I. PERSPECTIVES ON THE PROBLEM OF POLLUTION

	Economic Perspective	**Non-Economic Perspective**
Normative Goal	Maximizing social welfare	Improved quality of life.
Positive/Descriptive	Pollution is result of externalization of costs.	Human centered v. nature-centered perspective
Attitudinal	Pollution is not a result of anti-social behavior; rather it is rational response to self-interest.	Pollution is the result of man's willful ignorance.
Regulatory Approach	Cost-Benefit Analysis	No Risk
Role of Government	Allocate initial entitlements (Coase)	
Theories	Hardin, Coase	Sagoff, Taylor

Theories:

1. Tragedy of Commons, Garret Hardin
    a. Prohibitive transaction prevent private agreement
    b. Free rider problem
    c. Consider excludable v. non-excludable resources. Public goods tend to be non-excludable and non-rivalrous. Natural resources are often non-rivalrous to a point.
    d. Potential solutions: privatization, taxes, unitization
2. Coases' Theorem
    a. Pollution is a reciprocal problem: balance harm of pollution with harm of enjoining pollution
    b. When transaction costs are sufficiently low:
        i. Invariance claim: regardless of initial distribution of entitlements, outcome will be the same
        ii. Efficiency claim: outcome will be socially optimal
    c. Role for government is to reduce transaction costs and set initial distribution of entitlements. Coase objects to regulation and Pigouvian taxes which move outcome away from optimal result.
3. Sagoff:
    a. Adopts a non-economic human-centered perspective.
    b. Objects to economic regulations, which are industry specific, and supports social regulations that are issue specific and aimed at social values. But RR is skeptical about the difference.
    c. Envi law is about achieving better quality of life.
4. Taylor
    a. Nature-centered perspective → attach intrinsic value to plants/animals/etc.
    b. This is most closely paralleled in the concept of existence value, but even that is still fundamentally human-centered.

II. RISK ASSESSMENT STRATEGIES

- **Definition:** Risk assessment is a tool for determining the extent of the hazard (contrast to risk management, which is aimed at how to deal with a hazard—addressing questions of extent to which risk should be controlled).
- **Best Practices in modeling risk:**
  - Theoretically this should be done in outside of a political framework, but, in practice, science isn't good enough to make this happen because assumptions are required at every step in scientific assessment.
  - Ruckelshaus's solution is to have expert-wide decisions made about what assumptions will be → better than having them made inconsistently by individual experts. Exceptions would be acceptable when evidence supports using a different model.
  - Rosenthal argues that generic policies lead to outcomes that are inconsistent with science, because circumstances vary so much.
- **Lay perceptions of risk:**
  - Breyer notes that much regulation is written to address risks perceived by lay people rather by experts. Empirical studies show a dramatic difference between these two things. Breyer thinks regulation should address real risk, but if regulation is meant to improve quality of life, lay perceptions of social welfare are important.
  - Risk communication is ineffective.
  - Expert vs. Layperson: Slovic et al list sources of divergence

Perceived risky	Perceived less risky
Involuntary	Voluntary
Immediate effect	Latent effect
Unknown risk	Known
No control over risk	Some control
Novel	Old hat
Large-scale	Small numbers effected
Dread	Conventional
Severe consequences	Generic consequences

- **Scientific Issues:**
  - Types of dose response cures: threshold v. non-threshold pollutants
  - Shape of dose response curves: linear, concave, convex, etc.
  - Assumption with carcinogens is linear, non-threshold.
  - Margins of safety.
  - Available information: studies tend to be based on toxicology rather than epidemiology because controlled studies are difficult to find.
  - Latency problems.
- **The legal realities:**
  - *Benzene* requires that decisions be made based on a showing of significance of risk.
  - Public Citizen v. Tyson requires shows that once agency pleads significant risk and offers some evidence, courts will defer to expertise.

III. RISK MANAGEMENT

1. Frameworks for Responding to Risk

Framework	Advantages	Disadvantages	Where it is used
Market Regulation	In a perfect market, cost would reflect all costs and benefits. See Coase.	Imperfect information, unbalanced bargaining power. Unequal choices.	Risk premiums in wages.
No Risk	No need for detailed information. Rhetorical appeal.	High cost (diminishing marginal returns). Inflexible.	NAAQS → generally transformed into negligible risk (see Breyer concurrence in *American Trucking*).
Technology-Based	Easy to enforce. Don't require too much information about risk.	There is always better technology. Doesn't incentivize further innovation.	Command-and-control.
Risk-Risk Direct	Allows minimizing net risk. Gives no info about costs but can inform c/b a.	Limited applicability (requires direct benefits) – food additives example (nitrates are carcinogenic but prevent botulism). Requires quantification of benefits. Doesn't generally take into account positive ancillary results, but it should.	Plays role in c/b a.
Risk-Risk Indirect	Takes into account a broad range of risks/benefits along the production stream. Raises distributional issues (impact on worker v. impact on consumer).	Requires quantification of benefits. Raises issues of risk but doesn't provide a framework for addressing them.	Plays role in c/b a.
Risk-Benefit	Maximizes net benefits by looking at risks and benefits of regulating (cost v. number of lives saved). No need to quantify benefits.	Doesn't tell you how much it is worth spending to save an additional life.	Plays role in c/b a.
Cost-Effectiveness	Very useful for allocating money among several programs that are designed to achieve the same goal.	Considers only the costs of the agency. Tells how to achieve a goal, but not what the goal should be.	Only theoretical.
Regulatory Budget	Forces program prioritization.	Doesn't tell you what the budget should be.	Only theoretical.
Benefit-Cost	Quantifies all costs and benefits of a regulation.	Difficulty of quantifying a lot of values. Discount rates.	Mandated by executive order 12,866 except when forbidden by statute.

2. Judicial Responses to Implementation of Frameworks

- Compare *EDF v. EPA* (in which agency conducts a thorough assessment of whether or not benefits of continued limited use of heptachlor outweighed benefits posed, but remanded for further consideration of impact of use of existing stocks).
- With *Corrosion Proof Fittings v. EPA* (in which court took a hard look at EPA's c/b a, and determined that EPA could not discount costs but not benefits, that unquantified benefits cannot be trump card, that EPA failed to address the substitution problem (possible risks of substitutes), and that EPA did not maximize net benefits).
- *EDF v. EPA* is more typical judicial approach to c/b a → it will defer to agency unless there are glaring problems with the analysis such as

- Failure to consider a pertinent alternative (although there is no burden to consider all alternatives).
- Failure to consider health impacts of substitutes.
- Failure to apply consistent methodology with discounting.

3. Some c/b a challenges

- Valuation
  - Use value → determined through market rates.
  - Existence value → determined through contingent valuation studies.
    - Results vary dramatically depending on methodology.
    - Compare what people will pay to get something v. what they will pay to keep something.
- Discount Rates
  - Discounting is tied to valuation of human life, but revealed preference studies are
    - based only on instantaneous deaths and don't account for deaths with latency periods. (tracking problems with causation, mobility, etc).
    - Based on assumption of national job market.
    - Based on assumption that workers understand risk
  - With latent harm to individual consider:
    - Fear/dread
    - Level of pain
    - Costs to society (of instantaneous death v. drawn out illness)
    - Life years at stake
  - Harm to future generations:
    - Distributional question (consider 2 person world hypothetical).

IV. Environmental Justice: Risk Distribution

- Economic perspective focuses on maximizing net benefits, but it does not address how those benefits are divided up. Ideally, this division would be addressed through taxation not through regulation.
- Goals of environmental justice:
  - Improve how environmental risks are parceled among communities.
  - Ensure that parceling out is done openly and with input.
- Siting Issues:
  - Economic perspective: Where is siting least expensive?
    - Land values
    - Access to transportation networks
    - Low political resistance.
  - Political perspective: Where is siting socially optimal?
    - Consider economic costs
    - Consider existing undesirable uses
    - Consider potential for containment and impact minimization
    - Consider how to balance out for powerlessness.
  - Options:
    - Veto chip system

        - Homogenous risk distribution
        - Counterbalance with desirable uses
    - Causation:
        - Do LULUs go to low-income neighborhoods or do LULUs create low-income neighborhoods? Probably the latter.
    - Legal Options (equal protection, Title VI, administrative complaint) are largely ineffective: state actor problem, intent problem, no private right of action).

V. REGULATORY TOOLS

Approach		Advantages	Disadvantages	Uses
Command-and-Control	Design/equipment standards	Easy to enforce. Useful when performance cannot be measured.	Inflexible, but industry is not uniform. Inefficient. Old Plant Effect.	Both are set to extent industry can bear cost, without bankruptcy →will be most stringent in thriving industries with few substitutes and international competition.
	Emission Effluent std	Can incentivize improvement (finding cheaper ways such as changing inputs)	No incentivize to make further improvements. Old plant effect.	Most common form.
Marketable Permits		Incentivizes innovation. Minimizes cost. Reduces litigation incentive. Helps prioritize. Reduces need for bureaucracy. Can set cap.	Hot spot problem (if harm curve is convex). See *Clean Air Market Groups*. Challenge in allocation of permits (grandfathering has become default b/c of political pressure). Morality of permitting pollution. Need a sufficiently thick market. Property rights problem.	SO2, water quality trading schemes.
Taxes		Can set cost. Don't need a market. Source of revenue.	Can't set cap. Americans hate taxes. Requires reset in case of inflation.	Offsets under nonattainment?
Deposit/Refund Systems		Incentivizes proper disposal where act is inconspicuous and each act has little impact and incorrect disposal has serious impacts.	Concern about creating an affordability problem.	Bottles. Should be used for batteries.
Ex Post Liability Schemes		Incentivizes due care. Useful where actors have information advantages.	Costs of litigation. Latency issues. Causation issues. Collective action problems. Solvency.	CERCLA. Common law negligence.
Informational Approaches		Use where informational	People don't always	NEPA

	approaches in cases where consumer behavior is a substantial cause of risk and where changing behavior is very expensive. Correct information asymmetries. Preserves free will. People have different levels of risk aversion.	listen. Information cannot always be transmitted successfully.	

VI. FEDERALISM

1. Limits on Federal Power

- **Commerce Clause**
  - Impact of interstate commerce must not be too indirect, see *Nat'l Assoc. of Homebuilder v. Babbitt*, holding that even though the protected species was only in CA, protecting species is essential to biodiversity, which is a critical interstate commerce issue.
  - This is not a substantive constraint on environmental regulation.
- **10th Amendment**
  - Powers not delegated to the federal government are reserved for the states or the people.
  - See *New York v. United States*, addressing the ways in which the federal government can induce state government action.
    - Monetary incentives are constitutional through spending power.
    - Access incentives are constitutional through the commerce clause.
    - Take Title provision unconstitutional because it requires state to adopt a type of regulation.
  - Federal government cannot tell states how to regulate → states must have a choice (consider SIPs/FIPs dynamics) → underlying issue of democratic accountability.
- **11th Amendment**
  - State immunity from suit and limit on congressional ability to abrogate this immunity.
  - Limits potential for authorization of a citizen suit provision.
  - Language says immunity from suit of "citizens from another state," but Supreme Court has interpreted this to include citizens of that state in state courts as well as federal courts.
  - Methods to sue state:
    - Under §2 of the 14th amendment, to enforce §1 of the 14th amendment.
    - Can get injunctive relief by suing state official in official capacity, see *Ex Parte Young*.
    - Can get damages by suing officials in personal capacity, but this option is limited by indemnifaction agreements.
  - 11th amendment does not limit ability of federal government to sue states.

2. Limits on State Power

- **Supremacy Clause**

- Congress has the power to preempt state law in any area in which it has the power to act.
    - Express, implied, and field preemption.
    - Creates problems for states wanting more stringent regulation, see mobile sources provisions of the CAA, pesticide regulation under FIFRA.
- **Dormant Commerce Clause**
    - States cannot take any action interfering with interstate commerce.
    - Creates issues around waste disposal → states cannot be protectionist on giving access to out of state waste to instate landfills.
    - See cases on interstate pollution: *Alliance for Clean Coal v. Miller* and *Clean Air Markets Group v. Pataki*.

3. State v. Federal Regulation

Pro State	Pro Federal
Local geography has implications for stringency requirements → states are in a better position to tailor regulations to local conditions.	Race-to-the-bottom suggests that states will compete for mobile industry by reducing stringency of environmental regulations → RR doesn't think so.
Laboratories of democracy → easier for states to experiment with different types of programs.	Public choice → states will undervalue benefits of environmental protection and undervalue costs.
States can tailor to local preferences → willingness to pay for cleaner environment (see regional distinctions in environmental voting records).	Interstate externalities → states have incentives to allow pollution that is felt in other states (they can derive benefit without paying costs). See smokestack growth under CAA. RR thinks this is the best argument.
Different regions have different costs of environmental protection → changing formula for setting socially optimal levels.	Interjurisdictional existence values – mirror image of interstate externality. States might undervalue its own resources relative to their value to noncitizens.
Different benefits of pollution reduction related regional characteristics such as population density.	Efficiency/economies-of-scale – regulations require substantial work/expertise cost → it is inefficient to reproduce this process fifty times. This justifies federal research, but not necessarily federal regulation.
	Production economies-of-scale – burdensome on industry to comply with multiple stds (although in reality, industry will just build to most stringent std, cars and CA)
Conclusions: Federalism allows for both: Rights → federal minimum Preferences → state extension beyond	Minimum fed. Stds might protect against environmental injustice → allow underrepresented groups to form nat'l coalition. But aggregating at nat'l level is

minimum.	ultimately harder. And industry starts organized!
	Quasi-rights-based argument: as citizens we are entitled to a baseline level of environmental protection. This depends on taking an aggregate perspective on overall quality of life.

VII. PUBLIC CHOICE

VII. CAA

1. Regulation Flow Chart

		Ambient Stds (levels not sources specific)	Emission Standards (source specific emissions limits)
1970	NAAQS (CO, NOx, PM10, PM 2.5, O3, SOx, PB (see *NRDC v. Train*)	1. Fed. listing under 108, on finding of "reasonably anticipate to endanger human health or welfare." 2. Fed. Sets primary and secondary stds under 109	3. States set limits for existing sources under 110 (SIPs) 4. Fed. sets limits for existing sources where states fail to do so (FIPs) 5. Fed sets limits for new sources under 111 (NSPS)
1977	Non-attainment	6. Fed/states mandate RFP under 171(1)	7. fed/states permit new major stationary sources using LAER std under 171(3) 8. Mandate RACT for existing sources under 172(c)(1)
	PSD	9. At requests for permitting, fed sets baseline under 169(4) and increments under 162-64.	10. Permitting for new MEFs under 169(1)-(4).
	Interstate Pollution	110(a)(2)(D), 126(f)	110(a)(2)(D), 126(f)

2. On Setting NAAQS

- No Risk approach → "requisite to protect public health…with adequate margin of safety."
  - This could have been interpreted differently to mean aggregate public health → focus on average person rather than sensitive person.
  - See *American Trucking*, determining that NAAQS cannot be set on basis of cost, and establishing a silence as prohibition default rule.
  - See *Lead Industries*, holding that adequate margin of safety is not an opening for considering costs.
- What is the critically sensitive population → protect everyone.
- What is the pivotal adverse effect → protect against all effects.
- Level at which adverse effect occurs.

3. On Implementing NAAQS

a. Existing Sources: SIPs

- Implementation vis-à-vis existing sources was allocated to the states because they are the best position to divvy up the costs of implementation; they can use SIPs as a tool for implementing industrial policy. See *Union Electric*, establishing that NAAQS are a federal floor, and states are free to implement them more stringently it they choose.
- Because states can allocate however they see fit, many existing sources are not regulated at all → grandfathering.
- Federal Enforcement of SIPs:
  - EPA approval of SIPs: EPA considers SIPs in light of 110 factors
    - Must disapprove if they are insufficient to meet NAAQS
    - See 110(a)(2) for the SIP criteria
  - FIPs bring the NAAQS system into compliance with the 10th Amendment. See *Coalition for Clear Air v. EPA*, holding that FIPs do not preempt

future state action, and affirming that FIPs are an affirmative requirement (established in earlier suit related to same issue).
    - SIP Calls: 110(k)(5): whenever EPA thinks existing SIPs are insufficient to meet NAAQS or any other 110 requirement it may issue a SIP Call
- Exception to state control: RACT (172(c)(1)) → EPA permitting std for existing sources in non-attainment areas

b. New Sources:

- **NSPS** Three requirements for individual new sources, come from 111(a)(1):
    - Best system of continuous emission reduction
    - Taking into account cost → feasibility is all that is required, see *Portland Cement*, holding that EPA need not conduct c/b a, but that it must consider any assessment submitted by the industry.
    - Adequately demonstrated → if EPA uses a few test plants it must demonstrate their representativeness, see *National Lime*. See also *Portland Cement*, requiring that EPA match its data to its argument.
    - EPA may balance these factors as it likes and courts will give it substantial deference (A&C review), see *New York v. Reilly*.
- When does NSPS apply? Other types of new source review:
    - **PSD**: BACT 171(3)
    - **Nonattainment**: LAER, Offsets & reasonable further progress required. 169
- What is a new/modified source? 111(a)(4)
    - "The term modification means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."
        - "Any physical change"
            - Exempts routine maintenance. (1980 Rule)
            - Case-by-case determination based on cost, nature, extent, purpose, and frequency. See *WEPCO v. Reilly*, holding that a like-kind replacement of substantial parts of plant to extend life did not constitute routine maintenance.
            - After *WEPCO*, EPA adopted a 20% bright line rule, which was overturned in *NY v. EPA*. (2006), but EPA continues to use 20% rule as one of its factors in case-by-case analysis for decisions of whether to bring enforcement actions.
        - "Increase in the emissions of a pollutant"
            - **10 yr. look-back:** In 2002, EPA changed method for determining baseline from average two previous years, to averaging any two previous years from previous ten years. Upheld in *NY v. EPA*. (2005)
            - NSPS and PSD have same statutory definition of modification (the latter is defined by cross-reference to the former), but EPA has interpreted them differently: upheld in *Envi. Defense v. Duke Energy* (rebuttable presumption of paralleism)

- NSPS: increase defined with regard change in hourly rate.
- PSD: increase defined with regard to change in total annual emissions.

c. Attainment Areas: PSD

- PSD was a judicially created doctrine based on a limited reading of the legislative history and on the preamble, see *Sierra Club v. Ruckelhaus*.
- 1977 amendments at a nondegradation to SIP requirements: 110(a)(2)(D)(ii)(II).
- Procedure for setting PSD:
  - Area classification: (redesignation is entirely procedural)
    - Class I: Pristine areas 162(a)
    - Class II: Attainment areas 162(b)
    - Class III: No one has redesignated to Class III, perhaps because Class II essentially lets you reach NAAQS.
  - First application for permit by MEF triggers std setting
    - baseline 169(4) This procedure means that significant degradation can occur before a **baseline** is set and puts burden on applicant to measure baseline. → incentive to build below MEF threshold (see 165(a)(1) and 169(1))
    - **Increment** 163: vary by class but cannot lead to total that would exceed NAAQS
  - **Permitting Requirements for new sources**:
    - BACT: 165(a)(4) and 169(3) → case-by-case determination of best technology. Cannot be less stringent than NSPS.
    - EPA uses a top-down approach: sets most stringent and reduces as plant shows infeasibility → see *ADEC v. EPA* demonstrating EPA holding state permitting agencies to this approach.
    - States typically have oversight (delegated by EPA) but with strings attached.
    - Compare to language for 111(a)(1) which emphasizes achievability over cost.

d. Nonattainment Areas

- Procedure:
  - Classifications: 172(a)
    - Marginal, moderate, serious, severe, extreme
    - Classification triggers particular deadlines and stringency requirements.
    - Final deadlines are now 2010, but will not be achieved, so will likely be extended again.
    - EPA cannot grant extensions to without reclassification: In *Sierra Club v. EPA*, EPA did so on the basis that nonattainment was caused by interstate transport, but statute doesn't allow for this type of action.
  - **Permitting of new sources**: 172(c)(5)
    - For construction or operation of new or modified **major stationary sources** (302(j)) anywhere in nonattainment areas.

        - Modified- see 171(4): "any physical change in, or change in the method of operation of, a stationary source which increases the amount of air pollution."
        - Conditions:
            - Offsets: if you won another source, you can reduce emissions or you could pay someone else to reduce emissions → funny incentive for firms about to shut down to hold out until their emissions are purchased from a new firm.
                - Reduction sufficient to cover your emissions + reasonable further progress
                - *CARE v. EPA*, accepting as a sufficient offset a decision to change from one type of pavement to another (a decision which was being done anyway) But this decision contravenes the goal of RFP.
            - LAER: 171(3): lowest of that which is contained in any SIP or achieved in practice (in comparison to BACT, focuses more on what is actually happening than what is feasible) → less tech-forcing
    - **Requirements for existing sources:**
        - RACT: 172(c)
    - Bubbles: *Chevron* court found that reduction within the facility was sufficient → no permit required (case turned on definition of modification – requiring net increase in emissions – and definition of plant –broadly defined)
        - As compared to offsets:
            - No net reduction in emissions
            - Potentially lower transaction costs
            - Allows for old plants to keep from becoming modified (enhancing old plant effect)
            - No LAER required

e. Interstate Air Pollution

- Requirements
    - 110(a)(2)(D): prohibits "contribut[ing] significantly" to nonattainment of NAAQS, maintenance of NAAQS, or PSD
        - Substantiality requirement is intended to prevent enforcement against de minimus contributions from another state: don't want to "hold one state hostage to another's failure to enact the pollution control strategies necessary to conform with the requirements of the CAA." *Air Pollution Control District of Jefferson County*
        - If area is in nonattainment, it cannot bring action against another state for interfering with PSD.
        - **Cost considerations:** EPA may consider costs in determining significance. Not allowing them to do so would result in requiring total risk elimination (b/c SIP call dealt with ozone, a non-threshold pollutant) – EPA determined cutoff for significance by

looking at level achievable with most cost-effective controls. *Michigan v. EPA* (note contradiction to American Trucking; in this case court relies on statutory silence to give permission to consider costs).
    - For SIP revision purposes – EPA or permitting agency looks only at the revision or permit, not at aggregate emissions after new addition. *NY v. EPA* (1983)
- Acid Deposition and enforcement under the sulfur dioxide trading scheme:
    - CAA favors western coal: *Alliance for Clean Coal*:
        - CAA 1990 revisions eliminated scrubber requirements and thus favored western coal → Illinois passed a law clearly favoring Illinois coal. Court struck it down under the dormant commerce clause.
    - CAA creates a national market for sulfur dioxide, but this doesn't address deposition problem in NY State: *Clean Air Markets Group v. Pataki*:
        - NY passed a law disincentivizing sale of permits out of the state (taxing sales to upwind states): Law struck down under the supremacy clause (conflict preemption with CAA provisions creating a national market).
        - Raises issue of hotspots → why create a national market for a pollutant with hot spot problems.
- Enforcement mechanisms
    - Challenge SIP of another state
        - Statute of limitations: Must sue w/in sixty days (see 307(b)) → cannot bring up challenge to SIP as a defense in an enforcement action. See *Duke Energy*.
        - Appeals go to DC Circ (rule designed to prevent circuit splits).
    - 126 petitions:
        - State or political subdivision may petition EPA to find a violation under 110(a)(2)(D)(ii) (ii was a scrivener's error, should be i, see *Appalachian Power*)
            - *Air Pollution Control District of Jefferson County* addresses the substantiality requirement and finds that a district cannot petition based on PSD if that district is in non-attainment
        - Within sixty days of petition, EPA has a public hearing and makes a finding.
            - EPA has no discretion in granting relief if it finds a significant impact. *Appalachian Power*.
        - In case of finding of no impact, state can appeal to court of appeals of local circuit.
        - Violators must come into compliance "as expeditiously as practicable" within three years.
            - *Appalachian Power* dealt with same violations as SIP calls in *Michigan* → EPA automatically made findings against states on basis that they had not yet submitted SIPs

addressing these problems, thus, deadline was initially tied to the SIP call deadline, but when that was extended by court order, EPA did not change 126 compliance deadline. Court approves action:
    - Federalism issues: is 126 compliance order EPA direction control over individual sources?
        - Direct action is justified by serious failure of state action.
    - Statute prohibited extension: clear three year deadline, EPA has little discretion in granting relief.
- SIP Call: 110(k)(5)
    - Admin may issue a SIP call when he finds that SIP for an area is substantially inadequate to meet NAAQS or otherwise to comply with any requirement of this chapter (including interstate pollution provisions)

f. Mobile Sources

- Regulations
    - 202(a)(1): Admin shall prescribe stds for categories and classes of new motor vehicles and new motor vehicle engines which in his judgment cause or contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare."
    - Extensions: statute allows for one year delay
        - EPA must balances economic cost of unmeetable stds w/ environmental costs of not enforcing meetable stds. In *International Harvester*, EPA denied waiver, but court granted it, putting burden on EPA to show meetability (whereas EPA had put burden on applicant to show unmeetability.
- Preemption: 209
    - (a): Preempts state regulation "relating to control of emissions."
        - Scope of preemption extends to regulation of purchasing: *Engine Manufacturer's Association v. SCAQMD*, finding that CA fllet rules on public and private fleets violated preemption.
            - CA could apply for waiver, OR
            - CA could apply rules only to public fleets, in which case they would fall into state as market participant exception.
    - Waivers: (b) → **No waiver if** allows waiver to California if (note: finding any factor is sufficient to bar waiver)
            - (A) Determination of state is arbitrary and capricious
            - (B) state does not need such state std to meet "compelling and extraordinary conditions"
            - (C) such state standards and accompanying enforcement procedures are not consistent with 202(a)
        - EPA has granted every waiver request except the recent request to regulate GHGs.
        - Scope of waiver = scope of preemption, applying equally to 202, 206, and 207: *Motor & Equipment Manufacturer's Assoc.* (CA

wanted to limit maintenance requirements in warranty, governed by 207).
    - Piggyback provision: 177
        - (1) such stds are identical to CA std for which waiver has been granted
        - (2) CA and state adopt stds at least two yrs before commencement of model yr to which they will apply
- Regulating GHGs under 202: *Mass v. EPA*
    - GHGs are air pollutants (302(g)) → admin can only deny petition to regulate if he makes finding that there is no threat to public health under 202(a)(1)

VIII. CWA

1. Comparison to CAA

- Federalism
  - **EPA sets effluent limitations: NPDES 402** (in the statute it is unclear if this responsibility is allocated to states or federal agencies, but *Du Pont* court settles in favor of EPA). (Contrast to state SIPs in CAA)
  - **State Set: Water Quality Standards** (Contrast to NAAQS in CAA)
    - **Designate use:** 303(c)(2)(A)
      - Designate Minimum attainable use
      - 131.10 → designation of uses
      - Rebuttable presumption of fishable/swimmable (*Idaho Mining*)
        - To designate below fishable/swimmable → Use Attainability Analysis: meet any of the criteria of 131.10(g)
      - Attainability:
        - 101(a)(2) require mtg nat'l f/s stds by 1983, but 101 also says that this is only necessary wherever attainable → 131.10(d): "at a minimum uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections (b) best management practices for nonpoint source control."
      - Antidegradation policy:
        - 303(d)(4)(B): statutory reinforcement of regulatory antidegradation policy
        - 131.10(i): where presently designated use is less than what is currently being attained, it must be revise to reflect use that is being attained.
        - 131.12: Tier System
          - (a)(1): protect existing use → could never degrade below f/s if you start out at or above it
          - (a)(2): if existing use is above f/s cannot degrade unless necessary for social/economic dev.
          - (a)(3): high quality (nat'l parks, etc)
        - *Ohio Valley*, Approaches to classification:
          - Pollutant-by-pollutant v. water-body-by-water-body: either approach is acceptable to so long as the choice is justified.
    - **Criteria**: translate WQS into a minimum std
      - 131.11(b)(1): numerical stds
      - 131.11(b)(2): narrative stds
    - Submit to EPA: 303(a)(3)(A)

        - EPA can reject plans if they are inconsistent with the ACT 303(a)(3)(C)
    - **Non-attainment: TMDLs:** 303(d)(1)
        - (A): Identify waters for which "effluent limitations required by 301(b)(1)(A)-(B) of this title are not stringent enough to implement any water quality standard" → list and prioritize
        - (C): Defined TMDL
            - Time frame must be **daily** as opposed to seasonally or yearly, *see Friends of the Earth v. EPA*
        - *Pronsolino v. Nastri* -- extends TMDLs to encompass nonpoint as well as point sources. TMDL could still be triggered even if all the sources on a body of water were nonpoint.
        - Margin of safety – substantial deference to agencies to set margin of safety, which is required b/c of lack of sufficient information – *NRDC v. Muszynski*
        - 303(d)(2): If state does not submit TMDL plan, then EPA can create one based on the constructive submission doctrine from *San Francisco Bay Keeper* → triggers nondiscretionary duty (didn't apply in this case b/c CA has submitted a plan, albeit, 15 yrs late)
- Grandfathering
    - CWA: applies to all existing sources with industry bankruptcy limitations (federally set). Although 301(c) variances offer limited grandfathering.
    - CAA: only regulation of existing sources is through SIPs (except RACT in nonattainment areas and FIPs)
- Both deal poorly with interstate externalities: CWA detectable impact v. CAA significant contribute. On paper CWA standard is more stringent, but in practice it is difficult to identify.

2. Control of Point Sources

- NPDES: 402: Gives admin power to permit water polluters → no discharge without permit!
- **BPT:** 301(b)(1)(A) Requires implementation of best practicable control technology by 1977.
    - Statute says set with reference to sources, but EPA sets with reference to categories and classes to avoid cost of case-by-case determination (see *Du Pont,* allowing setting by source b/c EPA allows variances)
    - Factors: 301(b)(1)(B) No c/b a required, see *Weyerhauser* (petitioners wanted incremental balancing test, and comparison to consideration factors): Factors 304(B)(1)
        - Comparison factors: cost of reduction v. environmental benefits → limited balancing test, no overall c/b a required.
        - Consideration factors: age of equipment, process, engineering aspects of application of control techniques, process changes, non-water quality environmental impacts, anything else
    - This scheme is essentially moot, since the deadline passed.

- **BAT:** 301(b)(2)(A) Requires implementation of best available technology by 1987 (extended from 1984).
  - Set with reference to categories and classes.
  - Factors: same as BPT, but all are consideration factors (no bankruptcy) 304(b)(2)(B)
  - **Achievability:** See *Kennecott*
    - Technical nature of inquiry → deference
    - Zone of reasonableness for data selection/methods
    - Criteria for transfer of technology from another industry: (see *Kennecott*).
      - Availability in other industry
      - Transferability of technology
      - Reasonable prediction of effectiveness in new industry
- **New Sources: 306**
  - 306(b)(1)(B): Admin must promulgate stds for categories and classes of new sources.
  - 306(a)(1): standard of performance: "greatest degree of emission reduction which the Admin determines to be achievable through application of the **best available demonstrated control technology**, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants."
    - *CPC International*, allowing tech transfer, but remanding for unclear data.
  - Factors: No c/b a required (avoid industry shutdown → *CPC*)
    - Cost of achieving 306(b)(1)(B)
    - Any non-water quality and environmental impact and energy requirements
  - 306(e): Illegal to operate in violation of applicable stds → no variances (see *Du Pont*)
- **Variances**
  - 301(c) variances: Modify if "such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."
    - Factors:
      - Economic capability – your costs may be no different from any one else's but you may have lower profits.
      - Must still achieve reasonable further progress.
    - When to use:
      - Statutorily mandated for BAT
      - Barred for new sources (see *Du Pont*)
      - Barred for BPT (see *EPA v. Nat'l Crushed Stone*) -- requires reference to past technology and none exists for BPT
      - Cannot be used for toxic pollutants (301(l))
  - 301(g) variances:

        - Factors:
            - Based on water quality, if you could pollute above std w/out impairing the "fishable" "swimmable" std.
        - When to use:
            - Cannot be used for toxic pollutants (301(l))
            - Not for new sources.
    - FDF variances: 301(n) Fundamentally Different Factors (created by regulation, but added to statute in 1980s)
        - Factors: 301(n)
            - (A): fundamentally different with respect to factors (other than cost) refers to 304(b) and (g):
                - 304(b): Effluent limitation guidelines: cost of application technology, age of equipment, process, etc
            - (B)(i): is based solely on information and supporting data submitted to the Admin during the rulemaking
            - (C): new requirement is no less stringent than justified by the fundamental difference
        - When to use:
            - Can still apply to toxic pollutants (See *Chem. Mnfctr v. NRDC*) → see 301(l)
        - Codification following Chem. Mnfctrs makes it more difficult to get a FDF variance. Concern about the incentive the holding made to hang back to rely on FDF rather than go through the hassle of 307 rule change is mitigated by 301(n)(B)(i). Concern about case-by-case basis of FDF (you don't know if others are in the same position).

3. Distinguishing b/w point and nonpoint sources:

- Point Source: 502(14): "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, cafo, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows irrigated agriculture."
- Nonpoint: Defined by implication, anything that is not a point source, per 502(14).
    - 304(f) gives specific examples, including agricultural and silviculture runoff, mining activities, construction, salt intrusion, etc.
    - Early litigation focused on getting regulation by expanding the definition of point source:
        - Runoff pollution from manured field = nonpoint; manure-spreading vehicles = point sources. See *Concerned Area Residents for the Env't v. Southview Farm (2d Cir. 1994)*.
        - Mine basin overflow runoff (after heavy rainfall) point source pollution under 502(14) if the advent of such a 'conveyance' was foreseeability likely—even if mine owners had no direct hand in its creation. *See Sierra Club v. Abston Contruction Co. (5th Cir.*

1980). RSR Corp (holding that direct entry of pollutants to water was not required to be defined as point source).

4. Control of Nonpoint Sources

- **Management Programs**:
  - Areawide waste treatment plans (208)
  - State management plans (319)
    - States must create plans and have them approved by the EPA
      - 319(b)(2): mandates plan contents
      - 319(a)(1)(A): identify what waters cannot achieve WQS w/out regulation of nonpoint
      - 319(a)(1)(B): identify categories of nonpoint soures
      - 319(b)(1): submit for control of pollution added by nonpoint sources
      - 319(b)(2)(E): identify funding
      - 319(b)(2)(A): identify best management practices
    - EPA approval: 319(d) makes disapproval easy
      - Requires admin to determine if plan is best management plan, not if it would lead to meeting WQS (contrast to requirements for EPA approval of SIPs).
  - Problems with plans:
    - Enforcement and monitoring failures
    - No definition of BMP
- **Water Quality Trading Schemes**
  - Defining market – watersheds
  - Challenges of including nonpoint and point
    - Inputs
    - Management practices
    - Modeling
  - Units
  - *Ohio Valley*:
    - Trading schemes are acceptable if they will result in improvements to water quality of the same segment.

6. Interstate Pollution

- *Arkansas v. Oklahoma*; Dispute b/w Arkansas and Oklahoma (the downstream state) → only actually **detectable or measurable impact** could be held to violate the downstream std. (compare to CAA "significant impact" requirement)
  - The circuit court had said that if the downstream state was not in attainment any additional contribution from upstream state was barred
- 40 CFR 122.4(d): an NPDES permit shall ensure compliance with water quality requirements of all effected states.

IX. RCRA

- Purpose: To use regulation to reduce generation of and ensure proper treatment of waste. Cradle to grave regulation of hazardous waste.
- Citizen Suits: citizen suits are designed to minimize imminent threats and to restrain harm or order cleaning. The provision does not envision cost recovery for clean up already undertaken. *Mehrig v. KFC Western*.
  - Requires showing of harm or threat of harm.
  - Allow only for injunctive remedies.
- Requirements for prosecution: *United States v. Elias*
  - Transported or disposed waste
  - Waste was hazardous
  - Representative sample
- **1. Is it solid waste?** Solid Waste: 1004(27): "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, mining, and agricultural operations."
  - What constitutes "discarded material"?
    - Defined by EPA regulation to include any material, which is abandoned, recycled, or inherently wastelike.
    - Where in the lifecycle does something become waste? In *American Petroleum Institute*, water was treated to recovery oil and then water was disposed of. Did it become waste before or after treatment?
      - Look at purpose of treatment → primary purpose was to prepare for disposal (and meet CWA discharge std) or to recovery oil?
      - EPA would generally get deference in characterization, but in this case its reasoning was insufficient.
    - Was there intent to dispose?
  - How do you create the proper incentives to recycle?
    - Direct reuse ≠ recycling → line based on amount of time things sit, whether they are reprocessed.
      - *American Mining Congress*: in process materials aren't wait, if you are feeding them right back in
      - How long does it sit before it is no longer in process?
    - EPA has recently expanded exemptions to incentivize recycling.
- **Regulation of hazardous waste:** Subtitle C
  - **2. Is it hazardous?** 1004(5): Any solid waste:
    - (A): "cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or
      - Risk assessed by individual risk and population risk, but population risk is not a mandatory consideration factor (concern for residents, highly exposed). *API v. EPA* (2000).

        - (B): "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
        - Identification by characteristic v. identification by substance:
            - Characteristic: toxicity, ignitability, corrosivity, reactivity.
        - **Mixed waste rule**: It is hazardous if it is mixed with/derived from a hazardous substance. *American Chemistry Council v. EPA* (2003).
            - Options:
                - Statute allows for delisting through showing of no hazard.
                - Regulation allows for petition for exception at time of rule making.
            - Rule is efficient for EPA and it is reasonable to presume that something mixed w/ or derived from is also hazardous.
            - This is a precautionary statute.
    - Requirements for hazardous waste:
        - Manifest system cradle-to-grave → implications for CERCLA
        - Requirements for TSDs for handling, etc.

X. CERLCA

- Purpose: Use litigation to induce clean up and apportion costs. Incentivize better behavior.
- Ex Post Liability is meant to incentivize good decisions at the following stages:
  - Volume of hazardous waste to produce (consider cost of production v. expected liability associated with waste)
  - Whether to treat, recycle, dispose
  - Level of care in dealing with the waste
  - Selection of disposal site
  - Level of effort to prevent contamination of the environment
  - Cost-effective cleanup mechanisms (private parties tend to spend 20% less than the government)
- When does it work best:
  - Solvent parties
  - Prospective liabilities → CERCLA is retroactive (see *US v. Monsanto*)
  - Ex ante regulation can transmit the same incentives but it requires a lot more information up front.
- Problems:
  - Scope of liability
  - Excessive cost of cleaup
  - Delays (12 years from listing to cleanup)
- Impacts of the liability scheme:
  - Cottage industry around all appropriate inquiry
  - Bank inquiry prior to mortgaging commercial properties
  - Lots of work for lawyers
- **Basics of the 107(a) action:**
  - 107(a) actions have 6 year statute of limitations
  - allows for imposition of J&S liability
  - **Prima Facie Case**:
    - Site = facility
    - Release/threat of release
    - Response costs incurred consistent with NCP
    - Defendant is a PRP

1. Was there a release?

- 107(a): "from which there is a release or threatened release."
  - "release" 101(22): any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing…"
    - Must be outside. *Reading Co.*
  - Threatened release is not defined. Corroding barrels may qualify. Look for increased probability of release. There must be more than proper disposal (although proper disposal at an improper site may be sufficient).
    - Examples:
      - Pinhole leak: *O'Neil v. Picillo*

        - Hazardous substance disposed and site abandoned *US v. Northernaire*
        - Old barrels *Nurad*
    - Release if both active and passive. *CMDG Realty*. Case suggests that all release is disposal with the exception of passive migration.

2. Were there response costs incurred?

- 107(a)(4) shall be liable for…
    - (A) Costs of removal or remedial action **incurred by the gov't** not inconsistent with NCP (response cost sufficient to trigger liability)
        - Burden on defendant to show that costs were inconsistent
        - Removal action 101(23): cleanup or removal
        - Remedial action 101(24): actions consistent with permanent remedy
    - (B) Other necessary costs of response **incurred by another person** consistent with NCP (response cost sufficient to trigger liability) plaintiff must show that costs were consistent → **bring 107(a) action against other PRPs**
        - *US v. Atlantic Research* → PRPs can bring 107(a) actions; they count as "any other person" in 107(a)(4)(B). This case resolved an ambiguity created by *Cooper v. Aviall*, which forbade PRPs to use 113 recovery without 107(a) action.
        - Availability of this remedy is essential to provide incentives for private parties to engage in cleanup actions.
        - Watch out for state defendants when plaintiff is a private party. 11th amendment.
- Other 107(a)(4) costs can't trigger liability, but must be covered by already liable parties.
    - (C) Damages for injury to, destruction of, or loss of natural resources (NRD) → don't apply retroactively *US v. Northeastern Pharma*
        - Limited to public land 101(16)
    - (D) Costs of any health assessment or health effects study (note that there is no recovery for personal injury)
    - 3.

3. Who is a PRP?

- 107(a)
    - For the purposes of (1) and (2) who qualifies as an owner/operator?
        - 101(20): person who owns or operates or otherwise controls…the site where disposal occurred.
        - **Gov't:** State and local governments are not owner and operators of land acquired through bankruptcy proceedings, tax delinquency, abandonment. 101(20)(A)(iii) and (D)
            - → Owner is prior owner
            - → Unless gov't caused or contributed to release or threatened release.

- **Banks**: 101(20)(E)-(F)
    - Exclusion of lenders who hold indicia of ownership to protect security (additional provisions added in 1986 due to fear of credit freeze) (E)
        - (i)(I) Unless they participate in management → parallels parent/subsidiary test
        - (i)(II) management requires more than capacity to influence. Doesn't include usual pre-foreclosure actions.
        - In case of foreclosure, if management is solely for purpose of resale(ii)(II)
        - Bank can clean up without becoming an owner operator and then sue for recovery form PRPs
- What does it mean to participate in management (F)
- Successor liability: extends only when
    - Express/implied assumption of liability
    - De facto merger or consolidation
    - Successor is mere continuation of predecessor (some circuits says substantial continuation is sufficient)
    - Transfer to successor corporation is fraudulent attempt to avoid liability.

- (1) Current owner/operator
    - See *Shore Realty* – (a)(1) language not limited to time of disposal.
    - Liability of a parent company (applies to (1) and (2): *US v. Best Foods*
        - Direct liability: Was parent involved in operation of facility? → operator liability.
            - Parental involvement in hazardous waste decisions.
            - Presence of agent of parent company.
            - Control of other aspects of the facility are irrelevant.
        - Derivative liability: veil piercing analysis → owner liability.
    - Applies to owner **or** operator → 101(20)
- (2) Owner/operator "at time of disposal"
    - Applies to owner **or** operator
    - **Disposal:** 101(29) (Refers to definition in RCRA 1004(3)) "discharge, deposit, injection, dumping, spilling, leaking, or placing."
    - *US v. CMDG Realty*: holding that disposal is active, and all the words in the definition must be interpreting as requiring action → passive migration (traditional definition of

leaking) is insufficient. Passive migration does not count as disposal, but it is captured by definition of release.
    - Note also that if passive leaking were disposal, the 101(35)(A) exemption from contract would never apply → refers to "after disposal" This logic works only is disposal means the same thing in both places.
  - *Nurad v. WE Hooper* held the other way.
- (3) Anyone who "arranges" for transport, storage, or disposal
  - Factors Include:
    - Ownership
    - Control
    - Foreseeability
    - Knowledge
    - Intent
    - Timing
    - Immediacy
  - **Circuit Split!**
    - Intent to dispose (7th Cir. *Amcast Industrial Corp.*)
    - Intent as one of several factors but not dispositive (11th Cir. *South Florida Water Management*)
    - No intent required (8th Cir. *US v. Aceto* – the chemical companies arranged for another company to formulate chemicals into commercial grade pesticides)
      - CERCLA should be broadly interpreted.
      - Critical that they arranged for a process that would necessarily result in waste.
      - Draw line before those who sell useful product.
    - Ownership is also a factor. No ownership transferred in *Aceto*, but in *Heinz Lumber*, ownership was transferred, and no liability was found.
      - Another 8th Cir. case, focuses on control rather than ownership. *Northeastern Pharma. & Chem. Co.*
    - Ownership And either control or knowledge. 3rd Circ. *Morton Int'l.*
- (4) Anyone who accepts for transport (and played some role in site selection).
  - You need to have significant voice in the selection process; although this doesn't require unilateral decision-making.
  - Can you accept something from yourself or arrange something for yourself? If no, there is incentive to do everything yourself. *Pakootas* closes the loophole →

generators of hazardous substance (who disposes on another person's property) can be liable for transport and arrange done themselves.
- What about the leaky truck? If the driver knows of the leak, you could find that the driver selected the site.

4. Is there a valid defense?

- **Causation:** 107 has no causation requirement, but 107(b) **Affirmative Defenses**
  - If defendant can show that release was **caused solely by** (9th circuit uses but for cause analysis; 10th uses proximate cause analysis)
    - (1) act of god → 101(1) something no reasonable god would ever do…
    - (2) act of war
    - (3) act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs **in connection with a contractual relationship**, existing directly or indirectly with the defendant, if the defendant establishes by a preponderance of the evidence that
      - (a) he exercised **due care** with respect to the hazardous substance
        - Notify proper authority
        - Take action to prevent spread of harm
      - (b) he took **precautions against foreseeable acts** or omission of any such third party and the consequences that could foreseeably result from such acts of omissions.
        - Court will look for willful or negligent blindness
  - Contractual relationship exception to the defense:
    - Likely intended to get at owners who lease land to operators, and are still in a position to ensure that the contractor uses land appropriately. → prevents a highly solvent company from outsourcing to company with low solvency.
    - Possible also intended to prevent outsourcing liability to low solvency transporters.
- **Innocent Landowner Defense** under 107(b)(3) → **No Contract**
  - 1. Meets 101(35) requirements to exempt from contractual relationship provision:
    - Land contract is not a contract if the defendant acquired the property after disposal and meets one of the following requirements:
      - 101(35)(A)(i) Current owner "did not know or had no reason to know" that hazardous waste had been disposed of at a facility.

        - Reason to know: 101(35)(B)
            - All appropriate inquiries
                - Do a title search
                - Conduct an environmental assessment
                - Soil investigation never constitutes as shifting and spreading – in other words, you can't be a PRP for conducting an environmental assessment.
        - Factors: What is **appropriate?**
            - *US v. Pacific Hide*
                - Higher standard for commercial transactions than for residential transactions.
                - Sophistication/specific knowledge of parties
                - No inquiry could be deemed appropriate in certain circumstances.
                - How you acquired the land.
            - Other Factors:
                - Market practices
                - Opportunity of parties to inspect
        - *AMCAL Multi-Housing, Inc. Pacific Clay Products*, 2006, p. 675, AMCAL knew of minimal contamination and claims it had no way to know contamination was worse, but it sill doesn't get the innocent land owner defense.
    - 101(35)(A)(ii)**Gov't:** Deed is not contract for purposes of 107(b)(3) for land acquired by government through escheat or other involuntary mechanism, including eminent domain.
    - (101)(35)(A)(iii) Gifts and bequests automatically exempted
- 2. Meets the other requirements of 107(b)(3) relating to cause, due care, and foreseeable precautions
- 3. If you learned about waste release or threatened release after purchase, did you transfer without **disclosure?** See 101(35)(C). Requires actual knowledge, of release or threatened release (creates funny incentive not to conduct further inquiry). This is essential a **fifth class of PRP** that is precluded from raising innocent landowner defense.

- **Past Owner → Not in Connection With**
  - *Westwood Pharmaceuticals* Current owner brought action against prior owner, who claimed that release was caused solely by current owner during the process of demolition.
  - Past owner cannot take advantage of 101(35) because it extends only to those who purchased after release/threatened release, but can claim that the release was not **"in connection with"** the contract.
    - Giving this meaning to the language creates a possibly very broad loophole for current owners. **But** if release is capitalized into the price, it will always be in connection with the contract. → However, *Lachins Arcade* extends this defense to the buyer, saying logic applies. RR says this is wrong.
    - RR: Differentiate b/w things that happened before the sale and things that happened after the sale.
- **Indemnity agreements as defense**: 107(e)(1)
  - Indemnity agreements ≠ defense, but they are legal under the act and may be used to recovery costs.
  - Private party, rather than government, takes risk that the party with whom the agreement was made is insolvent.

5. What costs can be recovered?

- **Were the costs consistent with NCP (see above for who has the burden of proof)?**
  - 1. Listing on CERCLIS (done by gov't)
  - 2. Preliminary Assessment/Site assessment.
  - 3. Hazardous ranking system → above a certain threshold is listed on the NPL.
    - Implication of listing: can use superfund money for remedial action (for non-NPL sites, it can be used for removal actions where there is an imminent threat).
    - But listing on NPL is not a barrier to recovery in private actions.
    - Listing is relevant when all PRPs are insolvent and superfund money is needed for cleanup,
  - 4. Remedial Investigation/Feasibility Study (RI/FS)
    - In *Raytheon v. ASARCO*, ASARCO skipped this step, so the court barred recovery → need for consistency, but RR was concerned about the incentive effects of this case.
    - Consider and compare all options
    - Issue a Record of Decision (choosing an option) (done by gov't)
  - 5. Remedial Design/Remedial Action
- **Was the cleanup sufficient? See 121.**
  - 121(d)(1)

- Protective of human health and the environment
- Cost-effective → not an opening for c/ba; must choose most cost-effective measure of those sufficient to protect health/env't (*Ohio v. EPA*)
- Permanent to maximum extent practicable

▪ 121(d)(2) Clean to any legally applicable or relevant and appropriate standard under federal or state law
- A state std is an ARAR when: 121(d)(2)(A)(ii)
  - Properly promulgated
  - More stringent than the federal std: if there is not fed std, state std is more stringent. *US v. Akzo Coatings*.
  - Legally applicable or relevant and appropriate
  - Timely identified
- State goals can be ARARs
- 40 CFR 300.5:
  - Applicable: legally applicable – those that specifically address the hazardous substance, pollutant, contaminant, remedial action or other circumstance found at a hazardous waste site.
  - Relevant and Appropriate: Address problems or situations sufficiently similar to those encountered at the CERCLA that there use is well-suited to the particular site? E.g. Safe Drinking Water Act stds for surface water that is going to end up in the drinking supply (but isn't going straight there).

o Advisability of such thorough/expensive cleanup:
▪ Balance constraining future use (note findings that most of risk comes from future residential use – see Viscusi & Hamilton) with cost of being able to change current use.
▪ Local choice?
▪ Not legal under the statute.

6. Is there joint and several liability?

o **J&S liability is a rebuttable presumption**: *US v. Chem-Dyne*: J&S language was removed from statute only because Congress wanted common law principles to apply → prevent mandatory use.
o J&S → solvent PRPs cover shares of insolvent PRPs → ensures that government can get full recovery.
o **Divisibility:** If defendant can show basis for division → courts will apportion through 107. *US v. Monsanto*
▪ Defendant has burden of proof, and it is difficult task!
▪ Determination not based on equities (relevant only to contribution inquiries).
▪ Common law tort principles: RST 433A:
- (1) damages for harm are to be apportioned among two or more causes where

        - (a) there are distinct harms, or
        - (b) there is a reasonable basis for determining the contribution of each cause to the single harm
    - (2) Damages for any other harm cannot be apportioned among two or more causes.
- Volumetric division:
    - Where there is no evidence that volume is proportionate to harm → no division (*Monsanto*)
    - Where there is no commingling of different substances, it can be done (*In Re Bell Petroleum Services*)
- Parcel size: *Burlington Northern & Santa Fe Railway*
    - Where ownership is sole basis of liability and harm is proportionate to parcel size… maybe, otherwise…
- *Alcan* exception: No liability for polluters who pollute up to the background level of pollution.

7. Can the PRPs recover against each other?

- **Counterclaim for contribution → 113 action**
    - Three year statute of limitations.
    - Available only in context of 107(a) action → *Cooper v. Aviall Services*, PRPs not meeting civil action requirement could not bring 113 suits
    - Based on equitable considerations
    - Courts have substantial discretion and can use a totality of the circumstances test: *US v. Consolidation Coal*
    - Potential Factors:
        - Gore Factors:
            - Ability to demonstrate contribution
            - Amount of waste involved
            - Degree of toxicity
            - Degree of involvement of parties
            - Amount of care exercised
            - Amount of cooperation with the government
        - Critical Factors
            - Extent to which costs are attributable to waste for which party is responsible
            - Level of culpability
            - Degree to which party benefited from disposal
            - Ability to pay

8. Impact of Settlement on ability to recover?

- Pro tanto → reduce recoverable amount by amount of settlement. Risk of defendants being responsible for inequitable share
    - Although this is better for the second defendant in cases were the first defendant is on the verge of insolvency → any contribution achieved through settlement is better for second defendant than if plaintiff went to trial against both and first defendant became insolvent.

        - Risk of collusion between plaintiff and first defendant.
    - Proportionate share approach → reduce the remaining recoverable amount by amount that settling party is equitably responsible for. Risk of plaintiff not getting full recovery.
        - Under this rule, plaintiff is less likely to seek settlement.
    - Which approach is better depends on whether there is a correlation of probability of prevailing against both defendants.
        - Perfectly correlated → plaintiff expected return is increasing by settling with first defendant.
        - Completely independent → plaintiff's expected return is decreased by settling with first defendant.
    - While courts tend to use proportionate share approach; court has discretion to choose among the two approaches in the context of settlement among private parties. *Atlantic Richfield Co. v. American Airlines*.
    - In the context of settlement with the government, pro tanto approach is specified. 113(f)(2).
    - Settlement protection – settling with government gives you protection from contribution claims from other parties. 113(f)(2). But there is no protection from 107(a) claims.
    - 122(g) de minimis settlement provision: government is encouraged to reach settlement with PRP if release/harm is minimal or if PRP did not conduct/permit disposal or contribute to release.

XI. NEPA

1. Procedure!

- Informational approach to regulation
- While declaration of policy announces substantive goals (102), *Calvert Cliffs* interprets the act to impose only procedural requirements.
- *Strycker's Bay*: NEPA doesn't provide a substantive std for weighing environmental impacts
- Basis for suit: A&C claim under the APA (Marshall's dissent in Strycker's Bay)
- Value:
  - Transparency
  - Younger and more liberal staff
  - Reputational issues
  - Modify action to bring below EIS trigger level

2. Practice

- EIS required for all major federal actions and legislative proposals that are likely to have a significant impact on the human environment
  - There are certain actions that automatically require EISs and certain actions that fall into categorical exclusions
  - Conduct an EA to determine if there is likely to be such an impact
    - If no → FONSI
      - *Hanly v. Kleindienst* creates the EA requirement → agencies need a reasonable basis for FONSI (In dissent, Friendly thought that majority rule made it too easy to get out of granting EIS)
      - Regulations define significantly effecting as including actions where there is controversy. 1508.27(b)(4)
        - Courts interpret reg as meaning controversy over the science: (*Anderson v. Evans*) Tribe wanted permission to hunt whales → looks to local environment and impact on local population, remands to consider that impact.
      - **Mitigation:** If action has large impact if unmitigated and small impact if mitigated, you cannot use mitigation to escape EIS requirement.
        - Uncertainty that mitigation will work.
        - Wouldn't allow for consideration of alternatives.
    - If yes → NOI
- Timing and scope
  - *Kleppe*: there must be a proposal for action before Act requirements kick in (here there was no regional plan, so no regional EIS was required)
  - *Thomas v. Peterson*: aggregate actions require a single EIS
    - Cumulative actions: 1508.7 → synergistic effect
    - Concern about incentive to break things into small pieces
- Adequacy of the EIS
  - **Alternatives:** *Vermont Yankee*

        - An agency need not consider every alternative; they need to consider reasonable alternatives.
        - An agency may, however, consider alternatives outside their scope of authority.
        - CEQ requires consideration of alternative of not doing the project.
    - **Sufficient information about risk**: *Alaska v. Andrus*
        - Deference to agency as to how much information gathering is required in face of uncertain risk.
        - In this case, EPA advised against drilling, but DOI went ahead with leasing → as long as agency considers cost of uncertainty: compare cost of gathering information with benefit that new information might weigh heavily on decision.
    - **Sufficient information about impact**: Westway (*Sierra Club v. Army Corps*)
        - Army Corps found no impact on wildlife in river, but court remanded for EIS to be amended to addressed impact on fish. Rule: don't ignore things.
        - **Delay can kill projects (lose funding, administrative change)**
    - **If new information appears** → at what point does requirement to supplement EIS cease? *Marsh v. Oregon Natural Resources Council* → if something comes up do not ignore it. Balancing changes as project gets closer to completion.
- EIS's for proposed legislation: *Public Citizen v. United States Trade Representative*
    - USTR did not have to complete an EIS because it was the president that actually proposed the legislation.
    - President does not have to prepare EIS because president is not an agency of the federal government (see APA)
- Limits:
    - Causation requirement: Agencies do not need to require EISs for impacts that there actions do not proximately cause (*Dept of Transp. V. Public Citizen* addressing DOT registration of trucks that resulted president lifting moratorium on entry).
    - FIFRA pesticide registration is exempted *Merrell v. Thomas*
    - Limits are often added through appropriations riders → Congressional mischief!

3. Themes

- Validity of informational approach
- Transmission of incentives
- Useful allocation of resources
- Allowing agencies to police themselves?

XII. ESA

1. Listing of species

- 3(15) secretary is secretary of Interior → FWS and Commerce → NOAA.
- Why species as opposed to ecoysystems?
  - Biodiversity goal
  - Noah's Ark explanation
  - Human-centered → aesthetic, historical, recreational, scientific goals
- 4(a) By action of the FWS or NOAA of own volition or in response to listing petition.
  - 3(6) Endangered: In danger of extinction in all or significant portion of range
  - 3(2): Threatened: Likely to become endangered in the foreseeable future.
- 4(b)(1)(A): Listing is done without consideration of cost.
- **Distinct Population Segments:**
  - Species: includes subspecies or DPS
  - DPS is not defined in the act → FWS DPY Policy
    - Discrete
      - Markedly separate/ physical geographical characteristics
      - International borders create discreteness when the two countries have differences in
        - Conservation status (defined as size of population)
        - Management of habitat
        - Protections
    - Significant (requirement intended to protect genetic diversity)
      - Unique setting
      - Loss of population → gap in range (gap at periphery is sufficient. *Nat'l Association of Home Builders* (finding there would be a gap in range, but that it wouldn't be significant b/c the loss wouldn't represent a significant portion of the population or a significant percentage of the range)
      - Only surviving natural occurrence
      - Markedly different genetically: Specific evidence of genetic difference is required; speculation is insufficient. *Nat'l Association of Home Builders*.
  - Policy: is ESA to protect species in the US or globally?

2. Designation of Critical Habitat

- FWS has a statutory obligation to designate CHD when it lists species. 4(b)(2) (for the purpose of enforcing 7(a)(2), which prohibits federal action that "results in the destruction or adverse modification of critical habitat").
- List to maximum extent prudent and determinable. 4(a)(3) see 424.12(a) for definition
- Critical habitat can include: 3(5)(A)
  - (i) Areas in habitat
  - (ii) Areas outside habitat
  - There is a general presumption against including entire habitat range.

- **Factors:**
  - Biological features to consider in designation: 424.12(b)
    - Space for individual/population growth and normal behavior
    - Food, water, air
    - Cover/shelter
    - Sites for breading
    - Habitats protected from disturbance
  - Other Factors:
    - Economic impact of designation
      - FWS used a baseline approach for calculation of economic impact, but b/c FWS sees CHD and listing as coextensive, it found additional impact of CHD to be zero. Court invalidated this approach, finding that FWS must consider impacts even if they are attributable to other causes. *NM Cattle Growers*.
    - National security impact of designation
- FWS Position:
  - CHD and Listing are coextensive because listing leads to protection against jeopardy:
    - CHD: "that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.
    - Jeopardy: "to reduce appreciably the likelihood of both the survival and recovery of a listed species.
  - FWS likely resists CHD designations because of the unpopularity of listing private land.
  - FWS approach conflates jeopardy and CHD because it finds both are tied to survival **&** recovery, but some courts have argued that jeopardy is tied to both, but CHD can be implement solely for the purposes of recovery → requiring a broader range of action. *Gifford Pinchot Task Force v. FWS.*
  - Standard of proof for impact on ability to recover is lower than standard of proof for impact on ability to survive → separating them would lead to broader protection.

3. Limits on Federal Actions

7(a)(2): Prohibition on Jeopardy and Destruction

- Prohibits federal actions that jeopardize endangered or threatened species or will lead to destruction or adverse modification of critical habitat.
  - Agencies cannot make exceptions to this rule on the basis of cost. *TVA v. Hill*.
  - Applies even to actions already authorized, because of inclusion of "carrying out" of actions federally funded or authorized.
  - No repeals by implication.
- Following *TVA*, Congress created the **God Squad**, which can, by vote of 5 of 7, grant exemptions.
  - Criteria for exemptions: 7(h)(1)(A)
    - (i) No reasonable and prudent alternatives to agency action;
    - (ii) Benefits of action clearly outweigh alternatives;

- This prong creates substantial valuation problems.
- Often, surveys get value of habitat rather than species.

- (iii) Action is of regional or national significance; AND
- (iv) Neither the federal agency nor the exemption applicant has made irreversible or irretrievable commitment of resources prohibited by subsection (d).

- Procedure for exemptions:
  - Ban on ex parte communications b/c exemption proceedings meet APA requirements for on the record adjudication (adjudication, on the record, after a hearing).

- Consultation Process: 402.10 et seq. Agency considering an action must follow this procedure. In comparison to NEPA, this process ensures external checks, but it may be inefficient since agencies have developed the infrastructure to do these assessments themselves.
  - 1. Ask FWS/NOAA if there are threatened/endangered species that might be impacted.
    - If no, proceed.
    - If yes, go to step two.
  - 2. Project agency must prepare a biological assessment to determine if the present species is likely to impacted (BA may be part of EIS/EA).
    - If no, proceed, although this determination is subject to judicial review.
    - If yes, go to step three.
  - 3. Agency must formally consult FWS/NOAA, which must issue a biological opinion.
    - Allow agency to proceed.
    - Condemn the project (unless FWS allows an alternative).
    - Allow agency to proceed if it can meet certain mitigation requirements.
  - 4. If FWS/NOAA condemns the project, agency can seek an exemption form the God Squad.
  - Courts will hold agency to these procedural requirements as a means to ensure that the substantive ends are achieved. *Thomas v. Peterson* (agency found no likely impact as part of its EA but it did not complete step one).

7(a)(1): Obligation to Conserve

- Agencies must "carry out programs for the conservation of endangered and threatened species."
- 3(3): Conserve: "The use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which measures provided pursuant to this chapter are no longer necessary."
- The provision gives agencies enormous discretion as to which conservation method to select, so adherence to this requirement is essentially unreviewable.
  - In action might be a violation, but, under *Heckler v. Chaney*, inaction is presumptively unreviewable.

- Courts are concerned that enforcement will interfere with the carrying out of agency missions.
- In *Pyramid Lake Paiutes v. US Dep't of Navy*, the court puts a burden on the plaintiffs to provide an alternative, but then reject that alternative because it doesn't lead to substantially better protection that would have been afforded by the original action.

4. Limits on Private Actions

- 9(a)(1)(B): Unlawful for any person to "take" any endangered species.
  - 3(13) person includes individuals, corporations, and government, but the provision is thought to apply only to private action because any application to government would be covered by §7 (unless it is possible to take with out jeopardizing).
    - 7(o)(1) ensures that where there is a God Squad exemption §9 requirements cannot be imposed.
- 3(19): Take: "harass, harm, shoot, capture, pursue…"
- Harm (defined by regulation): "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." This definition is sanctioned in *Babbitt v. Sweet Home*.
  - Stevens' structural argument that this definition (including indirect taking) is necessary to give meaning to the incidental take permit provision is flawed.
  - Scalia's grammar/statutory construction argument is flawed b/c Congress likely wasn't considering grammar.
  - At the very least, the statute is vague → deference.
  - Bounds on indirect taking: proximate cause (See O'Connor's concurrence in *Sweet Home*).
- **Incidental Take Permits**:
  - 10(a) parties may apply for incidental take permits for actions that would otherwise violate §9.
  - Requirements:
    - Take is incidental.
    - Applicant will to the maximum extent practicable minimize and mitigate impacts of taking.
      - Buying land elsewhere can be a sufficient measure. *Nat'l Wildlife Federation v. Norton*.
        - This case reflects a concern about being too strict with implementation of the ESA vis-à-vis private property holders → concern about regulatory takings claims.
      - Could you create a market for substitute conservation land?
    - Applicant has ensured adequate funding for habitat conservation plan.
    - Taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild.

- Any additional measures required by the secretary will be undertaken.

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XIII. ENFORCEMENT

1. Civil Penalties

- Deterrence, dislocation (ability to pay is a factor to prevent bankruptcy), equities (unjust enrichment)
- CAA & CWA have 25k/day/violation max.
  - CAA 113(b)
    - For permit violations for new sources, prohibition, sip.
  - CWA 309(d):
    - For permit violations and violations of compliance orders.
- Calculating Proper Damages:
  - CWA factors: 309(d) Factors: seriousness of violation or violations, the economic benefit resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.
    - *Cedar Point*, 5th Cir., Court calculates maximum possible and then subtracts based on the factors: trial court has substantial discretion in weighing these factors; can limit to economic benefit. But see *Student PIRG v. Monsanto* finding setting at econ benefit is insufficient to have deterrent effect.
    - EPA Penalty Calculation: Economic benefit + gravity +/- gravity adjustment factors – litigation considerations – ability to pay – supplemental environmental projects (explanations on p. 1036)
  - CAA factors: 113(e)(1): size of business, economic impact of penalty on business, violator's full compliance history and good faith efforts to comply, duration of violation, economic benefit of non-compliance, severity of violation.
  - Consider the difference between characterizing as a tax and characterizing as a fine: reputational, ethical, and deterrence issues.
- Civil actions against federal agencies: executive tends to say these are non-justiciable → DOJ tends to settle, manages cases as an arbiter, but courts say justiciable!

2. Voluntary Audits

- Reduce labor-burden for EPA, incentivize self-monitoring and clean-up, and deters violations
- State privileges and immunities laws:
  - Audits are privileged → cannot be discovered
  - Immunities → cannot be liable for violations discovered through voluntary audits
  - Do these reflect a race-to-the-bottom?
  - What about public choice?
- EPA Requirements for sufficient state enforcement power (before EPA will revoke delegations): Set limits but doesn't bar privileges and immunities laws
  - Immunities Laws:
    - States must be able to take immediate and complete injunctive relief

        - Recovery civil penalties for econ. Benefit, repeat violations, violations of judicial and administrative orders, serious harm, imminent and substantial endangerment.
        - Obtain criminal fines and sanctions for willful and knowing violations of federal law and grossly negligent of CWA.
    - Privileges:
        - Obtain information gathering authority required to have under specific requirements of regs guiding authorized or delegated programs.
        - Avoid making privilege applicable for criminal investigations, grand jury proceedings, and prosecutions, OR exempt evidence of criminal conduct from scope of privilege
        - Preserve right of public to obtain information about non-compliance, report violations and bring enforcement actions for violations of federal environmental law.
- EPA policy: Incentives for self-policing: if all are met reduce gravity-based penalties by 100% and not recommend crim
    - Systematic discovery (if this one is not met, gravity based penalties reduced by 75%, and not recommend crim.)
    - Voluntary discovery (this excludes discovery through compliance with statutory requirements or compliance orders).
    - Prompt disclosure
    - Discovery & disclosure independent of government or third party-plaintiff
    - Correction and remediation
    - Prevent recurrence
    - No repeat violations
    - Other violations excluded: serious harm
    - Cooperations
    - Note: this policy is not binding; it is guidance.
    - Still crim enforcement for individuals
    - Firms still liable for economic benefit and possible also for injured benefits.
- Insufficiences:
    - Only rewards for corrections → disincentive to reporting?
    - Not enough reward generally?

3. Over-filing

- Benefits of over-filing: Allows EPA to police state actions without requiring EPA take full responsibility for all enforcement. Polices the public choice problem of lax enforcement in states. The *Harmon* all or nothing std limits EPA flexibility.
- RCRA:
    - 8th: *Harmon* overfilling impermissible (interpretation of language that state programs operate "in lieu of" EPA despite contrary language providing EPA blanket enforcement power w/only procedural requirement of giving states notice) RR noted that citizen suits bar over-filing; Congress knows how to ban such suits!

    - 10th Cir: *Power Eng. Co.* Deference to EPA interpretation allowing for over-filing.
  - CAA: Over-filing is permissible: statute expressly contemplates paying twice by saying that in setting price court shall take into account fines previously assessed. 113(e).
  - CWA: EPA can delegate permit power but retain enforcement power 402(i). Over-filing is allowed. 309(g)(6)(A) appears to bar over-filing but no case has every barred an action on this ground.

4. Criminal Sanctions

- Most "knowing" violations of environmental law carry potential criminal penalties, though generally prosecutorial discretion limits to only more egregious cases or when civil penalties likely to be meaningless (insolvency):
  - Knowing pertains to know endangerment, w/ substantial certainty sufficient.
  - Mens rea bar is quite low, especially audits will provide knowledge of the violations, which is sufficient.
- *US v. Hansen* execs convicted for knowing endangerment under CWA and RCRA: awareness of non-compliance + risk = sufficient. Kowledge of specific incidence of exposure is unnecessary.

5. Citizen Suits

- Meant to supplement limited government resources, allow decentralized private enforcement/oversight.
- CWA: 505, CAA: 304, RCRA: 7002, ESA: 11
  - Action-forcing: limited to non-discretionary actions (if discretionary duty, petition for action, and then take action for review under judicial review provision – not citizen suits) CWA 505(a)(1)
  - Enforcement actions: meant to supplement limited government resources, allow decentralized private enforcement/oversight CWA 505(a)(2)
- Citizen suits are distinct from challenges of regulations: Most statutes have judicial review provisions with exclusive venue and mandatory pre-enforcement review.
- Procedural requirements:
  - Notice to admin, violator, and state
  - Waiting period
  - Barred by state/admin action: "commenced and diligently pursuing"
  - Admin can always join citizen action see CWA 505(c)(2), CAA 304(c)(2)
- Attorney's fees mandated by statute: 304(d), 505(d)
- Suits for past violations:
  - CWA: barred (*Gwaltney* pervasive use of present tense- note majority "alleged" and concurrence focus on what "in violation" means): subsequent courts seemed to look for any reason to getting around the *Gwaltney* rule.
  - CAA: explicitly allowed under 1990 amendments 304(a)(1)
  - RCRA: bars wholly past violations
  - Unclear why to limit for past violations, generally justified by desire to give discretion to states and EPA in enforcement.

6. Settlement

- Requirements for consent decrees: *Sierra Club v. Electronic Control Designs*
  - Come within the scope of pleadings
  - Further the objectives of the law
  - Don't violate the statute
  - Court may order broader relief than it could have through judicial process – monetary settlements need not be paid to the US Treasury
- Supplement Environmental Projects: EPA stds
  - Advance the environmental statute
  - Adequate nexus with the violation
    - Project designed to reduce likelihood of similar violations recurring in the future.
    - Project must reduce the adverse environmental or public health impact of the violation.
    - Must reduce the overall risk to public health or the environment caused by the violation.
  - Define type and scope.
  - May not use for projects of the EPA or for which Congress has appropriated funds.
  - Must be more than a donation to a charitable or civic organization.
- Concern about collusion b/c:
  - Lower fines for industry and better tax result (if not a civil violation)
  - Money to pet causes and atty fees (without litigation)
- Notice to government before decree entered: CWA 505(c)(3)
  - Consent judgments cannot be entered without giving US 45 days to intervene in proceeding → gov't can then object to settlement
- Policies: prevent circuit splits allow uniformity (limited venue) and prevent uncertainty (limited time)

7. Justiciability Requirements

- Standing
  - Constitutional Requirements: Art. III case or controversy
    - Injury-in-fact
    - Causation
    - Redressability (note questions of control) See *Mass v. EPA* finds Redressability despite unclear impact of regulating GHGs through 202. Incremental remedy argument
  - Prudential: "any citizen" language in citizen suit provisions is interpreted as a waiver of the prudential requirements.
    - Generalized grievances → Art. II problem. *Mass v. EPA* seems like a paradigmatic generalized grievance, but there is specific harm
    - Zones of interest (statute is aimed at something like you)
    - Plaintiff must assert his own rights/interests
- Ripeness
  - Exclusive pre-enforcement review of regulations → no ripeness defense for failure to file in review period. *Eagle-Picher*.

- Ripeness: Fitness: raises a purely legal question or will the agency or court benefit form deferring **Balance** against hardship to the parties of withholding court consideration.
- Court must do the balancing – you can't do it on your own.
- Exceptions to SOL:
    - Entirely new event/information
    - Clear precedent exception (but if any doubt at all you have to file!)

XIV. CASE FILE

NOTES ON JUDICIAL DECISION-MAKING

- **Note on Chevron deference and shifts in administration:** preserves democratic accountability by allowing new administration to put a new policy into place → Bubble policy of Reagan administration was a shift from the Carter administration.
- The expertise rule
- Pay attention to whether words mean the same thing at different points in the statute.

ACETO (US V. ACETO AGRICULTURAL CHEMICALS CORP.), 1989, P. 660

Statute: 107(c)

Agency Action: EPA and Iowa brought recovery claim for response costs of facility maintained by Aidex. Suit brought against 8 pesticide makers who hired aidex to turn their technical grade pesticides into commercial grade pesticides.

Theory of the Case: Pesticide companies knew that waste was an inherent part of the mixing process and companies maintained ownership of pesticides while they were being formulated.

Discussion:

- District Court relied on the principle that CERCLA should be broadly interpreted.
- Defendants claim they lacked ownership and decisionmaking power about disposal. They arranged for formulation not for disposal. Assert intent requirement.
- Plaintiff claims that ownership of the pesticide created authority of operations in which waste was inherent.
- Court affirms intent that CERCLA is to be read broadly.
- Courts have drawn the line at extending liability to those who sell a useful product to another party who incorporates it into a product that is later disposed of.
- It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme.
- In other words, arranging for a transaction in which there will necessarily be waste is sufficient to trigger liability.

AIR POLLUTION CONTROL DISTRICT OF JEFFERSON COUNTY V. ENVIRONMENTAL PROTECTION AGENCY, 6TH CIR. 1984, P. 425

Action:

- Jefferson County, Kentucky, filed § 126 petition claiming violation by neighboring Gallagher County, Indiana. Jefferson County alleged that emissions from Gallagher County interfered with Jefferson's ability to meet NAAQS and interfered with the margin for future growth that Jefferson was trying to protect for itself.
- EPA denied petition, finding that Gallagher did not "substantially contribute" to violation of NAAQS. EPA found that Gallagher only contributed 3% of Jefferson's pollution, and that the worst impacts were in areas of Jefferson that were in attainment.

- EPA also denied the claim that Gallagher needed to cease interfering with Jefferson's margin for growth; because Jefferson was currently in non-attainment it had no PSD measures in place. While EPA acknowledged that 110 does offer a protection against interference with margin for growth, it later noted that by trying to use 126 to prevent upwind states from contributing to air that is cleaner than NAAQS, Jefferson was trying to establish a local standard more stringent than the national standard.

History:

- The two counties are in the same air quality control region, but are in separate states so are governed by separate SIPS.
- They began with the same control levels.
- In 1973, Indiana issued a SIP allowing 1.2 lbs/MBTU of SO2 from the Gallagher Power station. Kentucky had set the same limit for Jefferson's three power plants.
- In 1974, Indiana exempted Gallagher from the limit.
- 1979, Indiana set 6 lbs/MBTU limit for Gallagher, essentially maintaining status quo as that level was about the level of pollution anyway.
- 1978, Jefferson was designated a nonattainment area, despite its strict limits on emission.

Discussion:

- Margin for growth:
  - While EPA was inconsistent, its ultimate determination is not unreasonable.
  - Jefferson County had yet to achieve NAAQS, so interference with PSD was conjectural.
- "Substantiality requirement"
  - Turns on interpretation of "prevent" in 110(a)(2)(D)(i)
  - Jefferson urges a percentage point by percentage point accounting, but the court accepts EPAs interpretation, noting that 126(a) hints at a substantiality requirement when it says that States are entitled to notice of any proposed new or modified sources that may significantly contribute to levels in excess of NAAQS.
  - The de minimis logic: Congress couldn't have intended de minimis contributions to count because that would "hold one state hostage to another's failure to enact the pollution control strategies necessary to conform with the requirements of the CAA."
  - Deference on finding of insignificance.

AKZO COATINGS OF AMERICA, INC., 6TH CIR. 1991, P. 748

Challenge: State challenges consent decree on basis that it does not meet state ARARs

- Michagan law prevents degradation of groundwater in usable aquifers.

Procedural History:

- District court found that Michigan law met all criteria
- Properly promulgated: distinguished from advisory opinions, guidance, rules not of general application

        - Petitioners focus on vagueness and lack of specific requirements, but EPA does not limit to state laws with specific numerical standards.
        - EPA regs specify that state goals can be ARARs
        - EPA would have latitude in determining how to implement.
    - More stringent:
        - EPA interpretation and legislative history indicate that state rules are more stringent when there is no comparable federal rule
    - ARAR:
        - Prohibits types of discharge, and discharge has been going on at the site → applicable!

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION V. ENVIRONMENTAL PROTECTION AGENCY, SCOTUS, 2004, P. 379

Issue: Question of EPA authority to enforce BACT selection methods under 113(a)(5) and 167.

- 113(a)(5): authorizes EPA to issue an order prohibiting construction or modification of a major source, issue admin penalty or bring a civil action under 113(b) whenever EPA finds that state is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources
- 167: says admin shall and state may issure an order or seek injunctive relief to prevent the construction of a MEF that does not conform to the PSD requirements or that is located in an attainment area which does not have a sIP that conforms to the PSD requirements

History:

- ADEC set a BACT for Cominco. Accepted Cominco's proposal that they add a generator and add a low-NOx tech that reduces pollution by thirty-percent.
- EPA criticized ADEC for failing to follow top-down BACT procedure. ADEC did not respond.
- EPA issued enforcement orders prohibiting permit issuance and construction pursuant to the permit.
- ADEC claimed that the statutory definition of BACT unambiguously assigns to the permitting authority alone determination of the control technology qualifying as best available.

Majority: Ginsburg

- State permitting authorities have the initial responsible of determining the BACT
    - States are in the best position to due this since it must be done on case-by-case basis.
    - But EPA is not contradicting this. Agency asserts only that it can reject unreasonable determinations
- EPA may find an individual outcome invalid if it not based on a reasoned analyis.
- Other sections of the act require EPA oversight. Inclusion of a requirement in one portion does not contradict potential for permissive oversight in other sections. Here EPA is *authorized* rather than *required.*

- Authorized: stop order only where determination that permitting authority decision was unreasonable.
- Required: stop order wherever EPA would come to a different determination on the merits.

Dissent: Kennedy

- Alaska followed all required procedures.
- All this is a substantive disagreement. State should prevail.

ALLIANCE FOR CLEAN COAL V. MILLER, 7TH CIR. 1995, P. 443

History:

- 1970s: The initial clean coal/dirty air fight
- 1977: Requires scrubbers in all new sources.
- 1990: requires two stage reduction allowing transfer of allowances.
- Illinois Assembly passed Coal Act, which included the following protections for Illinois (high sulfur) coal:
  - Required commissioner to take in account costs to local coal industry in assessing compliance plans.
  - Requires certain large egus to install scrubbers.
  - Allowed for pass through of costs of scrubbers to consumers
  - Required commerce commission approval before a utility could make a change in fuel that would result in 10 percent or greater decrease in use of IL coal.

Discussion:

- This Act is a violation of the dormant commerce clause.
- Prohibition of out-of-state product is not required to trigger dormant commerce clause.
- The act discriminates against western coal.
- Insufficient that costs are covered by rate-payers.
- **Concurrence:**
  - Agrees that the act passed the line, but argues that there is some merit to IL's argument.
  - Social cost: should include the cost of compensating the sector of society that suffers from loss of business.
  - There is also a potential preemption issue. IL cannot mandate scrubbers where the CAA has specifically not done so.

AMERICAN CHEMISTRY COUNCIL V. EPA, DC CIRC. 2003, P. 626

Agency Action:

- EP modified the regulatory definition of hazardous waste to include a mixture of solid waste and one or more hazardous waste and a derivative of hazardous waste.

Statute:

- Delisting is possible through showing of no hazard.

Discussion:

- Chevron Step One:
  - ACC claims that EPA admits that not all mixtures/derivatives pose hazard and Congress couldn't have meant for regulations of no threat wastes.

        - EPA cannot make determination without consideration of toxicity, persistence, and degradability in nature…"
        - Legislative history suggests two step process: determine characteristics then show waste has them.
    - EPA: statutory sweep is road and includes both actual and potential threats, and includes those wastes that may pose threat only if mismanaged.
        - It is reasonable to presume that unless otherwise demonstrated mixtures/derivatives are also hazardous.
    - Statute does not speak directly to this question, and, especially, because delisting is always possible, will presume statute is flexible on this issue.
- Chevron Step Two:
    - Final rule is in keeping with the cradle-to-grave philosophy
    - Efficiency argument: place burden on industry to show particular mixtures or derivatives are not hazardous rather than placing burden on EPA to show that they are all hazardous.
    - It is irrelevant that delisting is cumbersome.
    - Other option is to petition for exceptions at initial listing.
    - EPA has shown that ACC-proposed alternatives would be less effective.
    - RCRA does not require cba.
    - ERR ON SIDE OF CAUTION.

AMERICAN PETROLEUM INSTITUTE V. ENVIRONMENTAL PROTECTION AGENCY, DC CIRC. 2000, P. 615

Agency Action:

- EPA defined oilbearing wastewaters as solid waste for the purposes of RCRA regulation.

Statute and statutory question:

- When is waste "discarded" for the purpose of being classified as solid waste?
- Definition of solid waste contains the phrase "and other discarded materials."
- Defined by regulation as "any material which is abandoned, recycled, or considered inherently wastelike."

Discussion:

- Petroleum refiners remove impurities using water and end up with oilbearing water, which is then processed to recover the oil. Primary treatment removes oil and secondary treatment is done before discharge. At what point in this process is the water discarded?
- EPA concluded that treatment for disposal was the purpose of primary treatment (as opposed to treatment for recovery) on the basis of the fact that treatment was done, at least in part, to comply with the CWA and because only a small amount of oil was recovered.
- Petitioners claim that they did this recovery before the CWA and would do it regardless because a valuable amount of oil was recovered. Thus the primary purpose was recovery so the water is not discarded until after primary treatment.

- Question: is primary treatment step in act of discarding or last step in production process?
- Generally EPA would get deference in its choice of characterization, but in this case its reasoning is insufficient.
    - That only a small amount of oil is recovered is irrelevant because it may still be valuable enough to justify the process.
    - Reliance on CWA is insufficient, because EPA did show that petitioners wouldn't undertake the process anyway → didn't show that CWA was primary motivation for undertaking process.
    - EPA didn't conduct cba to determine validity of industry claim that the process was worthwhile.

AMERICAN PETROLEUM INSTITUTE V. ENVIRONMENTAL PROTECTION AGENCY, DC CIR. 2000, P. 622

Same as case above, this time dealing with the question of what the standard is for finding substantial hazard to human health.

Agency Action: EPA listed certain refinery materials as hazardous wastes after concluding that they presented a hazard to human health.

Discussion:

- Agency based its determination on its assessment of individual risk; it determined population risk to be near zero.
    - Individual risk: risk of death in a lifetime.
        - 1/100,000 → candidate for listing
        - 1/10,000 → presumptively listed
    - Population risk: deaths per year
- Population risk is not a mandatory consideration factor; while EPA almost always considers population risk, court defers to EPA's logic that this factor should not be determinative.
    - Concern for nearby residents.
    - Concern for those highly exposed.

AMERICAN TRUCKING (WHITMAN V. AMERICAN TRUCKING ASSOCIATIONS), SCOTUS, SCALIA, 2001

Statute: CAA § 109: Setting NAAQS for Ozone NAAQS stds include a 1° (health) and 2° (welfare) std. CAA §109(b): set std "req'd to protect pub health" and w/ "adeq margin of safety."

Rulemaking:

- In 1997 EPA issued standards for particular matter (PM) and ozone (O3).
- EPA determined that both are non-threshold pollutants.
- EPA's O3 Level: Ozone: 0.08ppm (existing level is 0.09ppm);
- EPA's **Factors**: "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health info available, and the degree of uncertainties that must be addressed." **READ**: **effect severity, certainty, and size of pop affected.**
- Adverse effects of O3: The most certain effects of O3 below 0.8ppm, while adverse, are transient and reversible;
- Background levels have been measured at between .07 and .08.

Holdings:

- **Cost Benefit Analysis**
  - Elephants in mouse holes: whereas, in other places Congress acknowledges costs of environmental controls and authorizes cba, it has not done so in § 109 of the CAA.
  - There is no clear indication in the text that cba is permissible.
  - Industry argues for a broader reading of "public health" that could include cost considerations, but using the second definition makes no sense. DICTIONARY.
  - Scalia acknowledges potential of health impacts of compliance costs, but finds that they are accounted for in § 110(f)(1) which allows compliance waivers where compliance would impose public health costs.
  - In addition, because cost consideration is authorize explicitly in other places, it follows that where it is not authorized it is not permitted.
  - States may consider costs in developing SIPs.
  - New default rule: silence = prohibition.
  - Rejected DC Circ proposition that agency could cure non-delegation problem by narrowly reading its own power. DC Circ thought EPA would need to implement c/b a to make give NAAQS an intelligible principle.
- **Concurrence: Breyer**
  - Read silence as permitting rather than forbidding cost benefit analysis because EPA should be free to consider any detrimental effects of the regulation. In this case, looking beyond text (rejecting Scalia's "textual commitment), other tools of interpretation (legislative history, statutory structure) corroborate bar on use of CBA on basis of the fact that section was intended to be tech forcing. Public health was more important than industry viability.
  - Notes, however that § 109 does not compel elimination of all risk → deindustrialization would not improve human health.
  - Statute gives room to consider risk tradeoffs:
    - Contextual risk tradeoffs
    - Cost-induced health risk tradeoffs
    - Comparative health risk tradeoffs
    - RR thinks Breyer is wrong on wealth creates health. Thinks it is the other way around.

APPALACHIAN POWER COMPANY V. ENVIRONMENTAL PROTECTION AGENCY, DC CIRC. 2001, P.437

Actions:

- Dealing with same SIP calls from *Michigan*.
- Eight states filed 126(b) petitions.
- EPA's response to petitions:
  - Because the same set of facts governed both SIP Calls and 126(b) petitions, EPA decided not to make formal findings and instead made the affirmative technical determination that there were violations.
  - Automatic Trigger Mechanism: If state did not submit a SIP that complied with call or promulgate an implementation plan, EPA would automatically find against the state on the 126 petition.

        - This was justified by the parallel deadlines: Three year 126 timeline would end at same time of required implementation under original SIP call.
    - The court stayed the initial SIP Call in the process of separate litigation → EPA abandoned automatic trigger mechanism and proceeded with 126 findings. → Petitioner's argue that SIP Call (state) is preferable to 126 (feds) under CAA federalism principals.

Discussion:

- 126 offers an exception to Train-Virginia federalism bar. In some circumstances, EPA can directly regulated individual sources within a state. Parallels to 110(c). Direct federal action is necessary in face of serious failure of state action.
- Petitioners claim that delay in SIP did not effect the clear preference for state action, but allowing the SIP extension to suspend the 126 actions would destroy a number of elements of 126:
    - The three year deadline.
    - The provision that 126 is independent of actions of upwind states.
    - Relief is independent of EPA discretion (must respond within 60 days).

ARKANSAS V. OKLAHOMA, SCOTUS, 1992, STEVENS, P. 586

History:

- Fayetteville applied for a permit for city's new sewage plant, and EPA issued a permit.
- OK challenged on basis that permit would violate its own stds which applied to the portion of the Illinois River just below the state line.

Procedural History:

- ALJ: Must find an "undue impact" (more than de minimis) to find a violation → no violation.
- CJO: to find a violation must find, by preponderance of the evidence, that upstream source causes a detectable violation in downstream state → remand to apply standard.
- ALJ: Found no violation.
- CJO: sustained.
- Basis for Appeal:
    - OK: There was a violation by the CJO's standard.
    - AK: The CWA does not require AK point source to comply with OK WQS.
- Court of Appeals:
    - Rejects both bases for appeal.
    - Reverses on grounds that the permit will contribute to current violation; Illinois River segment in OK is already degraded and AK effluent will contribute to ongoing degradation, even if it does not substantially impact water quality.

Discussion:

- Court does not reach of the question of whether EPA is obligated to apply WQS of a the downstream state in considering permit applications of upstream state.
- EPA **does have authority** to require that compliance.
    - 40 CFR 122.4(d): an NPDES permit shall ensure compliance with water quality requirements of all affected states.
    - EPA has broad discretion in permitting: 402(a)(1): and other such requirements as he deems appropriate.
    - Application in interstate rules in consistent with Act's purpose.
    - Not in contradiction to *Ouellette* holding, which barred downstream states from participating in permitting decisions.
- Was Court of Appeals correct that Act requires total bar on discharge of effluent that will reach degraded waters? **NO**
    - COA relied on 402(h), which is not on point (that provision bars public treatment plants from accepting additional pollutants until ongoing violations are corrected)
    - Statute does not contemplate ban on discharge into noncomplying waters.
    - State water quality stds are part of federal law → defer to CJO's interpretation
        - He found no detectable impact.
        - Degraded status is only one factor to consider → more important to consider impact on status.

ATLANTIC RESEARCH CORP., SCOTUS, 2007, P. 730

Question: Can PRPs use 107 for cost recovery?

Discussion:

- 107(a)(4)(B) gives right of recovery to "any other person." Does this mean any other person that those defined in (1)-(4), in other words PRPS, or any other person than those listed in 107(a)(4)(A), in other words, anyone but government?
- There is a structural link between (A) and (B): parallel structures.
- Textual relationship: phrase other necessary costs in (B) refers to costs identified in (A).
- Plain language gives private right of action to PRPs using 107(a)(4)(B).
- This is not problematic because they are remedies for different circumstances
    - 107 allows for recovery of incurred response costs
    - 113 allows for contribution from other parties of response costs paid out in a recovery action
    - Because they cover different circumstances there is no choice between the statute of limitations and no choice to impose J&S over equitable contribution.

ATLANTIC RICHFIELD CO. V. AMERICAN AIRLINES, INC., N.D. OKL. 1993, P. 719

History:

- Plaintiff entered into consent decree to undertake cleanup and reimburse EPA.
- Plaintiff filed response cost and contribution claims against 400 PRPs, the majority of which settled on volumetric basis.

- In suit against remaining defendants, judge applied pro tanto method.
- Fairness hearings had been conducted to ensure no bad faith in settlement.

Discussion:

- Approach is up to judicial discretion and should be determined on a case-by-case basis.
- Problem with the proportionate rule is that it leads to risk plaintiff gets less than full recovery.
- In this case, there is little risk that pro tanto rule will result in defendants being responsible for inequitable share.

BENZENE: INDUSTRIAL UNION DEPARTMENT, AFL-CIO V. AMERICAN PETROLEUM INSTITUTE, 1980, P. 59

Statute: Occupational Safety and Health Act, reflects legislative compromise.
§3(8): Generic: Standard "reasonably necessary or appropriate" for a safe workplace.
§6(b)(5): Toxins: Assures, to the extent feasible," no material impairment to health.

Rulemaking: OSHA replaced the consensus rule (Benzene levels at 10ppm) with a more stringent rule, at 1 ppm (not applying to gas station employees).

Challenge: Industry argued that OSHA needed to conduct a cost-benefit analysis.

Plurality (Stevens):

- **Clear Statement:** Uses 3(8) to show that Congress could not possibly have intended to mandate zero risk, an unrealistic standard → OSHA must show that a significant risk exists and that the standard will alleviate that risk (purpose of act is to reduce risk substantially not to create perfect safety). Found that OSHA had not shown that standard would reduce risk.
- Stevens also objected to unequal application of the standard.
- Must show substantial risk, although agency can define substantial risk, and need not show risk with mathematical certainty. In other words, agency is still free to be precautionary.
- 3(8) is an overarching part of statute, governs the other parts → when to regulated. 6(b)(5) → how to regulate.
- As proponent of rule, agency has burden of proof.

Concurrence (Powell): Congress must have meant OSHA to balance desire for safety with desire for strong national economy.

Concurrence (Rehnquist): This delegation of power is unconstitutional. Feasibility is a "legislative mirage."

Dissent*:* Defer to the agency It is not the role of the judiciary to question expert determinations of appropriate safety standards; OSHA was well within its discretion. Focuses on substantive provision over definitional provision.

Notes:

- Created a cottage industry in quantitative risk assessment.
- Essentially creates a pleading standard.

IN RE BELL PETROLEUM SERVICES, INC. 5TH CIR. 1993

Holding: Court rejects the finding of joint and several liability and remands for apportionment on the basis of the fact that there was no commingling of different substances so liability can be apportioned volumetrically.

Discussion:

- Difficulty of apportionment doesn't mean it should not be done.

- Court does not need to determine contribution with certainty; merely needs to find sufficient evidence to get reasonable and rational approximation.

Dissent/Concurrence:

- Defendant met legal burden of showing that apportionment by volume would be appropriate in the case, but did not meet factual burden of showing what their volume contribution was.

BESTFOODS (UNITED STATES V. BESTFOODS), SCOTUS, 1998, P. 651

Agency Action: US brought action against Bestfoods for cleaning up waste from a chemical plant.

Facts:

- Ott Chemical company became a subsidiary of CPC.
- Bestfoods is the successor in interest to CPC.

Statutory Question: When is a parent company liable?

Discussion:

- Statute poorly defines owner/operator → both defined as "any one who owns or operates."
- District Court held that parent can be liable either when there is direct operation or when the corporate veil can be pierced (based on state common law corporations doctrine). Applied an actual control test that didn't distinguish between direct and indirect liability.
- 6th Circuit held that parent was liable when it was in a joint venture with the subsidiary. But SCOTUS thinks this definition is too narrow.
- SCOTUS:
  - Derivative liability – relationship between the two corporations (veil piercing analysis)
  - Direct liability – relationship between parent company and the facility (was parent an operator) → remand for further inquiry to address this question.
    - Presence of agent of parent company who is involved in facility/hazardous waste decisions.
    - Did parent company have its hand in control of facility relative to the disposal of hazardous waste?
    - Control of other aspects of the facility are irrelevant.

BURLINGTON NORTHERN & SANTA FE RAILWAY CO., 9TH CIR. 2007, P. 707

History: B&B owned facility, but is now insolvent. Railroads owned the land, and Shell delivered some of the chemicals.

District Court: Found Railroads and Shell only partially liable and apportioned liability based on:

- Percentage of land owned
- Percentage of time that RRs leased parcel
- Percentage of hazardous products attributable to RR's parcel.
- Margin of error

Circuit Court:

- When ownership is the sole basis for liability, it makes sense to apportion based how much pollution comes from owned land → but that doesn't hold up in this case.

- District court had good fact findings, but legal conclusions were wrong.
- Arvin facility had a unity of use → cannot divide pollution neatly among different parcels of land.
- No evidence that harm was proportionate to size of parcels.
- Proportion of chemicals stored would have been a better basis, but this is not on the record. Not likely to ever be available.
- The approach of the district court contradicts CERCLA's principle of no fault liability for owners, which is intended to avoid risk of incomplete information.
- District court also mistakenly assumed constant leakage.
- Net result is to make it harder for owners, who typically have least responsibility, from showing divisibility, but CERCLA is not concerned with fault.

CALVERT CLIFFS' COORDINATING COMMITTEE, INC. V. UNITED STATES ATOMIC ENERGY COMMISSION, DC CIR. 1971, P. 798

Question for the court: Is the AEC's policy legal under NEPA?

Agency Action: AEC developed a policy that detailed environmental statement is to be completed and submitted to hearing board in charge of evaluating permit application, but, if a party does not raise an environmental issue at the hearing, the report is not taken into evidence.

Discussion:

- AEC pleads vagueness of NEPA, but court finds vagueness is not a problem.
- Congress mandated that environmental issues be considered along with other issues.
- Substantively the act is very flexible, but procedurally its requirements are more precise.
- Envi impact part of mandate of every federal agency. (AEC had previously claimed that consideration of environmental impact was outside its mandated power).
- Act compels a detailed statement that serves as evidence the envi issues were given due consideration.
- Phrase "to fullest extent possible' in 102 does not mean that agency can use cost considerations as an excuse not to conduct a thorough assessment; it means that the assessment must by rigorously enforced by the courts → agencies must comply unless there is a statutory conflict.
- Courts can overturn for substantive issues only if decisions are arbitrary.
- Problems with AEC procedure:
  - EIS is not automatically a part of the decision-making record
  - EIA is limited to radiological issues for hearings announced pre-1971
- Envi statements MUST be considered in the review processes, at every stage where overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be to proposed action to minimize environmental costs.

COALITION FOR CLEAN AIR V. EPA, 9TH CIR., 1993, P. 348

Statute: CAA: Focusing on the FIP requirements of 110(c)(1).

History:

- After passage of the CAA, the South Coast (in CA) submitted several SIPS that EPA disapproved.
- EPA proposed a series of FIPs that would require gas rationing, but it withdrew proposals citing disruptive social and economic impacts.
- 1984: EPA approved a SIP, but deferred determining if control mechanisms would achieve attainment.
- 1984: citizen group brought suit saying that that EPA had exceeded authority by accepting SIP but not determining if SIP could achieve attainment.
- In compliance with court order, EPA disapproved SIP, thus triggering FIP obligation.
- 1988: Coalition for Clean Air brought suit to compel EPA to promulgate FIP. Led to settlement agreement to create FIP, extension was granted by the court after an earthquake in that region. To finalize by 1991.
- EPA went to Congress seeking statutory relief from obligation to promulgate FIPS.
    - Senate agreed, but House did not.
    - Admin Reilly wrote objection letter complaining about not wanting to impose Draconian measures on southern California.
    - 1990 amendments retained mandatory FIP language.
- 1991: EPA asked court to vacate the settlement agreement on basis of 1990 amendments → argued that issuance of new timelines meant that state must address new requirements at first instance before the EPA could impose a FIP.

Circuit Court Review:

- **Question for the Court:** Did passage of the 1990 amendments relieve the EPA of its obligation to issue a FIP based on the settlement agreement in the 1988 suit?
- Does 1988 disapproval trigger FIP, or can EPA wait to see if CA fails to meet1990 amendment deadlines?
- Plain language analysis: Language is explicitly not prospective. It refers to disapproval, and EPA must issue FIP within two years of disapproval. Two years from triggering event, whenever it was. Future tense of the word shall does not mean that Congress meant 110(c)(1) to operate prospectively only.
- It is true that the criteria of 1990 differ from prior criteria, but court does not address the question of which criteria the EPA would need to apply.
- Would an anomaly result from enforcing the plain language?
    - Same attainment schedule
    - State can produce new measures for NOx and VOCs as revisions to FIP.
    - FIP does not preempt future action by the state, which can continue to submit revisions.
- The deference question:
    - No Chevron deference is due because there is no ambiguity.
    - Even if there were ambiguity, the EPA interpretation would not merit deference because it reflects a change from a prior position without any justification for the change.

Agency Interpretation:

- Agency interpreted 301(l) to prohibit issuances of 301(c) and (g) variances for effluent limitations with respect to toxic pollutants. But EPA found that it could still issue FDF variances.

NRDC Interpretation:

- 301(l) prohibits all variances with regard to toxic pollutants.

Statute:

- 301(l): "The administrator may not modify any requirement for this section as it applies to any specific pollutant which is on the toxic pollutant list under 307(a)(1)." **(note:** language was later amended to reflect addition of 301(n), which limits the circumstances where FDF variances may be granted).
- Result turns of the meaning of "modify"
- 304(b)(2): FDF variance provision: "factors relating to the equipment or facilities involved, the process applied, or other such factors relating to such discharger are fundamentally different from the factors considered in the establishment of the guidelines."

Discussion:

- Chevron Step One:
  - Modify cannot be given its plain meaning because that would preclude any changes to the regulations involving toxic pollutants; this would foreclose revision and correction. An untenable reading.
  - Because modify does not have its plain meaning, the meaning is not immediately apparent and the EPA has discretion to determine the meaning.
- Chevron Step Two:
  - EPA found that giving and FDF variance was parallel to a revision under 307.
  - Purpose of FDF I to remedy categories that were not accurately drawn.
  - Legislative history calls for uniformity of control of categories, so FDF doesn't abrogate this purpose, it corrects categories.
  - In contrast, 301(c) and (g) are about cost and capability of individual plants. FDF is about correctness of agency determinations of categories.
- Dissent:
  - EPA presents FDF and 307 changes as being two procedures for the same ends.
  - But FDF and 307 have vastly different outcomes:
    - FDF is less protective of the environment because FDF standard is set in reference to one plant (tends to preserve status quo) whereas 307(b) standard is set in reference to best performer in the class.
    - FDF does not have the same tech-forcing impact as 307(b)
    - 307(b) could end up with a subcategory set for a single plant, but 307(b) would ensure uniqueness before creating the subcategory. Whereas an FDF determination could be made

without that establishment → standard set singly despite the fact that there may similarly situated dischargers.

CITIZENS AGAINST THE REFINERY'S EFFECTS, INC. V. ENVIRONMENTAL PROTECTION AGENCY, 4TH CIR. 1981, P. 390

Statutory Issue:
- Offset requirements under § 173.

Agency Action:
- EPA approved Virgina SIP for reducing hydrocarbon.
- The plan called for offsetting new emissions from a refinery by decreasing usage of a certain type of HC emitting asphalt.

Discussion:
- Was offset legitimate despite the fact that Virginia was likely going to stop using the bas asphalt anyway?
- Offset requirements:
  - Base time period to determine how much reduction is needed → first year of SIP or year in which permit application is filed.
  - Requires new source adopt LAER.
- CARE argued that switch of asphalt was illegitimate offset because it was part of a stated state policy, but court found that because the plan was voluntary and using it as an offset made it mandatory/enforceable, it was a legitimate.

CHEM-DYNE CORP. S.D. OHIO, 1983, P. 698

Action: Us brought reimbursement action against twenty-four defendants.

Question: Is J&S liability appropriate?

Discussion:
- Courts find the statutory language is ambiguous so look to legislative history.
- J&S language was initially included but them removed → in order to allow court to apply common law principles.
- Congress wanted to avoid mandatory J&S but not J&S altogether.
- Mixing waste raises questions as to divisibility of the harm.
- Showing of divisibility is the defendants burden.

Notes:
- Under J&S, solvent PRPs end up covering insolvent PRPs
- Costs less for the government to sue one, and let the defendants work out proportion later amongst themselves.

CHEVRON U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL, INC., SCOTUS, 1984, P. 392

Statutory Issue:
- Definition of stationary source under the nonattainment laws.

Rulemaking:
- EPA promulgated a rule for nonattainment permitting allowing for a plantwide definition of stationary sources.
- This rule reflected a change from previous EPA policy in the prior administration.
- This rule allows existing plants to make modifications without meeting permitting conditions so long as the change doesn't increase total emissions from the plant.

Discussion:

- Was there clear congressional intent?
  - No.
  - §111(a)(3) defines stationary source as any "building, structure, facility, or installation." This section does not directly apply to the nonattainment section, but the language does imply the bubble concept.
  - §302(j) which does apply does not offer a specific definition.
  - Common usage doesn't preclude EPA definition.
- Was the agency's interpretation permissible?
  - EPA justifications:
    - Wants to eliminate disincentives to new investment and modernization by discouraging modifications.
    - Wants to eliminate a rule that would retard progress.
    - Wants to simplify the rule to increase ease of implementation.
  - Bubble definition is consistent with the goal of economic growth and the EPA has given sufficient explanation for assertion that it is also consistent with environmental goals.
  - EPA has consistently interpreted source flexibly.
- Court is not an arbiter of policies.
- Reasons for deference:
  - Complexity of the statute
  - Expertise of the agency
  - Agency gave due consideration

CLEAN AIR MARKETS GROUP V. PATAKI, 2D CIR. 2003, P. 247

State Action: New York passed the Air Pollution Migration Law, which taxes sale of allowances from NY to upwind states. In order to avoid tax, NY seller must attach a restrictive covenant preventing even eventual sale to upwind plant.

Statute: Title IV of the CAA

- Creates a cap-and-trade system with automatic annual reductions in allowances.
- Provides for nationwide transfer.

Discussion:

- Is the NY law preempted?
  - Types of preemption: express, field, conflict.
  - District Court found conflict preemption on the basis that 66-k is an obstacle to accomplishment of objectives and purpose of Title IV.
  - NY argues that Title IV and 66-k have same objective: protection of natural resources, but this is insufficient to avoid preemption.
  - Title IV also has objective of nationwide trading scheme. Ti reduce SO2 emissions "through an emission allocation and transfer system."
  - Leg history supports nationwideness. While earlier house version contained geographic restrictions, Senate version with not and conference committee selected Senate version.

- EPA regs also reinforce this interpretation → nationwide is essential element of allowance trading system. These regs were adopted over the objection of NY.
- NY law interferes with free transfer by adding a strong financial disincentive.

CMDG REALTY CO, 3D CIR. 1996, P. 685

History:

- 1945-1972: Land was used as a landfill
- 1981: Purchased by Dowel; remained vacant
- Dowel found land insufficient for construction because of waste materials and subsurface subsidence
- 1987: Dowel sold the land to HMAY with full disclosure of problems discovered and ongoing investigation by state/fed environmental authorities

Agency Action: Suit against HMAT as current owner → HMAT brought suit for contribution (113(f)) against Dowel.

Discussion:

- Dowel's Argument: prior owners are only liable if they actively engage in waste disposal during ownership period
- HMAT's argument: prior owners are liable if they fail to stop the migration of contaminants on their property.
- Some courts have looking at "leaking"/"spilling" language and found that past owners are liable for passive migration → no active conduct necessary
- But, disposal is active, and all other definitional words are active, so leaking and spilling must be read in that context → affirmative human action is necessary to find disposal.
- Passive migration is encompassed not by disposal but by release, which is more broadly defined than disposal and includes passive results.
- Court suggests that limiting innocent owner defense to current owners make sense only if passive spreading is not included in disposal → if prior owners were liable for passive migration they would be substantial worse off without access the innocent landowner defense.

CONSOLIDATION COAL CO. 6TH CIR. 2003, P. 714

Facts:

- Consol. & trinangle v. Neville for contributions
- Neville had deposited 472k gallons of wastewater, but claimed no harm resulted.

District Court: found Neville liability under CERCLA and found liability of 6%

- Determined that it must look at shares of all PRPs.
- Considered following factors:
  - Varying levels of culpability (critical factor) → used to allot among types of PRPs → 60% to generators
  - Amount of waste contributed (Gore factor) → used to allot among generators (of which Neville was one) → 5% of generators (3% of whole)
  - Cooperation with the government (Gore factor) Used evidence of lack of cooperation to adjust Neville's share → 6% (doubling reflects fact

that in settlement between other parties and government remedy was set at half cost originally determined (Neville should not get windfall as result of other parties' cooperation)

Circuit Court:

- Contribution assessment is based on totality of the circumstances.
- District court was within its discretion to reject Neville's assertion of no harm on basis of lack of credibility of the expert witness
- Apportionment was also within its discretion → no clear error of judgment

CORROSION PROOF FITTINGS V. ENVIRONMENTAL PROTECTION AGENCY, 5TH 1991, P. 112

Statute: TSCA

- Mandates substantial evidence standard of review
- Must be a *reasonable basis* to find an *unreasonable risk of injury*
- Standard should *protect adequately* against such risk using the *least burdensome* requirements
- Required to consider costs and benefits of regulation and of alternatives to the regulation

Rulemaking: After offering up several possible asbestos regulations, the EPA chose to implement a staged-ban, finding that asbestos posed an unreasonable risk.

Holding:

- Least Burdensome: EPA must choose level and then reg. least burdensome to reach that level. In this case, the EPA chose the most burdensome option without justification. It did not offer consideration of the intermediate alternatives (such as ban in some circumstances and improve labeling).
- Problems with calculations:
  - 1. EPA discounted costs but did not discount benefits
  - 2. EPA equated time of exposure with time of injury. But, with asbestos, exposure does not necessarily translate into injury and there can be a long latency period.
  - 3. EPA only calculated costs and benefits to 2000, and then considered all lives saved after that to be 'unquantified benefits." Used that to justify vast projected cost per life saved. Unquantified benefits cannot be trump card.
- Reasonable Basis; Failure to address the substitution problem
  - EPA did not consider the cost imposed by the lack of substitutes
  - It also did not consider the possible harm created by those substitutes → cannot accurately assess safety improvement to the workplace without including assessment of risk created by the substitute.
  - While EPA does not have the burden of testing and assessing every possible substitute, it must consider the studies submitted by interested parties addressing this question. "A death is a death"
- Unreasonable risk of injury: TSCA mandates using cba to determine if the risk is unreasonable. In this case the costs per lives saved do not point to unreasonableness of risk.

Notes:

- Precautionary principle v. proportionality principle
- Distinguish between latent harms and harms to future generations.

CPC INTERNATIONAL, INC. V. TRAIN, 8TH CIR. 1976 (CERT DENIED) P. 528

Agency action:

- EPA set new source standard for the corn wet milling industry.
- 20 lb BOD5 and 10 lb TSS per MSBu.
- Tech: Deep bed filtration system.
- Data from a test plant for about one year.

BOD5: Uphold

- EPA synthesized a model plant from data received from industry and other industries with similar wastewater.
- Objections to the model:
  - Didn't consider additional wastewater flows from wet water scrubbers
  - Didn't account for higher BOD concentrations when dealing with modified starches.
- But petitioners objections are based on preliminary and conflicting data.
- EPA did consider increased flows and projected results with modified starches.

TSS: Remand

- EPA justifies standard with performance of technology in other industries but data indicates that transfer won't be efficient enough to meet the standard.
- Inconsistent data on effectiveness.
- Deep bed filtration success varies by concentration of influent, but EPA didn't account for cross industry differences.
- Some of the data was unclear.
- Cost benefit analysis is not required.

DU PONT DE NEMOURS & CO. V. TRAIN, SCOTUS, 197, P. 509

Questions for the court:

- Does EPA have the authority under 307 to issue industry-wide regulations limiting discharges at existing plants?
- Does 306, creating new sources standards, allow variances to individual plants?

Statute:

- 304: Mandates that that the admin publish guidelines.
  - to assist states with permitting,
  - to establish new plant standards
  - to establish existing plant standards.
- 301: Effluent Limitations
  - (a) requires compliance with permitting to allow for discharge.
  - 301(b): Establishes two stage process for existing sources. States that limits shall be achieved, but does not specify who shall set them.
    - Refers to 304 for definitions of BAT and BPT.
  - 301(c): Admin may grant variances from 1983 limits.
  - 301(e) Effluent limits shall apply to all point sources.
- 402: Admin may issue permits or authorize the state to do so. This section authorizing setting limits through individual permits, but does not mandate state or fed to prescribe effluent limits. Permits must comply with 301 limits.

- 306: Admin must publish list of categories of **new** sources, and, within one year, establish national standards of performance. Contains no provision for exception. Indeed (e) states that it is unlawful to operate a new source in violation of the std after the effective date. Requires BADT.

Agency Action:

- The deadlines were too ambitious, so the admin deviated slightly in statutory procedure in regulation the inorganic chemical industry.
- Admin defined 301(b) effluent limits before issuing 304 guidelines or 306 national stds for new sources.
- EPA hired a consultant who divided the industry into categories and conducted a technical study in order to determine the levels of control for BPT and BAT.
- Each subcategory had a variance clause only for the 1977 regulations.

The Parties Positions:

- EPA: 301(b) authorizes it to issue effluent limitations for classes of plants. Permits granted under 402 incorporate these standards except for limited variances granted under 301(c).
- Du Pont: 301 is not an independent source of authority for setting limits, instead it is merely a description of limits which are set on a plant by plant basis through the permitting process.

Discussion:

- **301 authority:**
  - Jurisdictional issues: 509(b)(1) provides for review of agency action in approving or promulgating effluent limitations under 301 → courts of appeal. Act does not provide for review of 304 guidelines → APA and district courts.
  - 1983: language of 301(b)(2)(A) implies setting of category/class wide effluent limits. Class-wide determinations are normally made by regulation, not on a case-by-case basis.
  - 197: speaks of point sources rather than categories and classes, but there are no other indicators that the 1977 and 1983 rules are to implemented differently, especially if this would result in jurisdiction being split for review and would create duplicative review.
  - While 301 is unclear about admin's authority, 304(b) and 509(b)(1) both imply that it exists.
  - What is the function of the 304 guidelines? Issued for survey of tech and prescription for methodology for limit setting.
  - Petitioner's view would make EPA's task impossible.
- **The variance question:**
  - 306(b)(1)(B) – create standards for new sources
  - distinguish among classes 306(b)(2)
  - best tech 306(a)(1)
  - The act does not contain any variance provisions for new sources. While the court of appeals thought such provisions would be appropriate, the statute leaves no room for them.

Statutory Issue: Definition of modification under § 111.

Agency Action:

- Under 1980 PSD rules, modification was defined as change in the hourly rate.
- Duke Power wanted to replace some tube assemblies to extend life and allow for units to run for more hours a day, and EPA termed this a major modification thus triggering NSR.

Procedural History:

- **District Court:** No increases to hourly rates → no major modification.
- **Court of Appeals:**
  - Statute defines modification in PSD section by referring to modification definition in NSPS section.
  - This cross-reference suggests that the two terms should have the same regulatory definition.
  - Therefore it was impermissible for EPA to define modification for PSD in regard to …..It had to use NSPS definition of hourly rates.
- **SCOTUS: Souter**
  - CoA essentially invalidated the PSD regulation, and this invalidation was inappropriate because the court did not have jurisdiction to hear the question → statutory authority questions cannot be answered in enforcement proceedings.
  - Presumption of parallelism is rebuttable, and there is no reason to think that the different contexts cannot lead to different regulatory definitions.
  - The cross-reference doesn't change the outcome.
  - "Thus, the natural presumption that identical words used in different parts of the same act are intended to have the same meaning…is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably or warrant the conclusion that they were employed in different parts of the act with different intent."
- **Concurrence: Thomas**
  - Agrees that parallelism and cross-reference create a rebuttable presumption of same meaning, but finds that majority did not explain why the presumption had been rebutted in this situation.

ENVIRONMENTAL DEFENSE FUND, INC. V. ENVIRONMENTAL PROTECTION AGENCY, D.C. CIRC. 1977, 108

Statute: FIFRA: authorizes administrator to withdraw permits for certain pesticides when new science shows the pesticides pose a risk of cancer.

- Suspend registration where there is an "imminent hazard"
- Exists where continued use → "unreasonable adverse effects on the environment."
- Defined by assessment of "economic, social, and environmental cost and benefits of the use of any pesticide."

Rulemaking: EPA barred further production of heptachlor and chlordane except in limited circumstances; although slow faze-in, and existing stocks could still be sold

and used. This followed a ruling by the ALJ opposing the ban, finding no imminent hazard. The administrator overruled.

Discussion:

- How much evidence is needed to show "unreasonable risk"?
  - Substantial evidence standard
  - Need not relate to a specific use
  - EPA must show hazard from one mode of exposure + presence in human tissue → burden shifts to registrant to rebut inference that other modes of exposure may lead to carcinogenic hazards
- Assessment of EPA's cba
  - Benefits: there are sufficient substitutes for the pesticide to get similar benefits → need not be substitutes with equivalent effectiveness (rejects industries claim)
  - Admin also met burden to show that benefit of continued use in limited circumstances outweighed cost (rejecting EDF's claim)
  - On use of existing stocks: insufficient consideration of that impact → remand for further consideration
- Court is generally deferential to the agency.

FRIENDS OF THE EARTH V. EPA, DC CIRC. 2006, P. 580

- EPA approved several TMDLs that called for seasonal or annual rather than daily limits on the basis that the river could absorb large quantities of pollutants in a day as long as the long term levels did not rise too high.
- Court found that daily means daily, so despite the advisability of a different time frame, EPA had no statutory authority to use one.

IDAHO MINING ASSOCIATION, INC. V. BROWNER, IDAHO, 2000, P. 556

Action:

- EPA promulgated a WQS for three bodies of water in Idaho. It used a rebuttable presumption for fishable/swimmable.

Statute:

- 101(a)(2) establishes preference for fishable/swimmable.
- 40 CFR 131.10(j)(1): where a state designates use other than fishable/swimmable, it must conduct a UAA.

Discussion:

- Plaintiiff's argue that there is also a presumption that "uses are not attainable unless they can be achieved by the imposition of tech-based and bmps" They get there by inverting the UAA requirement. **BUT** this is incorrect because this provision is not generally applicable, it functions only within the UAA requirements and UAA is not required to f/s designation.
- Plaintiff also argues that states may establish f/s without UAA, but that EPA may not, but EPA only issues designations where states fail to do so or have done so improperly, and, in such conditions, is subject to the same rules as states.

KENNECOTT V. EPA, 4TH CIR. 1985 (CERT. DENIED), P. 521

Agency action:

- EPA set standards for non-ferrous metals manufacturing industry (produce copper, lead, zinc).

- EPA pointed to substantial health effects of the discharge of toxic metals, and set a stringent standard.
- Standard applied the lime, settle, and filtration system + sulfide precipitation.

Challenge:

- Claim that the standard would impose widespread costs and was unachievable.

Discussion:

- Assessing technology requires expertise → cautious judicial review.
- EPA must consider BUT need not accept industry data. However, agency must avoid the imposition of fiat.
- EPA conducted a very thorough inquiry, and took seriously comments from the industry.
- Objection to data set:
  - Kennecot thinks that EPA drew on too limited a data set and shouldn't have drawn so much from other industries. Also was too short term.
  - EPA gets leeway in selection of data and methods: zone of reasonableness.
  - EPA can used statistical methods to account for seasonal change.
  - It doesn't need to account for operating problems.
  - Comparability of other industries: with this process varying concentrations of the pollutant are irrelevant to achievability.
- Selection of sulfide precipitation:
  - Kennecot claims insufficiency because tech is from another industry.
  - Congress contemplated transfer.
  - Criteria for transfer
    - Show availability of tech in the other industry
    - Show transferability of tech
    - Show reasonable prediction of effectiveness of tech within industry

KLEPPE V. SIERRA CLUB, SCOTUS, 1976, P. 819, POWELL

Agency Action: Department of the Interior conducted EIS for national program and for local actions, but not for region, where there were a number of coal mining operations.

Discussion:

- Respondents can prevail only if there was a proposal for action.
- There was no major action with regard to the region.
- No evidence of a regional plan.
- In absence of a plan, and EIA would be impossible.
- Contemplation of an action is insufficient to trigger a statement requirement.
- In theory, several local actions might trigger a regional EIS if the actions are so related and court defers to agency on that determination.

MEHRIG V. KFC WESTERN, INC., SCOTUS, 1996, P. 607

Actions:

- LA ordered KFC to cleanup a site that was contaminated by petroleum.
- Cost KFC 211k.

- KFC brought suit against prior owners using the citizen suit provisions of RCRA.

Statute:

- 42 USC § 6972(a) allows for citizen suit against past/present owner who caused/contributed to contamination. Gives court authority to restrain contamination or to order person to take clean up action.

Discussion:

- CERCLA envisions using litigation to clean up and apportion liability costs.
- RCRA envisions using regulation to reduce generation of and ensure proper treatment of waste.
- Citizen suits under RCRA are designed to minimize imminent threats and to restrain harm or order cleaning. The provision does not envision cost recovery for clean up already undertaken.

MICHIGAN V. ENVIRONMENTAL PROTECTION AGENCY, DC CIRC. 2000, P. 431

Agency Action:

- In 1998, the EPA issued a SIP call, finding that 22 states and DC had to revise their SIPS to mitigate interstate transport of ozone.
- EPA uniformly required that each state reduce NOx by amount accomplishable with highly cost-effective measures (2000 or less per ton).

Challenges: Per Curiam

- **Consideration of Costs**: does 110(a)(2)(D)(i)(I) allow EPA to consider costs?
  - EPA determined that the 23 districts were significant contributors on the basis of a cutoff of 2 ppb to 1-hour excesses. These contributors could then satisfy by reducing only amount possible with cost-effective controls.
  - Must EPA determine significance solely on the basis of health concerns? → this would result in requiring total risk elimination because any level of ozone has health risks (Court discusses Benzene and the finding that the threshold for significant risk is essential). This approach requires assessment of cost.
  - There is no clear statement to bar cost consideration (compare to *American Trucking*).
  - No legislative history to support opposition.
- **Uniform Control:**
  - EPA required reduction regardless of level of pollution for all significant contributors Court upholds this decision on basis of upholding EPA's decision to use a particular cutoff for determining significance.
  - Others object to uniform control on basis that health impact will vary depending on geography, etc. Notes that aggregate reduction will come at the lowest cost but that aggregate health benefit will not necessarily be at the lowest cost, but court decides to defer to EPA, which had considered and rejected this alternative.
- **NOX Budgets:**
  - Objections is on the basis that these budgets mandate per source reductions and thus violations of the CAAs federalism principals.

        - Each state may choose its own control technology including an interstate trading program.
        - Petitioners argue that states have primary authority to set per source limited, but the budgets still allow real choice to states as to control methods.
    - **Dissenting Opinion:** Sentelle: It is undeniable that EPA has exceeded its statutory authority in considering costs.

MONSANTO, 4TH CIR,. 1990, P. 702

Action: petition for review of finding of joint and several liability.

Discusison:

- Courts should apply federal common law tort principles.
- RST 433A
    - (1) Damages for harm are to be apportioned among two or more causes where
        - (a) there are distinct harms, or
        - (b) there is a reasonable basis for determining the contribution of each cause to a single harm,
    - (2) Damages for any other harm cannot be apportioned among two or more causes.
- 443B puts burden of proof of divisibility on the defendant.
- Is volume a reasonable basis for apportionment?
    - Defendant presented no evidence that volume was proportionate to harm.
    - Mixing of different hazardous substances means that there is not necessarily a direct relationship.
- Primary purpose is to make government whole, equity can be dealt with later in contribution actions.

NAT'L CRUSHED STONE (EPA V. NAT'L CRUSHED STONE), SCOTUS, 1980, J.WHITE

Agency Action:

- Promulgated pollution discharge limits for existing sources for mineral mining and processing including crushed-stone, construction-sand, and gravel.
- Each set of regulations contained a variance provision for the 1977 regulations.
    - This includes FDF variances, but rejects economic ability basis.

Challenge:

- There must be a provision for variance based on economic inability to meet the standard.

Discussion:

- 301(c) provides for modifying the 1987 BAT limits for individual sources upon showing that "such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."
- The Du Pont case established that variances must be available for the 1977 BPT standards, but that case did not make clear if that should include economic capability.

- The 301(c) language on its face is limited to BAT.
- Its standards parallel the BAT factors. Essentially the variance provision allows for application of the 301(b)(2) standard for BAT on a case-by-case basis rather than on a class-by-class basis.
- Assumption that all plants applying for 301(c) variances had already met 1977 standards.
- No connection between 301(c) and BPT:
  - 301(c) requires reference to a prior standard (for reasonable further progress), but none exists for BPT.
  - BPT limits do not require industrial category to commit the max economic resources to pollution control see 301(c)(1)
  - Applying 301(c) would undercut the statutory purpose:
    - Statute contemplated that some plants would have to cease production → Congress understood that it would impose economic hardship and offered going out of business as one option for compliance.
- Court of appeals made erroneous assumption that because BPT is less stringent that BAT it must be at least as flexible as BAT.

NEW YORK V. ENVIRONMENTAL PROTECTION AGENCY, DC CIRC. 2005, P. 410

Statutory Issue: Modification under § 111.

Agency Action:

- EPA replaced its 1980 Rule with a 2002 Rule on defining modification.
- 1980 set base line for determining emission changes by looking at average of the two years preceding the application, but the 2002 Rule allowed setting the base line by looking at average of any two years from the ten years prior to the application.

Discussion:

- Objections to the rule:
  - Might allow increases beyond most recent level without triggering NSR
  - Contravenes statutory purpose of enhancing air quality.
  - Rule doesn't account properly for business cycles.
- EPA support for rule:
  - Rule reduces disincentives to renovation that might ultimately benefit the environment.
  - Rule improves agency efficiency.
- Court:
  - Deference to the agency: petitioner fails to demonstrate that EPA's choice is impermissible under the CAA
  - Agrees on elimination of disincentives to improvement.
  - Also NSR is an extra for existing sources, which are already regulated under SIPs.
  - New rule will only change results for a tiny number of sources.
- Concurrence: Arguing for emissions charges or marketable pollution to deal with the old plant problem once and for all.

NEW YORK V. REILLY, DC CIRC., 1992, P. 361

Statute: In determining BDT, EPA must consider cost of achieving reduction and any nonair quality health and environmental impact and energy requirements. See 111(a)(1)(c).

History:

- EPA developed a rule for municipal waste incinerators that required separation of certain types of waste and banned incineration of lead-acid batteries. Separation was a method for achieving a reduction in emissions.
- Rules were submitted to OMB. Both OMB and the President's Council on Competitiveness rejected the proposal.
    - Separation is not a performance standard.
    - Violated principles of federalism.

Court Decision:

- There is no specific weight given to any of the factors that EPA must consider. Admin's discretion how to weight the factors and make a decision as long as that decision is tied to the factors.
- Court uses arbitrary and capricious review; a standard with much deference particular dealing with matters of uncertain technological information.
- EPA asserted that it was unclear if separation would yield a net benefit. It cited a variety of studies that yielded different results.
- Plaintiffs raised issue that EPA had just done what they were told by OMB and had not done their own consideration, but court found that EPA had taken OMB recommendations into consideration, but had used its own expertise in promulgating its rule.

NRDC, INC. V. MUSZYNSKI, 2D CIR. 2001, P. 577

Action:

- In 1995, NY added nineteen reservoirs that were suffering from increased phosphorous pollution to its TMDL list.
- EPA approved the TMDL for eight of them, but for ten found that there was a an insufficient basis to find that pollutant levels required TMDL.
- NY used a 10% margin of safety to perform its calculations.

Challenge:

- The NRDC alleged that there was an inadequate margin of safety.

Discussion:

- EPA asserts that it gives substantial deference for setting of margin of safety: the standard for choosing is "best professional judgment."
- There was substantial potential for uncertainty.
- NRDC asserts that selection of 10% was arbitrary.
- Court finds that to require precise quantification of margin of safety would paralyze the EPA and would prevent regulation in a lot of cases where it should be done.

OHIO V. ENVIRONMENTAL PROTECTION AGENCY, DC CIR. 1993, P. 739

Statute:

- Clean up costs are to be consistent with NCP (104(a)(1).

Question: Are the 85 and 90 amendments to NCP inconsistent with CERCLA?

Regulation:

- NCP definition of applicable requirements: those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws…identified by the state in a timely manner and that are more stringent than federal requirements."
- NCP definition of relevant and appropriate requirement: while applicable nonetheless address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.

Issue one: improperly fail to apply zero-level MCLG to ARARs

- SDWA requires zero-level for some pollutants, but EPA does not enforce those that are set at zero
  - the MCLGS are unenforceable goals
  - MCLs: feasible actual permissible levels
- 121(d)(2)(A): specifically lists SDWA as applicable. Specifies MCGLs not MCLs.
- EPAs given reason is the impossibility of detecting zero-levels.
- Court determines that relevant and appropriate language gives EPA discretion. Petitioners argue that that discretion cannot be exercised categorically, but court disagrees and defers to EPAs reason to acting categorically.
- ARARs must be measurable and attainable and zero is never measurable.
- EPA could used methods to approximate but it is not required to do so.

Issue Two: Does NCP mandate inappropriate cost-benefit analysis?

- §121(d)(1) at a minimum assures health: does not allow for consideration of cost in determining level of protectiveness, HOWEVER states contend that NCP provisions improperly authorize of c/ba.
- §121(b)(1) cost-effective
- NCP criteria includes cost, but it is not a threshold criteria.
- Cost-effectiveness does imply balancing, but that occurs only after the threshold criteria have been met.

Issue Three: Permanence of Remedy

- NCP balances permanence with five other factors, states contend it is an independent statutory goal so must be considered separately.
- BUT statutory language does not prioritize permanence over cost-effectiveness and other criteria.

Issue Four: NCP Cancer range

- Range from 10 to negative six to ten to negative four.
- If no ARARs for setting levels, EPA does so itself.
- Does so based on nine criteria, sate concerned that cost is one of those. But protective of human health is the threshold criteria.
- Cost may only be used to select within an appropriate range, not to select an option that is not protective of human health.
- EPA gets deference, and petitioners didn't introduce evidence that 10 to the negative four is not sufficient to protect human health.

OHIO VALLEY ENVIRONMENTAL COALITION V. HORINKO, W.V. 2003, P. 563

Statute:

- 303(c): authorizes EPA to approve state antidegradation implementation plans.

Action:

- EPA approved Virginia's antidegradation implementation procedures.

Discussion:

- Issue One: classification of segments of the Kanawha and Monongahela rivers as Tier 1.
  - Rivers were given per se Tier 1 protection without determination of whether or not the met water quality criteria.
  - FWS says they rivers exceed water quality criteria and thus should be Tier 2.
  - States have substantial discretion to classify waterways:
    - Pollutant-by-pollutant method:
      - Establishes separate classification for each pollutant in a waterway.
      - Easier to implement
      - May result in more waters getting some tier 2 protection.
    - Water body-by-water body method;
      - Establishes classification based on balancing of assessment of all pollutants in a water body.
      - Allows for weighted assessment.
      - Danger is that assessment may not be based on inclusive enough criteria.
  - Court is satisfied by the water body-by-water body approach, but is concerned that under that approach the rivers were misclassified.
    - Listing based solely on listing of rivers on an impaired waters list (which required only finding that at least one pollutant did not meet stds)
    - But EPA does not give any other justification for the classification, or offer criteria for making the water body-by-water body approach.
    - The rivers may well be tier 1, but EPA has not offered any justification of this assertion. (Procedural inadequacy)
- Issue Two: Trading Provisions
  - Trading provisions allow new/expanded discharge without triggering antidegradation where applicant pays for offset upstream "sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade."
  - Do provisions violate NPDES standards? No, provisions merely permit a new or expanded discharge to satisfy antidegradation requirements in certain circumstances.
  - Is point/nonpoint trade illegal?
    - WV has no nonpoint quantification method → but EPA says it must develop one.

        - Facially the regulation is fine, but there is potential for as applied problems.
    - Is it illegal to allow trading between stream segments?
        - Cannot make trades without requiring an improvement in the same stream segment.
        - EPA asserts that the regulations do not require degradation.
        - Provisions are ambiguous, so court will defer to EPA's interpretation.

PACIFIC HIDES (US V. PACIFIC HIDE & FUR DEPOT, INC)., D. IDAHO, 1989, P. 670

Agency Action: US brought suit to recoup response costs from clean up of PCPs/

Landowners:

- McCarty's owned the land when it was contaminated. It was operated by S.R. & William. Third owner, Richard, was absent almost entirely.
- 1979 Richard was elected director to facilitate sale to defendant.
- Richard acquired interest in real property in 1982 through quit claim to the shareholders.
- S.R. transferred stock to his wife by will.
- William transferred his stock to his kids by gift.
- They all end up as land owners through the quit claim.

Discussion:

- Williams kids had almost no involvement.
    - Had no reason to know.
    - Had no contract (see gift exception in 101(35))
- Wife also had no reason to know and had no contract by 101(35): will.
- Stringency depends on the type of transaction (what is appropriate depends on the sophistication of the party, court looks to whether the parties have special knowledge about PCBs) – statute requires taking into account party's knowledge
    - Commercial transaction
    - Private transaction
    - Inheritence/gifts
- No inquiry requirement: The kids/wife conducted no inquiry → but Congress didn't say that some inquiry is always required; it said "appropriate inquiry" is required
    - No inquiry might be appropriate depending on situation

PORTLAND CEMENT ASSOCIATION V. RUCKELSHAUS, DC CIRC. 1974, P. 356

Statute: cost considerations and adequately demonstrated, under CAA § 111(a)(1).

Holding:

- **Cost considerations: Uphold**
    - EPA is required to do some kind of cost analysis, and EPA's study on cost feasibility of the reg meets this requirement.
    - Cost benefit analysis is not required. This would be too burdensome a requirement for the agency.
    - Admin would have to consider cost benefit analyses if they were submitted by the industry.
    - EPA found that demand for cement is not price elastic.

- **Comparative Analysis: Uphold**
  - When doing CBA, uniformity across industries is not required. This is justified by variation in best available technology across industries.
  - There is no requirement of interindustry uniformity, although comparison is relevant in considering substitutes, and EPA did this.
- **Adequately Demonstrated**: Overturn
  - Two types of manufacturing processes would require different types on pollution controls. Wet process and dry process.
  - Admin's decision was based on:
    - A test done at a dry-process plant → high degree of error for single test. Weak basis that industry would be capable of meeting standard.
    - A test done at a wet-process plant → only looked at periods of normal operation.
    - Literature sources → methods in cited studies contradicted methods used in EPAs own testing. Agency should indicate which findings are significant.

PRONSOLINO V. NASTRI, 9TH CIR. 2002, P. 570

Action:
- EPA required CA to set TMDLs for the Garcia River
- EPA issues new list after CA refused to amend its list; it included 17 segments that were primarily nonpoint polluted. CA did not establish TMDLs, and after an action-forcing suit, EPA set deadline for CA to set them, but it did not, so EPA did.
- This River has no point sources on it, only nonpoint sources.
- Federalism: If Fed BAT stds are insufficient, states must fill in the gaps

Statute:
- 303(d) requires states to identify and compile a list of waters for which effluent limits are not stringent enough to achieve water quality standards.

Challenge:
- Effluent limits apply only to point sources, so 303(d) only triggers listing for Rivers with point sources → QUESTION: "The precise statutory question before us is whether the phrases "are not stringent enough" triggers the identification requirement both for waters as to which effluent limitations apply but do not suffice to attain WQS and for waters as to which effluent limits do not apply at all to the pollution sources impairing the water."
- Action brought by the Pronsolino's whose forestry business was financially impaired by the TMDLs, which limited their harvesting rights.

Discussion:
- EPA's interpretation: there is no implicit limit to waters initially covered by effluent standards.
- The meaning of stringent should be applied by looking forward to goal to be attained, not by looking backward to inadequate effluent limitations.
- The statutory scheme does not create a general division between point and nonpoint sources.

- 303(d)(1)(A) does require listing both waters impaired by point and waters impaired by nonpoint.
- The illogical result of the Pronsolino's reading would be to find that where one insignificant point source was polluting TMDLs could be set, whereas, if it were only significant nonpoint sources, it could not be regulated.
- Federalism: EPA only sets TMDL, still leaves to the states the power to allocate pollution rights.

PUBLIC CITIZEN HEALTH RESEARCH GROUP V. TYSON, 1986, P. 78

Statute: OSHA

Rulemaking: OSHA set standard for ethylene oxide at 1 ppm. This was based on assumption of linear dose-response curve and zero threshold. Evidence drawn from animal testing.

Holding:

- Challenge to no-threshold assumption:
  - Statute does not require absolute proof because it allows for use of "best available evidence."
  - Benzene does not require proof, it merely requires showing of significant risk, based on agency's definition.
  - In this case, there is uncertainty, and in face of that uncertainty, the court will defer to the expertise of the agency to pick the best path.
- Challenge to significance of risk at 1 ppm:
  - There are some questions about varying levels of significance, but even following interpretation preferred by plaintiffs, OSHA's conclusion that there is significant risk would still be reasonable.
  - OSHA's conclusion based on timeframe for exposure that plaintiff's thought was excessive.

RAYTHEON CONSTRUCTORS, INC. V. ASARCO, INC, D. COLO, 2000, P. 765

Action: ASARCO sued Raytheon to get contribution for incurred costs. Court found liability, but Raytheon wants to get out of paying on basis that response costs were not incurred in compliance with NCP.

Question: Has ASARCO met its burden to show that it acted consistent with the NCP?

Discussion:

- NCP requires:
  - Identify ARARs
  - Site evaluation: PA/SI
  - RI/FS and selection of remedy
  - Remedial design/remedial action
  - Public comment
  - CERCLA quality cleanup
    - Protective of human heath and environment, utilize permanent solutions to max extent possible, and cost-effect
    - Apply ARARs
    - Provide for meaningful public participation
- ASARCO did not conduct RI/FS

        - It claims that its initial work plan was an adequate substitute, but court reluctantly disagreed.
        - Insufficient cost comparisons, alternatives comparison, no ARARs identified until later.
        - Did not use the 9 evaluative criteria.
    - Court laments being able to hold Raytheon liable.
    - Need to make recovery accessible to incentivize cleanup BUT there is a need for consistency in cleanup

ROBERTSON V. METHOW VALLEY CITIZEN COUNCIL, SCOTUS, 1989, P. 810, STEVENS

Agency Action: The Forest service complete and EIA in connection with decision to issue Method Valley Recreation a permit to build a ski resort. The EIS identified adverse impacts of air and on deer and indicated potential mitigation that would be made more clear in later planning stages.

Claim: Petitioners claim that NEPA requires Forest Service to adopt specific/detailed mitigation plan.

Discussion:

- Purpose of NEPA is ensure that environmental issues are considered and to increase transparency/make information available.
- Action forcing procedures require agency to take a hard look, but do no prescribe substantive outcomes.
- Prohibits UNINFORMED rather than UNWISE agency action.
- Discussion of mitigation is required, but a specific plan is not required.

SAN FRANCISCO BAYKEEPER V. WHITMAN, 9TH CIR. 2002, P. 583

Challenge:

- Seeking declaration that California had failed to establish TMDL and thus that EPA had duty to do so.

History:

- CA did not establish any TMDLs between 1980 and 1994.
- It began to do so in 1994 and had plans to do so for the whole state, but still had a ways to go.

Statute: 303(d): EPA has duty to act when a TMDL is submitted but is inadequate.

Discussion:

- Constructive Submission: a failure to submit will be construed a constructive submission of no TMBLs, which triggers EPA's nondiscretionary duty to act.
- However, the constructive submission doctrine does not apply in this case because the failure had already been remedied.

SHORE REALTY (NEW YORK V. SHORE REALTY CORP.), 2D CIR. 1985, P. 642

Agency Action: New York brought suit against current owner who bought with knowledge of but was not responsible for hazardous waste on site. Owner had hired a environmental consultant who had found poor conditions.

Discussion:

- Shore argues that it is not covered by 107(a)(1) because it did not own site at time of disposal and did not cause presence or release of hazardous waste.
- But (a)(1) is in no way limited by the time of disposal language used in (a)(2).
- (a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release without regard to causation.

- Points to surplusage rule and statutory goals.

SIERRA CLUB V. ENVIRONMENTAL PROTECTION AGENCY, DC CIRC. 2002, P. 397

Statutory Issue: Deadlines for attainment in nonattainment areas. CAA 181(a)(1)

Agency Action:

- EPA granted an extension for Washington DC for achieving attainment. EPA based extension on fact that upwind sources contributed to nonattainment, thus it did not impose RACM requirements or ROP requirements or contingency measures.
- DC petitioned for extension. Statute allows EPA to grant extension when there is nonattainment in exchange for an updgrade in nonattainment class and increased requirements. Here, EPA sited upwind sources of pollution, and granted extension without the other requirements.
- Attainment for Nitrous Oxides and Volatile Organic Compounds.

Discussion

- Holding: mere existence of interstate transport is an insufficient basis to allow for extension without reclassification.
- Typically under the statute, if an area fails it is reclassified → heightened requirements and deadline extension.
- Court overturns because the EPA did not find any of the enumerated criteria for extension and reclassification. See § 7509a (b).
- Court finds no reason to stray from literal meaning of act because agency does not show that meaning is demonstrably at odds with the intentions of the drafters.
- Court finds no basis for determining that congress intended to allow EPA to grant extensions in such circumstances.

SIERRA CLUB V. RUCKELHAUS, 1973, P. 369

Statute:

- § 101(b): protect and enhance quality of air

Legislative history:

- Senate report: admin shall not approve of any plan that does not provide to the maximum extent practicable continued maintenance of levels that are better than goals.
- House report: several congressman voiced strong objection to suggestion that CAA would allow for degradation

Admin's Interpretation:

- NAAQS shall not be considered to all deterioration, but
- In regions in attainment they can reach up to the standard.

Court:

- Because of clear intent spelled out in act's mission and in leg history, and because the admin so clearly contradicts himself and therefore doesn't merit deference, the court will read in no deterioration requirements into the act.
- Clear legislative policy.

Notes:

- Nondegredation had been in the Senate version of the bill, but was deleted.
- Conference committee did not address the issue.

- Supreme Court upheld by a completely divided court. Marshall changed his opinion at the last minute after Douglas drafted a dissent saying that it was inconceivable that Congress would draft legislation that would make it possible to pollute existing clean air basins.

STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC. V. KARLEN, SCOTUS, 1980, P. 808

Agency Action: HUD approved a low-income housing project on the UWS on Manhattan, and a community group objected. After remand from Court appeals to consider alternatives, agency determined that alternatives would cause cost and delay which outweighed the potential benefits.

Procedural History:

- District Court: accepted amended record as in accordance with the law.
- 2nd Circuit: Again remanded finding reasoning for rejecting the alternatives to be arbitrary and capricious. Finding that considering alternatives is not the end in and of itself.

Question for the court: What is the court's role in enforcing NEPA?

Discussion:

- Following decision in *Vermont Yankee*, SCOTUS determines in this case, that courts do not have the power to mandate certain substantive ends.
- Courts only role is to ensure compliance with requirement that agencies consider environmental consequences of their decisions.
- HUD considered those consequences, so it met the burden.

Dissent: Marshall

- Whether agency decision is arbitrary and capricious is within the power of the court to consider.
- Yes, the court can not mandate particular ends, but it can find that an agency abused its discretion by insufficiently justifying a decision.

THOMAS V. PETERSON, 9TH CIR. 1985, P. 822

Agency Action: Forest Service made a FONSI for road and separate FONSI for timber sales (in regard to decision to build road into forest and sell off logging rights).

Question: Was the division into separate actions legitimate?

Discussion:

- Cannot allow divisions such that individual actions have no significant impact but the cumulative impact is substantial.
- CEQ has determined when actions are related: connected actions that proceed together:
  - Automatically trigger other actions
  - Cannot or will not proceed unless other actions are taken previously or simultaneously
  - Interdependent parts of a larger action and depend on larger action for their justification.
- There is a clear interrelation between the road and the logging.
  - Road described as a logging road.
  - No way to log without the road.
  - They are inextricably intertwined.
- Timing: Must do the EIS before the decision is made to proceed. EIS must be a factor in the decision.

- Considering cumulative impacts will have little value if road is already built, because at that point investment will point toward value of proceeding.

UNITED STATES V. ELIAS, 9TH CIR 200A, P. 619

History:

- Elias ordered employees to clean out tank but refused to provide safety equipment.
- He knew that the tank had cyanide in it. One of the employees collapsed, and Elias lied to doctors, who gave cyanide treatment anyway.

Prosecution:

- Standard of proof:
  - 1. Transported or disposed waste
  - 2. Waste was hazardous
  - 3. Representative sample
- Elias claims the government failed to show that the sample was representative of the entire tank, but the court finds that such a showing was not required.
- What is required is to show that the samples contained cyanide and that the cyanide was not disposed of properly.
- Logic that to show absence one would need many samples and proof of representativeness, but to show cyanide need only show in one sample.

UNION ELECTRIC CO. V. EPA, SCOTUS, 1976, P. 341

Statute: CAA § 110 requiring SIPs. (a)(2)(A) requiring that admin approve the plan if adopted after public notice and if it meets the specified criteria.

Procedural History:

- EPA approved MO's SIP, which allowed the state to grant variances for particular sources that would not be able to immediately be able to comply.
- Union Electric did not challenge the SIP, but it sought and was granted a one-year variance. It forgot to reapply, and EPA began enforcement action.
- Union Electric filed a petition for review of EPA's approval of the SIP.
- Petition was filed in the eighth circuit, which held that the administrator could not consider feasibility in the approval process, and thus the court was without jurisdiction to hear the case.

SCOTUS Review: Marshall

- **Question for the court:** Could the administrator take into account economic and technological feasibility when deciding whether to approve a SIP?
- Tech-forcing intention. → 110(a)(2) lists the criteria (not including feasibility) and requires admin to approve the SIP if the criteria are met → nothing else can be considered. Note: clear statement discussion in fn. 5
- **Is there room within the criteria for consideration of feasibility?**
  - UE argues that the time frame laid out in (a)(2)(A) allows for consideration of feasibility, but see legislative history:
    - Senate committee highlights primacy of health.
    - Conference committee settled on time mandate (rather than reasonable time language) to ensure compliance regardless of feasibility.

- Three-year deadline for achieving primary standard. Faster if possible: as "expeditiously as practicable." Any room for feasibility lies in that phrase.
    - Admin has no power to reject a plan that proceeds more expeditiously than is practicable because the federal requirements are a floor.
    - Early drafts expressly said that fed law was a floor, but the final draft was silent on this question, but admin may only reject plans that do not assure the minimum. See also § 116 to assist in this conclusion.
    - Fn.13: admin may determine that it IS economically and technologically feasible to achieve the plan more rapidly than it does → could reject the plan for not being as expeditious as practicable.
- Polluter may take up questions of feasibility with the state, which has the power to allocate pollution rights and consider feasibility in how to do that in creation of the plan and granting of variances.
- Admin, at his discretion, may also choose to give the polluter time to comply rather than taking an enforcement action.

- **Powell's Concurrence:** Powell aggress with the outcome but is concerned that a total rejection of feasibility considerations could lead to failure to consider health impacts of shut down that might result from a total infeasible plan → asking for Congressional revision of the law.

WEYERHAEUSER CO. V. COSTLE, DC CIRC. 1978, P. 516

Agency Action:

- EPA set 1977 first phase existing source limits for the pulp, paper, and paperboard mill industries.

Challenge:

- Petitioners contend that EPA must balance costs versus effluent reduction benefits of regs as well as non-water envi quality impacts of regs.

Statute:

- 304(b)(1)(B) identifies BPT factors:
    - Comparison factors: total cost of technology v. benefits of effluent reduction (statute calls for direct comparison) → balancing test
    - Consideration factors: → discretion in weighing factors
        - Age of equipment and facility
        - Process
        - Engineering aspects of application of control techniques
        - Process changes
        - Non-water quality environmental impact (including energy requirements)
        - Other
- For 1983 BAT: 304 makes all the factors consideration factors
- Because the statute singled out the comparison factors, EPA is not obligated to also compare the consideration factors in the same manner.
- Review of EPA Action:

- For comparison factors: EPA must do a limited balancing test.
  - Petitioners wanted an incremental balancing test.
  - EPA assessed costs by subcategories.
  - Calculated the cost/lb BOD removed.
  - Industry submitted an incremental breakdown, but EPA, while it must consider that (look for hidden imbalances), need not accept it.
  - EPA has discretion as to exactly how it will conduct the cba.
  - Possible underestimates: EPA refused to consider cost of installing SSL because 5/6 had already done so.
- For consideration factors:
  - EPA was thorough in examining the environment costs and energy costs of its requirements.

WESTWOOD PHARMACEUTICALS, INC. V. NAT'L FUEL GAS DISTR., 2D CIR. 1992, P. 681

Action:

- Westwood, current, brought action against national fuel, successor in interest of prior owner, Iroquois, to recover costs of clean up.

History:

- Iroquois used site for gas compression and storage.
- Iroquois sold to Westwood, which demolished remaining structures and built a warehouse. It discovered contamination.

Discussion:

- National Fuels argues that the threat of release was due only to the unforeseeable construction of the warehouse (thus Westwood was sole cause) and that the contract of sale was unrelated to the release of threatened release.
- No concern about 101(35) in this case because 101(35) assumes that the current owner will be raising the defense, but in this case, the prior owner is raising the defense. 101(35) doesn't address this situation. Thus everything that would be considered a contract counts.
- Because it is a contract, the only way to get defense is to show that the contract was not "in connection with" the release. Court must give meaning to this language otherwise the phrase will be mere surplusage.

WISCONSIN ELECTRIC POWER CO. V. REILLY, 7TH CIR. 1990, P. 407

Statutory Issue: Definition of modification under § 111.

Agency Action:

- WEPCO decided to undertake some major renovations that involved replacement a lot of pieces of the plant in order to extend its life.
- EPA determined that these renovations did not constitute routine maintenance, and, thus, the plan would be subject to NSR. EPA also found that there would be physical change.

Discussion:

- On physical change:
  - WEPCO argued that "like-kind replacement" did not constitute physical change, but the court rejected this argument.
  - WEPCO argued that to be a physical change it had to be fundamental, but court found that this definition would preclude application of

NSPS and PSD standards → Congress intended speedy clean up of air and balance with other interests.

- On routine mainteance:
  - EPA: case-by-case determination by looking at cost, nature, extent, purpose, frequency
    - Cost was 70.5 mill.
    - No renovation of this kind had been done before
    - Replacement of a substantial amount of the plant