stopped violating, even where the defendant has shown itself to be a frequent violator in the past (***Steel Co.***)
  + Plaintiff bear burden of proof for standing; once show, defendant has the burden of showing mootness
  + ***Laidlaw*** rejected what, prior to ***Steel Co.***, had been the unanimous view of the Court of Appeals, i.e. that nothing that happens after the filing of complaint can moot a claim for civil penalties
  + Takeaways from ***Laidlaw***:
    - The citizen must establish standing separately as to each form of relief sought (i.e. that the relief requesting will redress an injury)
    - Citizens who face ongoing violations may seek penalties as necessary to deter violations
    - While the burden of proving mootness shift to the defendant where it voluntarily ceases offending conduct, it can show this by showing that there is no reasonable prospect of future violations
    - If a defendant makes the required showing, it will in fact moot penalty claims for violations pre-dating the eventual solution – the point of civil penalties is to deter future conduct, if there’s no chance of future conduct, the penalties serve no purpose

4. Precluded by Government Action

* All statutes have preclusion provision barring citizen suits from filing if either the state or EPA **“has commenced” & “is diligently prosecuting”** an action **“in a court”** to require compliance
* Some have additional preclusion provisions for administrative actions as well (CWA)
* “Diligence”
  + Difficult for a plaintiff to prove an agency is not being diligent because diligence on the agency’s part is presumed – agency given deference
  + If action is taken during the notice period, hard to convince the court that this isn’t good enough
  + Citizen suits are meant to supplement, not supplant, government action (***Gwaltney***)
* “In court”: whether an administrative action can ever qualify as “in a court” for these purposes
  + Majority view: administrative actions can never qualify
  + Minority view: whether the tribunal has the power to accord relief which is the substantial equivalent to that available to EPA in federal courts; whether there are procedural similarities to a suit in federal court (has never been satisfied)
  + Under all statutes other that the CWA, only a “court action” will preclude a subsequent citizen suit
  + Whole area is a minefield and courts are split on numerous issues

5. Attorney’s Fees

* Attorney’s fees provided for “successful” plaintiffs – what is “successful”?
* Lodestar amount: reasonable rates for reasonable hours
  + Not entitled to it
  + Even if you didn’t prevail on certain claims, if there was common work between those claims and the ones you did win on, you get it
* *Hensley v. Eckerhart* (SCOTUS, 1983): primer on what it takes to be a “prevailing party”
  + Succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit
  + Takeaway: do not need to be 100% successful to obtain attorney’s fees – lots of deference to trial courts
* ***Buckhannon Board and Care Home v. WV Dept. of Human Health & Resources***(SCOTUS, 2001): rejected the “catalyst” theory (brining of suit is what caused voluntary cessation/compliance); if a defendant successfully moots a citizen suit, it will in some circumstances not only avoid penalties, but my also avoid paying the plaintiff’s attorney’s fees – result of ***Laidlaw***
  + Scalia concurrence: need an “enforceable change in legal relationship”
  + Ginsberg dissent: this lets defendant’s off easy & discourages lawyers from taking cases

**THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION & LIABILITY ACT (CERCLA)**

**I. Overview and Jurisdiction**

* Not a typical “command and control” statutes like other environmental regulations
* Imposes very few regulatory obligations
* Remedial program, giving EPA and others the tools they need to address contamination and to impose liability for past actions associated with it, even if those actions were consistent with then-existing laws and standards of care
* Primarily backward looking
* Jurisdictional Elements (defined but ridiculously broad

1. a release or substantial threat of a release;

- any uncontrolled movement of contaminants in the environment

- “substantial threat”: hazardous substance present at the facility and the relevant parties have demonstrated an unwillingness to assert proper control over them

2. of a hazardous substance

- defined through process of incorporation

- petroleum exempt

- no *de minimis* threshold

3. from a facility

- imposes virtually no substantive limitation on the scope of the program

* Four basic options for EPA for responding to contamination problems:

1. Investigate or clean up itself and then seek reimbursement from potentially responsible parties (PRPs)

* + - Use Superfund dollars – far-reaching authority
    - Types of actions: removal & response
      * No bright-line rule between them
      * Removal: cleanup activities, actions necessary to abate threatened release, and actions necessary to monitor, assess, and evaluate threatened release
      * Remedial: those actions consistent with permanent remedy taken instead of or in addition to removal actions
      * Can Superfund dollars on all removal actions, but only on remedial actions if the site is listed on the National Priorities List (NPL)

2. Seek to compel PRPs to conduct investigations or cleanups by initiating judicial action seeking a court order

3. Issue one or more PRPs a unilateral order (joint and several liability)

4. Negotiate settlement with some or all PRPs under which they agree to undertake necessary response actions (discussed further below)

* + National Contingency Plan (NCP): blueprint for EPA response under any and all of the four options above
  + Rely mostly on PRPs to do the work
  + No pre-enforcement review
    - Must comply or risk legal sanctions
    - Punitive damages up to 3x the cost of cleanup if non-compliance without sufficient cause
* EPA is not the only one who can use CERCLA – private parties can clean up sites and sue other PRPs for cost-recovery or contribution.
  + Private parties must demonstrate that any cost incurred were consistent with EPA’s NCP
  + In government actions, burden of proof is on the defendants to demonstrate that EPA’s costs were inconsistent with the NCP, which is very difficult to do
* Overarching CERCLA Liability Principles:
  + Strict liability & causation free
  + Can be joint & several
  + Retroactive
* Elements of liability:
* Release/threatened release of a hazardous substance from a facility
* Government incurred costs because of the release/threatened release
* Party being sued falls into one of the four classes of PRPs

**II. Liability**

A. Liable Parties

* Liable parties:
  + Current owners and operators
  + Anyone who owned or operated the site at the time of disposal
  + Generators: those who “arranged for disposal or treatment”
  + Transporters – if they played a role in the site selection process (only held liable if they’re stupid; pretty much ignore)

1. Owner/Operator Liability

a. Ownership Liability

* Strict liability on both the current owner of the contaminated site and anyone who owned it during any periods of disposal
* ***New York v. Shore Realty***(2nd Cir., 1985): seminal “current owner” liability case
  + Rule: CERCLA imposes strict liability for cleanup costs on current owner
  + Only escape from liability is by an act of God, act of war, or acts of a third party
  + Tried to argue that “at the time of disposal” from §107(a)(1) should apply to subsection (a)(2) as well – failed miserably
* Status liability – you’re liable because you’re the owner
* “Interim owners”: typically, not held as liable; passive migration does not = disposal

b. Operator Liability

* Current operator & operator at the time of disposal
* Operator: “those who operate facilities”
* Issues arise with relationship between parent corporations and/or individuals such as corporate officers/employees; to what extent were/are these entities doing business on the relevant property as to qualify as “operators” under CERCLA.
  + Does the relevant entity or individual bear “direct” liability under the statute by virtue of being an “operator” in their own right?
  + Is “piercing the corporate veil” appropriate such that the relevant entity or individual can be deemed to be derivatively liable for the since of the relevant subsidiary or employer?
* ***US v. Bestfoods*** (SCOTUS, 1998): a parent corporation may not be held liable for a subsidiary’s actions under CERCLA unless state law piercing requirements are met, but the parent may be held directly liable if the parent itself exercised significant control over the facility
  + Issues arise with determining what constitutes “significant control”
  + The corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf
  + Entities are operators if they get involved in environmental decision-making inconsistent with that with what the parents do
  + Nothing in CERLCLA bars parent corp. from direct liability of its own actions
  + Held: Secondary entities = operators when “sufficiently involved”
  + **Takeaway:** “sufficiently involved” relates to the level of involvement with the facility itself, not the subsidiary person (would get into derivative liability issue) – read to require that person have some involvement in the environmental component of the facility, not just the facility overall
  + Parent Corporations – Direct Liability Tests:
    - Capacity to control (owner/type authority)
    - Involvement in subsequent affairs (CEO/GM) (P argued in *Bestfoods*)
    - Involved in decisions at the facility (facility manager)
    - Involved in environmental decisions
    - Involved in decisions giving rise to contamination
    - Never (D argued in *Bestfoods*)

2. Arrangers for Disposal or Treatment (“Generator Liability”)

* Basic Elements:
  + Sent hazardous substance to the relevant site
  + There are wastes of that type at the site
  + There has been a release of that or any other hazardous substance
  + Causes the incurrence of costs
* *US v. Wade* (District Court PA, 1983): D tried to argue that a closer nexus/causation was needed – court rejected argument, said the only nexus required was the one by statute – minimum: prove generator’s waste arrived at the relevant facility
* ***Burlington Northern & Santa Fe Railway Co. v. US*** (SCOTUS, 2009): an “arranger” for the disposal of hazardous chemicals is liable if the entity “planned for” the disposal of a new & useful hazardous product;
  + Arranger: someone who takes initial steps to plan for the disposal of a hazardous substance
    - Fact-specific inquiry into the nature of the transaction
    - No bright-line rule
  + Here: Court didn’t hold them liable – need more than just knowledge
  + Pre-BN, courts construed “arranger” language much more broadly
  + “Knowledge alone is insufficient to establish ‘planned for’ disposal”
  + More likely to find liability where a by-product rather than a virgin product is being sold/transported

B. Scope of Liability

* Statute is silent on its face
* Courts have interpreted to impose joint & several liability, but not required when there is a reasonable basis for apportionment (originates from ***Chem-Dyne***)
  + J&S Liability is the universal starting point
  + ***Chem-Dyne***: justified by legislative history and need for federal uniformity
  + Also looked to R2d of Torts for guidance
* ***O’Neil v. Picillo*** (1st Cir., 1989): generators claimed their contribution was insignificant compared to the costs and therefore they should not be held join & severely liable for anything not covered by settlement
  + Court said too bad – D bears burden of proof to show basis of apportionment
  + “Chemical soup” usually always leads to J&S liability
* ***Burlington Northern & Santa Fe Railway Co. v. US*** (SCOTUS, 2009): CERCLA imposes joint & several liability, but apportionment is appropriate when there is a reasonable basis to determine contribution
  + Burden of proof is on the generators to provide the “reasonable basis”
  + Rare case where the defendants were able to meet the burden – facts in the record substantially supported the apportionment
  + Here, Court found the district court reasonably apportioned liability based on the percentage of the site the railway company’s parcel consisted of and the percentage of time during which the railway company owned the property while the relevant disposal activities were occurring
* *Matter of Bell Petroleum Services*: “one-waste” cases
  + Only case were “apportionment as a matter of law” was found
  + Multiple parties can contribute known amounts of the same contaminant to the same mass - rough approximation is all that is required
* ***Picillo*** & ***Chem-Dyne*** are much more broadly applicable than ***Burlington Northern***
* Purposes of joint & several liability in CERCLA:
  + Induce settlement
  + Reallocate “orphan shares” – liability of parties not present
  + Avoid issuing a unilateral order
* Defenses: very narrow
  + Traditional third-party fault
    - Party not in any contractual relationship with the party asserting this defense contaminated the land (e.g. vandal, up-gradient landowner)
    - Defendant must establish that he:
      * Exercised good care with respect to the hazardous waste
      * Took precautions against foreseeable acts or omissions
  + Innocent landowner
    - Exception for purchases that, before acquiring the title, diligently investigate the potential existence of contamination
    - Defendant must demonstrate:
      * Did not know or have reason to know
      * Made all appropriate inquiries into ownership and use
  + Prospective purchaser

**III. Recovery**

A. Settlement

* EPA’s preferred route for solving CERCLA cases
* Send out notice letters to PRPs, PRPs meet to begin informal process
* Enter into settlements with *de minimis* generators as promptly as possible when it is in the best interest of the public and practicable
* Two benefits to *de minimis* settling parties:
  + “Covenants not to sue”: promise not to seek further relief
  + “Contribution protection”: protection from suits from other PRPs who might seek to impose future liability
* After *de minimis* settlements, move to larger parties
  + EPA may offer large parties the ability to perform RI/FS themselves if they:
    - Organize quickly into a group representing enough parties to assume full responsibility for conducting the RI/FS
    - Agree to allow EPA’s scope of work for the RI/FS
    - Demonstrate adequate capability
  + “Special notice process”: formalized framework to invoke time restraints on the negotiation process – provides PRPs with names & addresses of others, volumes & nature of substance contributions; gives 60 days for coordination
  + Afforded convenient not to sue with 2 re-opener exceptions:
    - Undiscovered harms
    - Cleanup standards change to protect human health & the environment
* *US v. Cannons Engineering Corps* (1st Cir., 1990): left 37 *de minimis* non-settlers with $11 million – held them joint & severely liable
  + Parties obviously argued that their contributions were not worth that much
  + Court basically said too bad, you should’ve settled when you had the chance
  + Perfect example of the incentive and rewards of settling

B. Private Party Cost-Recovery & Contribution

* CERCLA’s cost-recovery extends to private parties as long as they meet the burden of proof by showing costs extended were in line with the NCP
* CERCLA has 3 provisions providing cause of action for private parties
  + Right of cost-recovery in any private citizen so long as the costs expended were consistent with the NCP
  + Express right of contribution against other PRPs in situations in which the contribution plaintiff is or has been the subject of a civil action under either § 106 or § 107
  + Express right of contribution where one has entered into an administrative or judicially-approved settlement
* *Cooper Industries* and *Atlantic Research:* (1)One who voluntarily cleans up a site has a cost-recovery claim; (2) One who has been named as a PRP and sued under CERCLA (3) Second contribution claim in situations where they have resolved their liability to EPA or the states through either administrative or judicially-approved settlement; (4) One who cleans up site pursuant to a consent decree; (5) One who received a unilateral order from EPA; (6)those who have cleaned up pursuant to either a judicial or administrative settlement under State law have under CERCLA

**THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)**

**I. Overview**

* NEPA is one of the most pervasive environmental laws in the US and has played a critical role in resource management, project development, and agency administration of numerous laws
* Functions solely as a **procedural law** requiring federal agencies to analyze and disclose the environmental impacts of their actions
* Triggered by major federal actions that significantly impact environment
* ***Robertson v. Methow Valley*** (SCOTUS, 1989): NEPA does not require federal agencies to make the best environmental decisions, rather, so long as an agency complies with NEPA’s procedural requirements, it has satisfied its legal obligations
* Citizen suits allowed for NEPA under the APA:
  + Agency didn’t follow correct procedure in documenting or analyzing
  + Did not prepare EIS when they should have
  + EIS was not adequate – Can’t second guess substantive decision of agency; Can only challenge if there is a “clear error in judgement”

**II. The EIS Trigger**

A. Overview

* EISs must describe the environmental impact of the proposed action, any unavoidable adverse impacts, and any alternatives to the proposed action
* Federal agencies must provide other agencies and members of the publ9ic with an opportunity to comment on EISs
* The preparation of the EIS and involvement of the public are meant to ensure that agencies take a **“hard look*”*** at the potential environmental consequences of their actions and fulfill NEPA’s purpose of promoting informed public participation
* The Council on Environmental Quality (CEQ)
  + Created by NEPA and in charge of its administration
  + To facilitate these objectives (above) and otherwise guide agencies’ implementation of NEPA, CEQ has developed regulations that are as influential as the statute itself
  + Although other agencies have developed their own regulations to implement NEPA, CEQ’s regulations receive deference from the courts if there is a dispute regarding the procedure

B. Is an EIS Required?

* EISs are not required for all federal actions. They are only required for major federal actions that may significantly affect the environment.
* Exceptions:
  + Rule of Reason: not necessary if it would provide no purpose (*Public Citizen*)
  + Functional Equivalent: if in compliance with a statute equivalent to NEPA requirements then this suffices
  + Categorical Exclusions: categorically, these activities do not have an effect on the environment
  + *Public Citizen***-** If agency has no discretion for taking environmental analysis into account in making decision as promulgated my statute
* **Two Questions:**
  + Is it a major federal action?
  + Might it significantly affect the environment?

1. Major Federal Actions

* To trigger the need for an EIS, non-legislative agency actions must:
  + Be federal
  + Be major
  + Significantly affect the quality of the human environment
* Timing and Scope Framed as, is there an action?

a. “Agency”

* + Examples: Project development and implementation, issuance of regulations, preparation of land use plans, issuance of federal permits and licenses, federal funding for state and private projects
  + Exceptions: NEPA does not apply where it would result in an irreconcilable conflict with an agency’s substantive obligations; ***Public Citizen:*** Purely ministerial, nondiscretionary actions are not agency actions triggering NEPA
  + ***Kleppe v. Sierra Club*** (SCOTUS, 1976): D’s merely “thinking” about doing something, didn’t actually have a proposal or anything
    - Said there has to be a proposal on the table
    - Important Holdings: Courts can’t require agencies to jumpstart the process before they are actually at the proposal stage; nothing in statute obligates them to do anything – only if there is a major federal action, must have an EIS
    - **CEQ Rule Defining Proposal:** Actively moving toward something and declared to move toward that goal
    - Nowadays subsumed by standing, final agency action, and/or ripeness
  + *Norton v. Southern Utah*: failure to act is only reviewable when the agency fails to take a mandatory discrete action – general inaction does not require an EIS

b. “Federal”

* + Under CEQ regulations implementing NEPA, agency actions that are “potentially subject to Federal control and responsibility” may trigger NEPA’s requirements
  + Interpreted by courts to include projects developed and implemented by federal agencies, as well as state and private actions that require federal permits, licensing, approval, or funding
  + **Takeaway-** In general, so long as federal agency undertakes a qualifying “action,” it will fit within NEPA’s scope
  + **“Small Handles” Problem (Scope Issue)**
    - Doesn’t mean an entire project will be subject to NEPA review if a federal agency’s action applies only to a small part of a larger non-federal project
    - Question here is if we have a project that is not a truly federal project, to what extent is the project subject to NEPA?
      * Really only becomes an issue when you have a private project requiring some sort of approval
      * Note: Question isn’t “is there a federal action” it is “How much of the project is federalized?”
    - Courts have limited the scope of NEPA review only to the agency action itself, while others have required agencies to apply the NEPA analysis to an entire project
    - In general, where the agency action is a necessary prerequisite to approval or implementation of the entirety or a substantial part of the project, courts tend to require a broader NEPA analysis than when the agency action applies to a discrete/severable portions
    - Note: The agency always has to consider the effects of the permitted activity; the question is whether it may or must also consider other aspects of the overall project
    - *Winnebago Tribe of NE v. Ray* (8th Cir., 1980): Corps issued permit for powerline across the Missouri River; not federal – only 1.25 mi/67 mi was the “federal portion”
    - **Two Tests** 
      * ***Medical Center***- This test considers several factors in determining whether “but for” veto authority should be enough to federalize an entire project:
        + Degree of discretion
        + If federal government gave any direct financial aid

Merely some funding does not mean by definition it is a “federal project”

With respect to funding it is not a yes or no thing, it is based on the level of funding

* + - * + If overall federal involvement with project is sufficient to turn essentially private action into federal action
      * **The Corps Approach-** Focuses on the last part of ***Medical Center***: Is the Federal involvement sufficient to federalize the entirety of what is essentially private action? 4 factors in determining whether sufficient “control and responsibility” to federalize the entire action:

Is the regulated activity merely a link in a corridor type project (think ***Winnebago***)

Are there aspects of the upland project that affect the location and configuration of the regulated activity;

The extent to which the entire project will be within Corps jurisdiction (does not require 100%, but more than 10% or *de minimis* federal connection) and

The extent of cumulative federal control and responsibility

c. “Major”

* To trigger the need to prepare an EIS, proposed federal agency action must be a “major” action
* “Major” threshold is linked to the significance of the impacts an action may have on the environment
* Thus, the real question regarding federal agency actions is whether they will significantly affect the environment
* Once we know we have a proposal and scope, process we use to figure out if we need an EIS is the EA process (below)

2. Significant Environmental Impact

* Question of whether a legislative proposal or federal agency action will significantly affect the human environment involves both substantive and procedural elements
* What are Significant Effects on the HumanEnvironment
  + Neither NEPA nor the CEQ regulations directly define the term “significantly affect the human environment”
  + Instead, the CEQ regulations separately define “effects,” “human environment,” and “significantly”
  + Need to conduct an EA to determine if you need to do a full EIS

a. Determining **“Environmental Impact”**

* Categorical exclusions
* Environmental Assessments (**EA**): a brief analysis of the project to determine if it requires an EIS
  + In between actions that clearly will significantly affect the environment and those categorically excluded, are a wide range of activities that may or may not significantly affect the environment
  + If an agency is not sure, will first conduct an EA
* At a minimum, an EA must Include:
  + A brief discussion of the need for the proposed action
  + Alternatives to the proposed action
  + The environmental impacts of the proposed action and alternatives
  + Identification of the agencies and persons consulted in preparation of the EA
* At the end of the EA process, there are 2 outcomes
  + Finding Of No Significant Impact (FONSI)
  + Finding EIS is required
* Finding is made by the action agency, whether Corps approving 404 permit or Dept. of Transportation building a highway. Either way it is that agency, not the CEQ or whoever has the environmental interests at heart
* **Note:** In practice, it should be the federal agency doing the EA analysis
  + Money actually being spent is by the permit applicant
  + Idea is- technically we’re supposed to do the EA, but we don’t have the money so we’ll have to deny your permit unless you hire environmental consultant and do the analysis which the agency will then review

b. Determining **“Significance”**

* The action agency is charged with making this determination, subject to judicial review based on the A&C standard
* What Effects have to be considered?
  + The CEQ regulations require that agencies consider both direct and reasonably foreseeableindirect effects, including growth-inducing effects
    - Direct Effects: Those that are caused by the agency action and “occur at the same time and place”
    - Indirect Effects: Caused by the agency action but are “later in time or farther removed in distance, but are still reasonably foreseeable”
    - Include Growth Inducing Effects: Changes in land use patterns, increased population density, and the consequential impacts form such growth
  + Cumulative Effects: When do you have to go beyond considering just the project at issue?
    - CEQ Regulations Require consideration of foreseeable cumulative impacts regardless of what other agency, federal or non-Federal, undertakes the future actions
    - Very, very broad definition, although we did see this does not answer the federalization question. When you have a private project only partially federal, direct and indirect only pertains to the regulated entity
    - Direct and indirect effects must be thought about differently depending if it is a classic federal project
* Note: Effects may be both beneficial and detrimental, “even if on balance the agency believes that the effect will be beneficial”
* Note: By themselves, economic and social effects are not considered to require NEPA analysis. ***However,*** if an agency is evaluating effects on the natural and physical environment, it must also discuss interrelated economic and social impacts
* For **True Federal Projects**

i. ***Kleppe***

* + Challenged coal operations
  + Embraced the notion that comprehensive EISs should be required where several proposals have cumulative or synergistic effects
  + ***Here***, no EIS required because no major action
  + Can only prevail if there is a recommendation or proposal for major action with respect to the region. Here there is not.
  + Also determined, however, that the task of determining when cumulative impacts exist “is assigned to the special competency of the proposed agency” and therefore is only to be overturned if the agency’s resolution is A&C
  + Court also ceded to the agencies the discretion to cut off consideration of cumulative effects based upon feasibility concerns
  + ***Kleppe*** did recognize we need to give agencies discretion in drawing reasonable boundaries – Just because you can identify one effect that gets left out does not mean the drawing of the line is A&C
  + **Takeaway-** Was the line drawn in a reasonable way? “Practical considerations may require agency to leave something out”

ii. ***Grand Canyon Trust v. Federal Aviation Admin.*** (DC Cir., 2002)

* An airport is always going to be a federal action in its entirety (presumed that’s the case)
* Rigorous analysis with view toward “is this the straw that breaks the camel’s back?”
  + Think about the action in context as part of the cumulative effects analysis and take seriously the additive nature
  + Considering the extent to which there is already a problem that will be exacerbated
* Takeaway: cannot view the proposed project in a vacuum; agency deference to if an EIS is needed, but if it is, no deference to what is require, that’s laid out in the statute
* The CEQ Regulations Define “Significant Effect” by reference to both the “context” and “intensity” of the action
  + Context: The term “context” indicates that the significance of the proposed action must be analyzed at several different levels- with respect to society as a whole, the affected region, the affected interests, and the locality
    - Refers to scale of action and effects it will have on society as a whole, the affected region, interests, locality
    - Example: An action with significant global impacts would likely be significant, even if impacts on a specific location might be difficult to pinpoint. Likewise, action with negligible global impacts could nonetheless be considered significant if it would have substantial local impacts
    - Must consider both short and long-term effects
  + Intensity: Refers to the severity of an actions impact. Requires consideration of factors such as:
    - The degree to which the proposed action affects the public health and safety, directly, indirectly or cumulatively;
    - Any unique characteristics of the area involved (are there any wetlands, park lands, etc.);
    - Are the environmental impacts uncertain or controversial;
    - Impacts on significant cultural, scientific, or historical resources;
    - Impacts on endangered or threatened species;
    - Whether action might violate federal, state, or local laws designed to protect the environment
    - Will the decision in this case be precedential?
  + Mitigation: can be taken into account in determining whether an action will have a significant effect requiring an EIS, so long as it is enforceable
    - Can mitigate your way out of an EIS if you agree to curve your effects not by way of 0 but ***to an extent that brings it below the threshold (FONSI)***
    - Not just a promise, must be actual activity
    - **Takeaway-** Conducting a mitigated FONSI is a way to avoid triggering full EIS process, however, must determine if it is cost-efficient to proceed in this way

C. Conclusion: Agency has 3 options for determining how to conduct its NEPA analysis

* Agency may decide the action is categorically excluded and not conduct NEPA review
* Agency may prepare an EA that ends in a FONSI, in which case the NEPA analysis will terminate with the issuance of the FONSI
  + Sub-set: Mitigated FONSI, engage in mitigation bringing action below threshold required to trigger EIS
* Whether through an EA or based on the agency’s determination at the outset that tis proposed action will significantly affect the environment, the agency will commence the process of preparing an EIS

**III. The EIS Itself**

A. Overview

* Major federal actions that are likely to significantly affect the environment require an EIS
* An EIS must include a comprehensive discussion of the short- and long-term environmental impacts of the proposed federal action, identification of any unavoidable adverse effects, and evaluation of a reasonable range of alternatives
* In discussing a proposed action’s impacts, an agency must consider direct, indirect, and cumulative impacts

B. EIS Procedures (Established by CEQ regulations)

* Issuance of notice of intent and scoping document
* Preparation of draft EIS
* An opportunity for Public Comment
* Issuance of Final EIS and record of decision

C. EIS Contents

* Statement of “purpose and need”
  + - Alternate analysis (subject to rule of reason)
    - Discuss of effects of preferred action and a reasonable range of alternatives
    - Description of the affected environment
    - Identification of the preparer of the EIS

D. Timing of EIS

* CEQ regulations require agencies to prepare NEPA analyses “early enough so that they can serve practically as an important contribution to the decision-making process and will not be used to rationalized or justify actions already made”
* It is ultimately up to the agency to decide when an actual proposal for major federal action exists, this triggering NEPA **(*Kleppe*)**

E. Alternatives Analysis

* What alternatives need to be considered?
  + CEQ regulations require the consideration of all ***reasonable alternatives***, or at least a reasonable number covering the full spectrum of alternatives
  + The Alternatives Must include:
    - Reasonable alternatives not within the jurisdiction of the lead agency;
    - The no action alternative
  + Do not need to include:
    - Alternatives that don’t meet the purpose
      * Federal agencies are allowed to have purposes
      * During Spotted Owl Rage, BLM said their purpose was to provide a certain amount of board feet of timber
      * Courts consistently said that if that is your purpose only need to look to alternatives that will generate that kind of yield
    - Worst Case Analysis
* ***California Block*-** Reasonable number of alternatives covering the spectrum that will achieve the agency’s purpose/meet agency objective
* ***ONDA v. Jewell***- For significant concerns, the federal agency must understand the baseline, at least for significant effects of proposed action
  + Sage grouse case. Hadn’t accurately characterized starting point
  + Looked at two other sites in lower elevation
    - No sage grouses. Reasonable to infer that there won’t be sage grouse here either
    - Record actually reveals that there actually is sage grouse at the other of two sites
  + Whole point is to what extent will there be vegetation above the snowline
* ***Union Neighbors United v. Jewell*:** The agency can’t narrow the alternatives such that it doesn’t consider any more protective options (assuming they exist) other than those which are infeasible
  + Issue: Did FWS fail to consider a reasonable range of alternatives? – Must afford relatively equal consideration of proposal and all alternatives
  + ***Here,*** the project purpose was to allow wind project to go forward and to protect the bat
  + Court found that you didn’t really rigorously look at if there was another alternative that provided greater protection for the bat
  + **Takeaway-** Courts have applied a rule of reason for both how many alternatives need to be considered but also the depth of how deep you need to consider each alternative
* Extent of Consideration
  + CEQ has indicated that each alternative should receive substantially the same degree of analysis devoted to the proposed action
  + ***United Neighbors*-** Should be equivalent consideration of each alternative, but rule of reason
  + ***NRDC v. Morton*-** Required only information sufficient to permit a reasoned choice of alternatives
  + If you don’t have enough information with respect to a particular alternative, you need only summarize the existing credible scientific evidence and evaluate the impacts based upon generally accepted theoretical approaches to the issues

F. Mitigation

* At the EIS stage, the CEQ regulations. require the discussion of environmental consequences include a discussion of the means to mitigate adverse impacts
* ***Methow Valley*-** SCOTUS made clear NEPA does not require the adoption of a mitigation plan
  + Yes, you need to consider it, but no need to implement it, at least under NEPA
  + ***Methow Valley*** is the last nail in the coffin as to whether NEPA has any substantive force
  + Justice Stevens- Only prevents uninformed, rather than unwise, decisions
  + Issue 2: How do you deal with uncertainty of indirect effects?
    - No worst-case analysis required under new CEQ regulations
    - Must adequately identify & evaluate impacts through accepted scientific methods

**IV. NEPA Enforcement**

* Citizen suits may enforce NEPA’s procedures through lawsuits under the APA

A. Challenge to procedure

* The agency didn’t follow correct procedure in either documenting or analyzing
* The agency didn’t prepare an EIS when it should have, an allegation that there was a significant impact on the human environment by a major federal action
* The EIS itself was not adequate
* Did not follow statutory requirements in terms of documenting impacts, alternatives, or mitigation

B. Challenge to Substance

* NEPA is procedural not substantive:
  + An agency need only ***consider*** these environmental values; it need not select the “best” action for the environment
  + Nevertheless, agency action may be set aside under the APA even with proper NEPA procedure if the agency’s overall decision (given the information produced by NEPA) is A&C
* Note: always another statute at play
  + The above statement is true, but it has to come from the other statute in play
  + Agency is always taking some other statutory action (permitting, etc.) that brings it within the NEPA realm, there is always another statute where the A&C standard comes from (APA)

**THE ENDANGERED SPECIES ACT (ESA)**

**I.** **Overview**

* Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and to provide for the “conservation of such endangered species and threatened species”
* Services
  + **National Marine Fishery Service (NFMS):** Ocean and anadromous fish
  + **Fish and Wildlife Service (FWS):** Freshwater fish, land animals
* **Purpose**: Protects endangered and threatened species
  + **Endangered:** In danger of extinction throughout all or a significant portion of its range
  + **Threatened:** Likely to soon be endangered throughout all or a significant portion of its range
  + Species can be listed if they face extinction in a significant portion of their range (new rule defines this dynamic very narrowly)
    - Services will only invoke this where they think impacts in that portion of the range will affect the species as a whole
    - Whether the rule is legal remains to be determined. Inconsistent with the ***Norton*** case
    - They can also be listed at the subspecies level
      * Definition of “species” specifically includes “distinct population segments.”
      * The DPS policy further elaborates this idea by speaking in terms of “discrete” and “significant” populations
* Substantive Requirements
  + Section 7: Imposes both procedural and substantive duties on federal agencies whose actions may jeopardize the protected species or adversely affect their habitat
  + Section 9: Prohibition on takings – Prohibits anyone from engaging in certain actions that might harm threatened or endangered species

**II. Listing & Critical Habitat Designation & Recovery Plan**

A. Overview

* Section 4 of the ESA governs the process for placing a species on the list of endangered or threatened species and designating critical habitat
* It also establishes the requirements for recovery planning
* **Ultimate Goal:** Restore species’ health to a point where ESA protections are no longer necessary for it
* Species listings and critical habitat designations occur either through a government-initiated process or as a result of citizen petition process

B. Listing Species

* Services must base their decisions solely on the “best scientific and commercial data”; May not consider costs or other economic factors
* If best scientific and commercial data shows a species is at risk of extinction or likely to be at risk of extinction in the foreseeable future- must list
* Difference between threatened and endangered status is one of degree: the worse off the species is, the more it warrants endangered status
* The Services determine if a species merits listing based on **five factors**

The present or threatened destruction, modification, or curtailment of its habitat or range;

Overutilization for commercial, recreational, scientific, or educational purposes

Disease or predation;

The inadequacy of existing regulatory mechanisms; or

Other natural or manmade factors affecting its continued existence

Note: seemingly all encompassing; usually a combination of factors

Service must also consider ongoing efforts by other countries, states, and other political subdivisions to protect the species

Must also consider if any state agencies or foreign nations have designated the species as in danger of extinction or likely to be in danger of extinction in the foreseeable future

***Defenders of Wildlife v. Norton*-** Listing throughout all v. significant portion of its range

Standing alone, the phrase “in danger of extinction throughout a significant portion of its range” is puzzling

Agency: Significant means significant as to whole species; Here, species as a whole is ok. Significant portion of range should be defined as impact on species as a whole, not just in a certain area

Defenders: 82% of lizard’s habitat in this case constitutes “a significant portion of its range”

Court doesn’t like either interpretation

Percentage isn’t a defining factor, analysis needs to be more flexible

Service has wide degree of discretion in delineation of “significant portion of range” since term is not defined in statute **(*Chevron*)**

**New Rule:** Portion of range is significant if the species is not currently threatened in the current range ***but without the valuable portion it would be threatened***

Still need to find that the species will be in danger of extinction or likely to become so throughout all of its range

Note: Range means current range, ***not historical range;*** Whatever the starting point is when we do the analysis, that’s the relevant range

C. Species and Distinct Population Segments (DPS)

* Listing decisions apply to “species”
  + Species: “any subspecies of the fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature”
  + Broad definition allows Services to list subpopulations of species as endangered or threatened, even if the species as a whole may not face the same level of risk that would justify listing
    - * Distinct Population Segment Policy
* Overarching Requirements- Population must be
  + ***Discrete*** “in relation to the remainder of the species to which it belongs”
    - Markedly separated form other populations of the same taxon as a consequence of physical, psychological, ecological, or behavioral factors; or
    - “Is delimited by international governmental boundaries within which differences in control or exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant
  + ***Significant*** “to the species to which it belongs”
* ***Homebuilders v. Norton***
  + Upheld FWS’s reliance on second “discreteness factor” when FWS determined cactus ferruginous pigmy owl in AZ was discrete from pygmy owls found in northern Mexico
  + Different population numbers and threats justified conclusion AZ pygmy owls were discrete from Mexican Pygmy owls
  + **Takeaway-** Both physical and policy factors may create discrete populations

D. Critical Habitat Designation

* + - * Whenever the Species play a species on the endangered or threatened species list, they must “to the maximum extent prudent and determinable” designate specific areas as “critical habitat”
      * **Critical Habitat:** Includes both “geographical areas occupied by the species” at the time of the listing and areas outside of currently occupied habitat
        + Services may designate currently occupied areas as critical habitat if they contain “physical or biological features”

Essential to the conservation of the species, and

Which may require special management considerations or protections

* + - * + They may also designate as critical habitat areas outside the currently occupied habitat which are “essential for the conservation of the species”
      * **The critical habitat designation process, unlike the listing decision, requires the Services to consider economics and other impacts of any critical habitat designation**
        + Services must designate CH based on the “best scientific data available” then apply this scientific assessment ***only after*** “taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular areas as critical habitat
        + Services must compare benefits and burdens of CH designations and exclude those where the burdens outweigh the benefits
        + **Exception:** Services must designate an area as CH, notwithstanding concerns about economic or national security, ***if the failure to designate*** “will result in the extinction of the species concerned”
      * **Remember:** Critical habitat is supposed to facilitate recovery, not just help to avoid extinction

Promoting recovery means getting the species to the point it can be de-listed

Designated critical habitat provides notice to the world that there are Endangered Species issues here

* + - * Recovery Plan: a “basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence” Essential Elements:
        + A description of site specific management actions that may be necessary to recover the species;
        + Objective and measurable criteria which, when met, would result in a determination that the species be removed from the list; and
        + Estimates of the time and cost required to carry out those measures needed to recover the species and to achieve intermediate steps towards the goal
      * Delisting
        + Apply same 5 factors analyzed during listing process
        + Judicial Review: Arbitrary and Capricious Standard

**III. ESA Substantive Requirements**

A. Section 7

* Applies only to federal agencies
* Requires all agencies to carry out programs for the conservation of listed species
* Requires federal agencies ensure that their actions do not jeopardize listed species or adversely modify or destroy their critical habitat; (meet this requirement by consulting with the relevant Service)
* Note: Even before consultation, action agency must have conservation programs in place if operating in areas with listed species; discretionary as to what those plans must accomplish – no substantive requirements
* **Scope of Agency Action:** Poses the exact same federalization questions as in NEPA
  + Statute makes clear that any “action authorized, funded, or carried out by” any federal agency triggers the agency’s obligation to avoid jeopardy and adverse modifications
  + ***TVA v. Hill*-** ESA applies even to actions that have begun well before the species’ listing and despite continued appropriations after the listing
    - Congress had appropriated more than 100 million for construction of a dam beginning in 1967
    - Scientists discovered species in 1973
    - FWS listed species in 1975
    - Congress had continued to appropriate dam funding after the species’ listing
    - Court found the ESA prohibited the completion and operation of the dam
  + ***National Association of Homebuilders*-** Limited breadth of ***TVA v. Hill –*** only discrete agency actions trigger ESA consultation
    - * If you have a federal permit requirement, could trigger Section 7 but maybe for only that portion of the project ***unless the whole project is deemed federalized***
      * Consultation Process

1. Ask FWS or NMFS if endangered or threatened species may be present in area of proposed action

* + - * + *If no*- consultation typically ends here
        + ***If yes*-** a Biological assessment must be prepared to determine whether the species is ***“likely to be affected”*** by the action (This may be part of the NEPA documents (EA or EIS))

2**.** Prepare **Biological Assessment (BA)** to determine if species is “likely to be affected” by action

* + - * + Trigger: Needs to be done if a species or critical habitat is in the area and the action would have physical impacts on the environment sufficient to require an EIS under NEPA
        + BA is to assess whether the agency action is likely to affect the listed species
        + Informal Consultation: To determine if “formal consultation is required”

Optional regulatory process that allows the action agency and Services to reach agreement regarding potential impacts of an agency action

Possibly avoid the more arduous process of formal consultation

* + - * + **Possible Outcomes:**

No Affect- Can do informal BA

Not likely to adversely affect (NLAA): Consultation ends if action agency’s BA shows that affects are discountable, insignificant or completely beneficial

Action agency must obtain the consulting Service’s concurrence with this conclusion.

If Service concurs, consultation ends.

Likely to Affect- Consultation required

If BA concludes agency action is likely to adversely affect listed species or critical habitat, or if the Service disagrees with a BA’s NLAA conclusion, Service proceeds with formal consultation

**Note:** Failure to prepare BA in area with listed species not *de minimis* violation

3. Formal Consultation

* + - * + Trigger: If the assessment determines that there will ***likely be an effect***, then there must be formal consultation, which eventually results in a biological opinion determining whether the proposed action would ***jeopardize the species or destroy or adversely modify critical habitat***
        + **The Biological Opinion (BiOp)**

Have profound impacts (***TVA v. Hill*-** SCOTUS enjoined construction and operation of the 100-million-dollar dam based on a BiOp’s conclusion)

***Bennet v. Spear*-** Although BiOps represent the Services’ opinions and do not technically bind the action agencies to take or avoid certain actions, SCOTUS has found BiOps ***constitute final agency actions*** that affect underlying agency behavior and are ***therefore subject to judicial review***

* + - * + Considerations:

How effectively what the relevant service says is binding

Technically law imposes requirement on action agency to make relevant finding and ***action agency gets deference*** in its decision. However, if finding is at variance to that of relevant service, most likely A&C because of varying levels of expertise

* + - * + ***Bennet v. Spear*-** Can sue relevant service because everyone knows what they say is basically binding
        + Substantive Requirement at the end of Section 7

If there is or there will be jeopardy, destruction or adverse modification, the project may not go forward in the absence of mitigation minimizing these adverse consequences

The action agency has an independent duty to comply with these substantive requirements

**Jeopardy Analysis-** Reduce appreciably the likelihood of both the survival and recovery of a listed species

Diminish likelihood of survival, as opposed to threatening species’ recovery

In making analysis, Services “shall use the best scientific and commercial data available”

* + - * **Adverse Modification or Destruction of Habitat**

Forbids any “direct or indirect alteration that appreciably diminishes the value of critical habitat for the ***conservation*** of a listed species”

Agency action would need to diminish the value of critical habitat for both survival and recovery

Made impermissible by ***Gifford Pinchot***

Too little protection to critical habitat

Rule essentially made adverse modification same standard as jeopardy – Statute meant to provide for recovery ***and*** survival of species, must provide for both

Expressly disclaimed that you also need to find impact on survival (which would always result in greater amounts of harm)

Unclear exactly what these standards mean.

***Cascadia Wildlands***- Not even the more rigorous of these tests—that relating the destruction or adverse modification—precludes even some significant habitat modifications in all cases

***Here,*** there were going to be salvage activities relating to approximately 1,600 acres of fire-affected trees

At PI stage, the court found that the plaintiffs had not established a likelihood of success on the merits

**Takeaway-** Even the more protective of those standards is not triggered by fairly significant modifications

Making clear that you can affect habitat, critical habitat, but doesn’t necessarily mean you have destroyed or adversely affected critical habitat

Stress on the term ***impermissibly –*** Clear there is a *de minimis* idea of habitat modification that can be fairly brought, can result in deaths, still relevant service can find no destruction or adverse modification

Idea: To extent there is adverse modification or destruction, it is not ***impermissible*** adverse modification or destruction of habitat

* + - * **Reasonable and Prudent Alternatives**
        + If relevant Service concludes that a proposed agency action will likely jeopardize a listed species or destroyed or adversely modify its critical habitat, BiOp will typically include reasonable and prudent alternatives (RPAs)
        + RPAs act as mitigation that may be taken to perform the proposed action and avoid an ESA violation
        + Courts will defer to the Services’ proposed RPAs, so long as they have a reasonable chance of being implemented and do not involve speculative measures
      * **God Squad (Exemptions)**
        + Application for exemption when a service has rendered a BiOp concluding that the agency action would likely jeopardize a listed species or destroy or adversely modify critical habitat
        + Decide whether action agency and applicant have engaged in required Section 7 assessments and consultations in good faith, reasonable effort made to adopt modifications or alternatives that would not violate ESA, not made irreversible or irretrievable commitment of resources after making initial consultations
        + If yes- Formal adjudicative hearing

B. Section 9- Takings

* Section 9 makes it unlawful for anyone to “take” an endangered species
* Prohibition generally also applies to threatened species pursuant to rules promulgated under Section (4)
  + Applies to all endangered species
  + Threatened Species- Depends whether relevant service has extended take provision to threatened species (FWS: Has extended provision to threatened species; NMFS: has not)
* Take: “to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to engage in any such conduct
  + is very broad and includes any action that would “harm” the species
  + Includes harassment and harm
    - * Harm: Encompasses “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering
        + Upheld in ***Babbit v. Sweet Home*** (SCOTUS, 1995): see below
        + Must be significant impairment of essential behavioral patterns- Not chopping down a single tree
* *Palila v. HI Dept. of Land & Natural Resources (9th Cir., 1981)*
  + “Harm” includes habitat destruction that could result in the extinction of a species, even without a showing of harm to any individual, living member of that species
  + Even no death or injury to actual living birds, can be a take if results in extinction over period of time
  + ***Here,*** sheep destroying trees. If this were to continue, Palila bird will go extinct
  + Justice O’Connor- Doubt whether this is consistent with ***Sweet Home***
  + 9th Circuit still thinks this is good law
* ***Babbit v. Sweet Home*** (SCOTUS, 1995):
  + - * SCOTUS upheld the FWS rule against a facial challenge
      * Harm has meaning independent of word take and other provisions
      * Incidental Take Permit: Hard to imagine agency would allow direct, intentional take of listed species; Indicates it could occur by mistake
      * Although the various opinions in ***Sweet Home*** left the ongoing validity of ***Palila*** in some doubt, 9th Circuit still thinks this is good law
      * **Takeaway-** Habitat modification would constitute a take only where it foreseeably causes actual death or injury to identifiable animals
        + Term harm broadly encompasses direct injury or death to endangered animals and indirect actions including the destruction of a species’ habitat and breeding grounds
        + Ambiguity, Sec. of Interior’s definition is permissible under ***Chevron***
        + Interpretation is consistent with Congress’ expansive efforts to protect endangered and threatened species

C. Section 10

* Designed to mitigate the broad scope and potentially harsh consequences of the take prohibition
* **Exemptions**
  + - * Parties may obtain permits for scientific research
      * **Incidental Take Permit:** For purely private projects, landowners can apply for permits authorizing takes incidental to otherwise legal activity, such as housing construction, logging, etc. that may substantially affect species’ habitat
        + Must prepare a conservation plan identifying impact to the species
        + Steps the applicant will take to minimize and mitigate the impact
        + Any alternatives to the proposed action
        + Any other measures identified by Services
        + Service: May approve so long as it is truly incidental and will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild”
        + Permit Shield: If granted and Service later decides there could be jeopardy, still protected

**REGULATORY TAKINGS**

* + Takings issues primarily arise in the CWA § 404 context and the ESA context
  + Involve taking of “property”
  + Constitutional Takings:When- in the words of Justice Holmes- does regulation go too far? **(*Pennsylvania Coal*)**

A. Framework for most regulatory Taking Scenarios

* Is the Claim Ripe?
  + ***Palazzolo*-** Court needs to know ***what is approvable***
    - * + State conceded that permit applicant would never get a permit
        + Plaintiff had 20 acres, most of it in tidal marsh. Repeatedly tried to develop it, and had his permit applications denied. State court erred in ruling it wasn’t ripe
        + Regulations being in place prior to ownership is not a bar (is relevant in the ***Penn Central*** analysis- Investment Backed Expectations)
        + **Key Question:** Do we know enough about what ***would be allowed***, not just what the regulators have said no to
        + SCOTUS is willing to fudge things. Gives concessions made by State at Oral argument, pretty clear nothing was going to be allowed here
        + **Takeaway-** Unless you know what ***can be allowed***, no idea if there is a wipe-out or how much economic use has been eliminated
  + What is the Appropriate Denominator?
    - What is the ownership interest that we consider when we determine the extent to which those interests have been diminished by the regulatory action?
    - ***Penn Central*-** Consider parcel as a whole
      * + Also re-affirmed in ***Lucas***
        + Note: Scalia, in FN 7 of ***Lucas***, said parcel-as-a-whole is something SCOTUS should re-examine, just not in ***Lucas***
    - ***Palazzolo-***
      * + P argued total wipeout on the severed portions, but never briefed it
        + SCOTUS did rule on denominator
      * ***Tahoe-Sierra***
        + Applied “parcel as a whole” framework in the temporal context
        + Parcel as a whole includes all relevant interests including time

Time is a factor that should be considered (temporally)

SCOTUS said they will not look at just brief periods (temporary periods) of restriction if someone has fee simple title

Value will come back as soon as moratorium is lifted.

* + - * + **Takeaway-** Not just meets and bounds, time as well
* ***Murr***- Established 3-factor test to apply in multi-lot situations
  + How the relevant lots are bounded or divided under state law,
  + The physical characteristics of the land, including location
  + The extent to which the unrestricted parcel’s value may be affected by restrictions on the burdened land
* Is there a wipe-out?
  + Has the regulation deprived the landowner of all economically beneficial uses of its land?
  + ***Palazzolo-*** suggests that if you are left with any non-token value, there has not been a wipe-out
  + ***Tahoe-Sierra***: moratoria do not qualify as wipeouts even if they temporarily preclude all economically beneficial uses of land
  + If there has been a wipe-out:
    - * + ***Lucas*** says there is a taking ***unless*** the regulation proscribes the maintenance of a nuisance
        + If wipeout, then compensation ***unless*** not part of the property right in the first place (nuisance)
        + Case-by-case determination
        + Can the absence of investment-backed expectations play a role here?
      * If there is not a wipeout, *Palazzolo, Tahoe-Sierra,* and *Murr* all indicate that the *Penn Central* balancing test applies:

The character of the governmental action;

The economic impact on the claimant; and

The interference with investment backed expectations

* + - * + **Note *Palazzolo***

***Palazzolo*** makes clear that the absence of investment backed expectations is not preclusive of a taking ever being found

However, Justice Kennedy did not make clear whether or how this factor should be taken into account under the ***Penn Central*** balancing test

Justices O’Connor and Scalia expressly disagreed with each other on this point

In ***Murr***, however, Justice Kennedy’s majority opinion clearly deemed it relevant in finding that there was no taking under the ***Penn Central*** test in that case