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I. General Stuff on Environmental Regulation

A. Environmental Philosophies

1. Preservationism: based loosely on morality of nature, preservation of wildlife, national parks, give America scenic beauty
2. Conservation: the dominant philosophy, concerned with moderating use of nature's resources, look to future
3. Ways of Dealing with Environmental Problems:
 - a. subsidize alternatives (such as mass transit)
 - b. taxes
 - c. centralized command and control regulation
 - d. federal grant money for R&D

B. Types of standards used in Environmental Regulation

1. Performance Standards: establish level of effect without specifying how to reach that level. Example: trucks are required to be built to be quiet. Don't care how you do it.
2. Ambient Standards: objective-oriented. Specify the minimum standards for the area. Example: total toxin content of Colorado River must be kept to specified level.
3. Design Standards: specify how the causes must be constructed or arranged. This is frequently not cost effective, therefore not liked in industry. They like performance standards.
4. Behavioral Standards: Prescribe standards by people affected by the harms to avoid the risk, rather than directing at cause of harm. Example: tell workers to wear safety clothes, goggles.
5. Information Standards: Requires information to be given to affected parties or disclosed to government. Used where perf/des standards are difficult to enforce.

C. Why bother?

1. Leopold: Food chain, world ecosystem: everything responds to everything else. Man-made changes tend to be violent, so they should be made carefully, since nature cannot respond to violent changes.
2. Hardin: Everyone tries to maximize their wealth in the commons. This often harms the commons. People let harms come from their activities which are borne by the commons only (such as air pollution). We must internalize the externalities,

make the producers pay for their mess.

3. Anderson: clean environment is just another economic goal, subject to supply-demand like everything else

D. Access to Courts: Standing and Related Preclusion Doctrines

1. Standing

Sierra Club v. Morton--Walt Disney needed to get permits to build ski resort. Sierra Club sued, no specific members named as π , on grounds of "special interest in preservation", etc.

Held: Sierra Club had no standing as π . They did not allege injury-in-fact, just general concern.

SCRAP--Small group of Georgetown Law Students challenged ICC rate increase on the grounds that it would discourage recycling, since most recycling was done outside state, using interstate commerce.

This case really stretched "injury-in-fact" requirement.

Valley Forge--Six Prong Test

Constitutional Requirements:

1. actual or threatened injury-in-fact
2. injury-in-fact can be traced to threat
3. likely to be redressed by favorable decision

Prudential Requirements:

1. Only π can assert his rights and interests, not third parties
2. Court cannot address generalized grievances
3. π 's complaint must fall within zone of interests to be protected by the statute in question.

2. Exhaustion, Primary Jurisdiction, Ripeness

II. NEPA

A. § 101 Declaration of Policy

"[I]t is ... the policy of the federal government ... to use all practicable means and measures ... to create and maintain

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conditions under which man and nature can exist in productive harmony ..."

B. § 102 General Function of Statute

1. directs all fed gov policies and legislation to consider NEPA
2. directs fed agencies to do same, specific methods
 - (a)+(b) ags must consider environmental impacts in their decision making
 - (c)+(d) must prepare an EIS
102 (2) (c) mandates EIS preparation. All ag's must prepare "detailed statement" for all legislation and "other major federal actions significantly affecting the quality of the human environment", and to make that report available to public.
 - (e) ag's must develop alternatives in any plan which contains environmental conflicts
 - 1) primary alternatives - entirely different method - may be out of agency's jurisdiction, so this is not always expected.
 - 2) same project, small alteration - easy for agency to do. Always expected.
 - (f) ag's must recognize long-term & world-wide effects on environmental and "support" int'l initiatives
3. Established CEQ, Council on Environmental Quality to advise president
4. Two types of NEPA claims:
 1. Agency had to write EIS and did not
 2. Agency wrote inadequate EIS

C. NEPA's Enforcability

Calvert Cliffs v. AEC: AEC rules challenged as not complying with NEPA. Ct says NEPA must be complied with. "To the fullest extent possible" does not mean discretionary.

Purpose of EIS

- a) show evidence that balancing of alternatives has taken place
- b) make sure the balancing is done by agencies.

CT found that AEC role is to make sure the EIS accompanies the comm'n reports, not looked at unless affirmatively challenged in hearing process, to violate 102 of NEPA. AEC must actively consider NEPA.

Strykers Bay: NEPA does not mandate particular results, just requires "considering".

III. The **EIS**

A. When the EIS must be prepared

§ 102 (2) (c) says that EIS is needed for for all legislation and "other major federal actions significantly affecting the quality of the human environment"

An ag who decides not to file an EIS must file a FONSI (Finding Of No Significant Impact)

1. Is this "federal"?

Federal actions - can be even federal grant supported actions. Generally, if the fed ag has any power to control (restrictions on funding, licensing, etc.), then its federal.

a. Note: where funding is left entirely to control of funded project, no control, so no EIS needed.

b. Arguments for and against requiring EIS from fed funded (but discretionary use) actions:

1) if feds have no control, whats the point of the EIS?

2) if purpose is also to inform and provide accountability, should still be required.

2. Is this federal "action"? Issues to spot:

a. When is the action taken to warrant the EIS?

b. Is this inaction? Is inaction action?

3. Is the action "major"?

Is this defined by dollar amount or by amount of environ impact?

This is defined in terms of environmental impact. If inexpensive actions could go by, NEPA's purposes would be frustrated.

4. Is there a "significant" affect?

a. "human environment" means more than just protected natural areas. Can also mean social effect, such as crime increase, but not psychological impact, or "there goes the neighborhood" impact. *Hanley v. Kleindienst*.

b. The meaning of "significant" is a question of law, not fact, and is subject to de novo review. *Hanley*.

c. *Hanley* test:

1) relative effect: the extent of the action's added

- adverse impact; and
 - 2) absolute effect: the action's absolute quantitative adverse impact, including cumulative harm from contribution to existing adverse conditions.
 - d. economic effects: Economic effects alone would not trigger EIS requirement, but if ag is doing EIS anyway, factor in economic effects.
5. Exemptions from EIS requirement
- a. Appropriations requests. *Andrus v. Sierra Club*. Why?
 - 1. Because CEQ said it was unnecessary.
 - 2. The EIS will be needed at the action stage.
 - 3. Appropriations requests are not legislation anyway.
 - 4. Only need EIS when the appropriation bill accompanies a new proposal for taking new action which significantly changes status quo.
 - b. Functional equivalent (of EIS)--EPA actions are exempt since they automatically serve the EIS purposes.
 - c. Statutory conflict--impossibility.
 - Example: If action is to start in 30 days, EIS cannot be made in time.

B. Contents of the EIS

- 1. Consideration of Alternatives--the ag must consider less damaging alternatives. 102 (2)(c)(iii) requires report of these alternatives, and 102 (2)(E) requires ag to study, develop and describe alternatives.
- 2. How broadly are alternatives defined?
 - a. *NRDC v. Morton*: **STANDARD: Alternatives must include anything reasonable within the jurisdiction of any part of the federal government, even beyond the scope of the ag.**
 - b. Must consider the alternative of doing nothing. (CEQ 1502.14(d)).
 - c. *Vermont Yankee v. NRDC*: upheld *Morton* but narrowed the test. How? AEC was not required, in considering alternatives to nuclear power plant, to consider power conservation. Why?

- 1) energy conservation was not popular then
- 2) π did not raise it sufficiently at the hearing. Ag does not have to investigate factor not raised by intervenors.

C. Adequacy of the EIS (they are usually upheld)

1. Burden is on challengers to show inadequacy. Court gives great deference to the EIS. *Sierra v. Morton*.
 - a. value assessments accused of being arbitrary, court said hey, all speculative value assessments are arbitrary to some extent.
 - b. Cost-benefit analysis is sufficient if it has enough detail to permit reasonable evaluation and decision.
2. Worst-case scenario requirement:
 - a. where impacts are certain, no worst-case scenario is required
 - b. where effects are very uncertain, worst-case scenario is sometimes required. Cases where it was not:
 - 1) CEQ, which gets great deference, used to require one, and now it does not (for that case).
 - 2) in highly uncertain cases, worst-case scenario will merely distort their importance rather than provide reasonable basis.

D. Effect of the EIS

Once an EIS discusses steps which mitigate environmental harm, must the agency then follow those steps? No. NEPA does not create an obligation but merely prescribes the necessary process for a result. Though, if ag does not do it, you may argue that it was an arbitrary consideration.

E. International Considerations

Defense Dept. is agency.
 102 (2)(F) recognizes worldwide effects of pollution. Does this carry any force? Unresolved. Carter's Exec. Order 12,114 requires minor review of extraterritorial actions.

No general exemption for military affairs in NEPA.

F. SEQRA (A Baby NEPA)

NY has SEQRA, which not only requires consideration, but also requires minimization of the adverse effects. It also is broader in

that requires EIS for all actions which may have an adverse effect.

IV. EPCRA--Emergency Planning and Community Right-to-know Act

(requires reporting of information on hazardous substances)(has had great effect in causing a lot of voluntary reductions)

A. § 311 - Piggyback to OSHA: Required a firm to file

1. Material Safety Data Sheets--information sheets filled with:
 - a. substance and its dangers
 - b. modes of exposure
 - c. precautions and treatment
2. MSDS is available to the public

B. § 312 - Toxic Chemical Inventory Sheet: must contain

- a. inventory of chemicals
- b. amount and storage location of the hazardous chemicals
- c. "extremely hazardous" chemicals -- must notify local committee of presence, unexpected leaks, and participate in planning activities.

C. § 313 - National Toxics Inventory Provision:

(locate and quantify discharges of chemicals into environment)

- a. scope - manufacturing firms >10
- b. trigger point - over de minimis threshold (based on estimate, not actual measurement).
- c. purpose - help EPA plan regs and inform public, creates a lot of public pressure.

D. Practical Effect of Disclosure

1. For:
 - a. keep firms honest-better communication with public
 - b. encourages voluntary reductions
 - c. may create liability link in toxic tort suit
2. Against
 - a. create sensationalism and bad litigation climate
 - b. distort public perception of risk
 - c. higher possibility of higher jury awards

d. provide lots of data that non-mainstream experts can manipulate

Clean Water Act

I. Effluent Limitations

A. General

1. Basic thrust - control effluent emissions, not ambient (like CAA)
2. All sources divided into two groups--point source and non-point source
3. Discharge from point source without permit is illegal. § 301(a).

B. Point Source Defined

1. Reasonably defined locus of discharge. §502(14). Not pipe only.
2. *US v. Earth Science*--mining runoff is defined as non-point under §304(f), but since this time it was unusual, was point, was illegal.

C. Effluent Limitations-Structure

1. All discharges are illegal w/o permit.
2. NPDES (National Pollutant Discharge Elimination System) creates permitting system for these discharges. §402
3. EPA must set pollution standards for discharges for whole classes of industry. These standards are technology based. §304(6).
4. *Dupont v. Train*--Ct held standards do not have to be tailored to the specific cite.
5. Standards are set into the NPDES.

D. Effluent limitations--Setting the Standard

1. As originally enacted, CWA §301(b)(1) required that all point sources adopt BPCT (best practical control technology) by 1977 and BACT (best available control technology) by 1983.
2. 1977- Amended to create 5 groups, each having different standards:
 - a. conventional pollutants
 - b. toxic pollutants

- c. non-conventional pollutants
- d. heat
- e. dredge and fill

- 3. Effluent standards are technology based.
- 4. States are free to set higher standards.

E. Technology Based Standards

- 1. Based on ability of the relevant technology. For instance, if the BACT can get Hg down to 3 ppm, then the standard is 3 ppm.
- 2. Quality of the receiving water is not considered. This upheld by court, when in Weyerhauser v. Costle, it said the water was so clean, he should be able to pollute more.
- 3. [check code for 306(6) requirement levels]

F. Citizen Suits

- 1. § 505 of CWA says any citizen may sue, but must at least have potential injury
- 2. § 303 of CAA, same but no restrictive language.

G. Enforcement and Standards

- 1. §301 - outlaws all discharges except as stated elsewhere
- 2. §301(b)(1) - by July '77, must use BPT (best practicable technology currently available).
- 3. §301(b)(2) - effluent limits for certain pollutants (toxics) must, by '89, use BAT.
- 4. §301(c) - variance provision
- 5. §304 - dredge and fill permit schemes
- 6. §402 - allows EPA to give permits (NPDES)

II. Ambient Water Quality Standards

A. General

- 1. CWA is generally for effluent, it also provides (non-point) ambient standards
- 2. Water quality standards can be stricter than NPDES standards. § 302(a)
- 3. State must designate which bodies of water will be covered. § 303(e)
- 4. Other water protection sections:

- a. § 319 - area-wide non-point source management plans
- b. § 208--planning process for waste treatment

B. Approval of State Plans

- 1. State must establish water quality standards. § 303(c)(2) (a).
- 2. State standard can be aesthetic, not technological.
- 3. EPA must approve the standard. It must be at least as tough as the EPA's recommendation.

C. Clean v. Dirty Water

- 1. Here, like CAA, depends on quality of receiving body of water
- 2. Designated uses must reflect water, not use. Pristine water must be treated as though it were for swimming and fishing, even if it were not.
- 3. Present uses must be maintained.

III. Wetlands

A. General

- 1. § 404 governs permits, so it is the only part of CWA which applies (would be for filling in wetlands)
- 2. 2 kinds of permits:
 - a. general permits--§404(e)--activity which causes de minimis damage locally and nationally can be given general permit
 - b. all other are done by case by case basis (action by action?)
- 3. Permits are given by the Army Corp of Engineers, EPA can veto. §404(c)

B. Permitting Requirements

- 1. Two things trigger a requirement for a permit:
 - a. discharge from point source
 - b. waters of the U.S.
- 2. Wetlands are "waters" of the U.S.

3. Exceptions:
 - a. farming
 - b. silviculture
 - c. irrigation systems, maintenance of roads, flood control
4. Attempt to fill it in prohibited. § 404(f)(2).
5. Cutting growth in a wetland produces a fill, which itself is an illegal discharge into the wetland. *Avoyelles v. Alexander*
6. Exemptions:

§ 404(f) - discharge of normal dredge material from normal farming, irrigation, drainage ditches, just subject to effluent limitations in §307.

If discharge is for purpose of changing an area's USE, exemption in (f)(1) is taken away.

C. Permit Standards

1. EPA and the Corp have set up joint guidelines for what factors must be considered. §320.4 and §230.10

The Chief of Army Corp issues the permits. EPA can veto any permit that will have an unreasonable effect on the water supplies, fish, wildlife, or recreation areas or can set aside an area wherein no permits are allowed if there would be unacceptable effects.

Fish & Wildlife Service is consulted, but no veto power.

2. Two basic parts of review:
 - a. effect on wetlands
 - 1) wetlands role in preventing flooding
 - 2) wetlands role in providing habitat
 - 3) quantity of wetlands in the area
 - b. public interest
 - 1) public and private need for this action
 - 2) positive and negative effects work will have on area
 - 3) availability of alternatives--very important! It is presumed that any non-water use has a practical alternative. §230.10
 - i. alternatives available at time of search, not trial, are examined. *Bersani*

- c. What permit seeker must do:
 - 1) avoid - look for alternatives
 - 2) mitigate - the loss of the wetland
 - 3) compensate - offsite wetland compensation

IV. Oil Spills

A. General

- 1. Oil spills are regulated by §311 of the CWA.
- 2. Three major parts:
 - a. spill prevention
 - b. spill cleanup
 - c. liability for cleanup
- 3. There is also maritime tort and state law protection covering oil spills.

B. Spill Prevention

- 1. Any discharge which causes a sheen on the surface is illegal.
- 2. All spills must be reported to the Coast Guard.

C. Spill Cleanup

- 1. Major thrust--charge cleanup to the liable party
- 2. Liable party need not be the one to do the cleanup
- 3. Certain caps on how much liable party will have to pay

D. Liability

- 1. Strict liability for oil spillers
- 2. Higher cap for wilful conduct
- 3. Four defenses to strict liability
 - a. act of g-d
 - b. act of war
 - c. negligence of U.S.
 - d. Sole cause is negligent act of third party
 - 1) Held: tug boat's owner is not 3P since owner has smoe control over tug. 3P must be out of the blue. LeBeouf.
 - 2) Held: Even where Δ takes all reasonable

precautions, if Δ actually causes a release, Δ is liable.
Reliance v. U.S.

Clean Air Act

I. General

A. Purpose

1. provide uniform national standards for performance for new stationary sources (111)
2. give each state primary responsibility within state

B. Five Main Classes of Pollutants

1. Carbon Monoxide (mostly from cars)
2. Particulates (from stationary fuel combustion)
3. Sulfur Oxides (SO_x) (corrosive poisonous gases)
4. Nitrogen Oxides (NO_x) (high temperature combustion product)
5. Hydrocarbons (CH_x) (combine with NO_x to form ozone)

C. Basic Structure of the Act:

1. NAAQS (§109) - Administrator establishes National Ambient Air Quality Standards for air pollutants which endanger health or public welfare.

Two kinds:

- a. Primary: allow adequate margin of safety and protect public health
- b. Secondary: requisite to protect public health

Administrator is not supposed to consider feasibility of attainment when setting NAAQS.

2. SIPS (§110(a)(1)) - State makes State Implementation Plan
 - a. Must be submitted to EPA within 9 months of NAAQS
 - b. SIPs must satisfy §110(a)(2):
 - 1) attain primary NAAQS within 3 years
 - 2) attain secondary NAAQS within reasonable time
 - c. Approved SIPs are enforceable as federal laws under §113.
 - d. If SIP is inadequate, Admin can amend, amendments bind state.

II. What Are the Standards?

A. New Source Performance Standards -- § 111 (NSPS)

1. Scope: all new stationary structures, including newly modified structures, which emit or may emit air pollution. §111(a)(3).

2. Standard: BACT (Best Available Control Technology), taking into account costs of compliance. §169(3).

3. Non Attainment Areas:

- a. Generally, need permits to not attain SIP. §172.
- b. Major sources must comply with LAER (Lowest Achievable Emission Rate) and satisfy OFFSET requirements.

LAER (§171) is the "most stringent emission limitation ...contained in the [SIP] ...of any state" or "the most stringent emission limitation achieved in practice ... whichever is more stringent."

Obviously, this cannot be any less than BACT.

- c. 1990 CAA sets special deadline for non-attainment areas, ranging from from a few years to decades. All areas are supposed to reduce 3% a year anyways.
- d. State must require RACT (reasonable attainable Control technology) for existing facilities. Much like BPT in CWA.
- e. Cars - state must adopt helpful measures, such as right on red law.
- f. feds can withhold highway moneys
- g. impose ban on new stationary sources
- h. require offsets
- i. emissions controls
- j. impose car pooling

B. Existing Sources §111

1. Scope - anything that would be covered if it were new. Emissions standards appear in SIPS.

2. Non attainment areas: §172 requires SIPS impose, at a minimum, "reasonably available control technology" (RACT). If EPA admin says not good enough (won't attain NAAQS within 3 years) under §110, he can amend. Difficulty of performance does not excuse performance.

3. Consideration of Economic Feasibility: A state may adopt, and EPA may approve a SIP that will exceed NAAQS, even if it will be technology forcing. Economic and technological infeasibility will be wholly foreign to EPA's consideration and approval of a SIP. State is proper forum to challenge this. *Union Electric v. EPA*

4. Limits on States means in SIPs: Ambient standards must be met by "continuous" emission limitations where possible. "Intermittant" and "dispersion" techniques may be used only if continuous controls are not economically or technologically feasible. 110(a)(2)(B) as interpreted by *Kennecott*.

5. Tall Stacks Provision: The "degree of emission limitation required for control of any air pollutant" under a SIP "shall not be affected in any manner" by 1) so much of the stack height of any source as "exceeds good engineering practice," or 2) any other dispersion technique. Good engineering practice means the height necessary to get good dispersion, so there is not "excessive concentrations."

6. Delayed Compliance: §113(d) - General DC provision

a. Scope:

- 1) sources retiring present facilities
- 2) sources investing in innovative reduction facilities
- 3) due to gov't orders to convert fuels

b. Prerequisites: source is unable to comply with statutory deadlines. EPA says that since §113 does not speak to good faith efforts to comply in the past, bad faith efforts will not make a source ineligible for a current DCO.

c. Effect: Authorizes state (or after 30 days notice, Admin) to issue a **delayed compliance order** (DCO) which sets a delayed date for compliance and attainment of NAAQS as "expeditiously as practicable" limited by 3 years after date of final compliance with SIP. DCO must set schedule for compliance, provide opportunity for hearing, monitoring reporting, warn Major source of non-compliance penalty if deadline is violated.

C. **Prevention of Significant Deterioration §§ 160-169**

1. Generally: Distrust of NAAQS: Areas where the ambient levels are substantially below the NAAQS are classified and new polluters may not exceed lesser of a specified PSD increment (based on the classification) or the NAAQS.

PSD's - prevention of significant deterioration. AN Air Quality Control Area can be a PSD area for one or more pollutants even though it is a non-attainment area for

others. Only some major facilities are subject to PSD review--when the PSD area and the source are in different states.

2. Means: To establish a new **major emitting facility** in the PSD area, must apply for a permit. §165.
3. Scope: **major emitting facility** (§ 169) is one which emits or has the potential (at maximum capacity WITH controls, not worst case scenario) to emit 100 tons of any pollutant (regulated under the act, according to the courts).
4. Permit Contents:
 - a. must assure that emissions will not exceed NAAQS or increment
 - b. must agree to BACT for all pollutants [§165(a)(4)], whether or not that is necessary to avoid exceeding requirements.
5. Increments: maximum allowable increase over current baseline. **Current baseline** is the ambient when the first PSD permit is filed. §169(4).

D. Offsets and Bubbles:

1. Offsets: §173: Requires permits for new or modified major stationary sources in non-attainment areas. To get a permit you must reduce the total allowable emissions of each pollutant even considering the new source. **Offset Ratio**: Must offset more than you contribute. What the ratio is is determined by the category of non-attainment. The category is determined by the figure that brought you out of attainment.
2. Applicable Reductions: New or modified sources receive credit only for reductions that are allowable under the SIP, not for reductions already required by the Act and are overdue.
3. Source: Offsets may be based on reductions at the same facility or at other facilities in the same area. The result is that §173 creates a private market in emissions rights.
4. Banking: Retaining unused or reclaimed credits is allowed by EPA. The state governs the allocation, transfers and ownership of offsets.
5. Baseline: If current level is lower than the required level,

which do you use as the baseline to offset from? Open question.

This creates a private market in emission rights. Either you cut back, or you pay someone else to.

6. Bubbles: Intra source offsets. Allowed in PSD areas but not in non-attainment areas.

Bubbling is treating all the sources at one facility as one source as a way to get around limits for individual sources. As long as the total is okay, you can do whatever you want with the individual ones.

NO BUBBLING FOR NSPS (new sources performance standards)!

E. Mobile Sources §202

1. Standard: "endanger health and welfare" just like in §111, BUT: §202(b) specifies standard of reduction, Congress is actually picking the numbers, as well as the pollutants, rather than leaving it up to EPA.

a. 7 gram/vehicle CO

2. CARS: They emit precursors to ozone. Less precursors, less ozone [deterioration?]. State can require lower emissions, but must give two years notice.

3. Gasoline Containers: Gaskets on car or pump required by 1993.

4. Car Pooling: In severe or extreme non-attainment areas, employers of 100 people or more must provide services, facilities or incentives for employees to share commuting trips.

Standard: Area must submit a SIP requiring employees to achieve no less than 25% improvement in commuting vehicle occupancy above a baseline that is the area-wide average for such trips.

Ideas: ride matching services, provide vehicles for day use for carpoolers, provide emergency car use, preferential parking, passes for mass transit users, local shuttles.

F. Hazardous Substances: §112 v. §211

Completely supplanted by §301 of 1990 Act. There used to be threshold, now none. There is no "zero risk" point for carcinogens.

1. §112 General Application: Provides for national emission standards for hazardous air pollutants (HAP). The definition of a HAP is:

- a. it must not be covered by a NAAQS, and
- b. it must cause or contribute to air pollution which may "reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating, reversible illness."

2. Standards: Standards are health based, with an ample margin of safety to protect the public. In 1990 version, standards are technology based, which works better.

3. New Sources: may not be constructed if they will violate standard

4. Existing Sources: get 90 days to comply or up to two years with waiver from EPA.

5. Impossibility: If a source cannot get under compliance, EPA may instead issue regulations controlling design, equipment, work practices or operations.

6. 1990 Act changes:

- a. new standard: Maximum Achievable Control Technology (MACT). This might allow for technology transfers.
- b. move away from end-pipe controls (e.g. control what goes in instead of what goes out)
- c. projections: requires ten years projection of risk. If risk is > 1:1 million at the point where the maximum concentration is, then Admin will write new standards or ban.
- d. limits based on "similar sources" - could be source of lawsuits.
- e. Congress micromanaging, limits Admin's power
- f. Incinerators -

7. §211 No Lead Gasoline

G. 1990 Amendments: Highlights

1. Nonattainment Program for Air Quality Standards:
Establish 5 categories of nonattainment: Marginal to Extreme. Increasingly stringent controls based on degree of nonattainment. For Serious, Sever and Extreme areas, 3% lowering/year precursors, etc. Impose controls on smaller sources down to 25 ton emitters. For cars, more stringent requirements and reformulated cleaner fuels.
2. Air Toxic Programs: §112
Pollutant list - add 189 substances to list of 8 existing
Source Category list - major sources that emit pollutant on list
Major Source - emit 10 ton/yr of 1 poll or 25 tons of any combo
Technology Standards - set emission controls based on MACT for ea. cat.
Residual Risk Evaluation - modify standards within 8 years to provide ample margin if needed.
3. Acid Rain Reductions:
Goal - reduce SO by 10m tons from 1980 level and NO by 2m tons
Timetable - Phase I - 1/1/95 (existing big units get allowances and emission limits imposed); Phase II - 1/1/2000 (emission limits for all facilities).
Reduction Scheme - national cap on SO coupled with marketable permits
Allowance system - EPA issues annual pollution allowances (even after shutdown)
Market System - allowances freely transferable
New Units - have to buy allowances from existing units or from EPA auctions
4. Operating Permits:
Require existing as well as new sources to be permitted. SIPs must integrate new requirements of amendments to create new permitting system.
EPA can still veto state permit issued under new system. New permits will require expanded monitoring and reporting.

H. Economic Interests v. Command and Control - Alternatives

1. Effluent Charges: Charge a fee or tax on each unit of
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pollution emitted. Each polluter would reach a balance, removing pollution up to the point where the cost of removing an additional unit would be greater than the effluent charge. The greater the charge, the larger the incentive to remove pollution. This would create a variable standard that would concentrate pollution abatement where it costs the least. Always have an incentive to reduce pollution to zero. Under a regulatory system (NAAQS) there is no such continuing incentive once the required levels have been reached.

Problems:

- a. Fixing the level of effluent ranges is very difficult. Ideally, it should be equal to the value of the externalities that it produces. Hard to calculate this.
- b. Monitoring - would have to monitor and report on ALL polluters
- c. There would be no fixed limit on the total amount of permissible discharges, or level of ambient pollution.

Benefits:

- a. Incentive for those who can reduce most cost effectively to go even lower than before.
- b. Incentive to develop technology to reduce emissions.
- c. Polluters cannot gain financial advantages of years of delay beyond official deadlines.
- d. Continuing incentive to always reduce lower.

2. Non-compliance Penalties: The financial advantages mentioned immediately above are remedied under §120 which imposes non-compliance penalties on:

- a. Major stationary sources which are not in compliance with any applicable SIP;
- b. Stationary source not in compliance with emission standard, standard of performance, or other requirements under 111,112;
- c. Stationary source under DCO, consent decree, or suspension not in compliance with interim requirement.

Amount: "no less than the economic value which a delay in compliance beyond July 1, 1979 may have for the owner of such source," including capital and operating costs, minus the amount of expenditures made for the purpose of bringing the source into compliance.

Current Issue: If a state has approved a plan revision, EPA

has only a limited time to respond, giving it a deadline it is often unable to meet. If EPA misses the deadline, may it impose a penalty on sources that are in compliance with the revised SIP? Circuits are split.

Economists dislike: Penalties eliminate the possibility of efficient breach by making any breach as costly as compliance. [maybe thats good!?!]

3. Marketable Discharge Permits: Impose an overall cap on pollution and allocate discharge rights up the limit of the cap by means of publicly issued permits.

Transferability: Once the permits were allocated initially, they would be freely transferable, and sales prices would function as free market equivalents of officially established effluent charges. Transfers among geographic areas would be regulated by exchange rates.

Advantages over Charge System:

- a. Avoids the problems of calculating the proper level to set effluent charges at. Once initially offered, if the price were wrongly set, market forces would correct it.
- b. Even if prices were wrongly fixed by the gov't or market, there would still be the fixed cap on total permissible discharges.

4. User Fees: EPA proposes to charge a fee for processing applications for new product approval.

Problems:

- a. Creates bias against new firms and products which may very well be those introducing better technology.
- b. Changes EPA role from agtekeeper to toll collector

Alternative: Charge user fee not for using EPA services, but for using the environment. But the practical problems would be insurmountable.

Federal Insecticide, Fungicide, Fungicide and Rodenticide Act (FIFRA)

- I. General: Regulation of toxic chemicals. Two significant sections: §135 - registration; §136 - pesticide specific with special provisions.

- II. Section 135:
 - A. Economic poisons must be registered with the EPA before they are distributed in interstate commerce.

 - B. Labelling: An EC may only be registered if it is labelled. Labelling requires that the label contain a warning or cautionary statement to prevent injury to human beings or to the environment. If no such label is possible because the product is inherently unsafe, the substance cannot be registered.

 - C. Cancellation: If a substance is registered and later info shows possible hazards, EPA can cancel the registration after a hearing. If the hazard is imminent, EPA can suspend registration pending completion of the cancellation proceedings.

- III. Section 136: Pesticides
 - A. Cancellation: there must be an "unreasonable environmental risk" which requires weighing of harm and benefits.

 - B. Review: registration will be reviewed every five years.

 - C. Suspension: §136(c) - a suspension hearing must be held at the Δ's request within five days. If even a five day delay would present a hazard, EPA may issue an emergency suspension.

 - D. Cancellation - Considerations: EPA must consider restrictions on types of methods of use as an alternative to cancellation, and also must consider the effect of cancellation on the agricultural economy.

 - E. Conditional registration: allowed if pesticide and its proposed use are substantially similar to currently registered pesticide and its use, and if approving the registration would not increase the risk of unreasonable harm to the environment. Also allowed if awaiting test data for whole or active ingredient if in the public interest and not unreasonably harmful to environment.

F. Classification: EPA must classify for general or restricted use, or use specific combination thereof. Restriction - amount, method, geographic area, pest.

G. Burdens of proof:

1. upon notice of cancellation, presumption arises in favor of suspension
2. upon suspension: presumption arises in favor of suspension if
 - a. no benefit is shown, or
 - b. animal tests show that the chemical causes cancer
3. Modalities: If evidence shows one mode of exposure is hazardous, presumption arises that all modes are hazardous.

H. Financial Responsibilities: When you register, you must show that you have the financial responsibility to handle cancellation, including disposal of remaining existing stocks if necessary.

Toxic Substances Control Act

- I. Policy Section: 2(b)
 - A. develop data on environmental effects - industry responsible
 - B. Gov't have authority to prevent unreasonable risk
 - C. Not impede economic or technological innovation while assuring no unreas risk
- II. Section 4: Testing

Allows gov't to adopt rules requiring testing by manufacturer.
- III. Section 5: Manufacturer Notice:
 - A. Must give notice to EPA before manufacturing a new chemical. If substance is covered by §4, must submit test results.
 - B. Pre Manufacture Notice (PMN): must be submitted to EPA before a chemical is manufactured or imported stating identity, use, volume, byproducts, mehtods of disposal. Tests are not required, but EPA may require more data if PMN is insufficient.
- IV. Section 6: Restrictions
 - A. Scope - applies to all chemicals
 - B. Trigger - reasonable basis to conclude that the substance presents or will present an unreasonable risk of injury to health or environment.
 - C. Remedy - restrictions to the extent necessary to protect using the least burdensome requirements. §7 allows emergency judicial relief in case of imminent hazards.
- V. Procedure
 - A. Expose info in PMR
 - B. Wait 90 days
 - C. If EPA says nothing, great
 - D. IF EPA says the chemica creates unreasonable risk, may impose restrictions, or even outright ban. Refer to restrictions provision.

Comprehensive Environmental Recovery and Cleanup Liability Act (CERCLA)

I. Background and Purposes

A. **Background:**

CERCLA was passed to clean up past disposal of hazardous waste sites (as opposed to RCRA, which addresses current disposal). It created a fund out of which to pay for federal clean-ups and provided a mechanism for the government to sue liable parties for reimbursement of clean-ups.

Impetus for CERCLA was Love Canal. A problem that arose was that the original estimate of hundreds of sites and 5 years necessary to finish clean-ups was sorely underestimated. To date, less than one hundred have been cleaned up.

B. **Basic Purpose:** to shift liability for clean-up from government to "responsible" parties, and to provide a federal buffer fund.

C. **General Intent:** Congress intended an extremely broad reading of its provisions in order to effectuate prompt and thorough clean up.

D. **Basic Mechanism:**

1. Three kinds of clean up action:

- a. removal (101(23)): short-term cessation of release
- b. remedial (101(24)): long-term clean up
- c. abatement (1-06(a)): EPA may order a party to clean up the mess itself, but only in the event of imminent and substantial endangerment

2. Mandate creation of National Contingency Plan (105(a)(8)) including:

- a. methods of discovery
- b. methods for evaluation of remedies
- c. methods and criteria for appropriate extent of removal
- d. roles and responsibilities of governmental bodies
- e. provisions for removal equipment and supplies
- f. method for responsibility for such facilities on federally owned or controlled land
- g. means of assuring remedial actions are cost-effective
- h. criteria for priorities of sites and potential sites
- i. roles for private organizations
- j. testing standards for alternative and innovative

treatments

II. Specifics of Liability

A. **Specifics of Liability**

1. Liability is strict, no regard to fault.
2. The statute does not explicitly say "strict" in the definition of liability in 101(32). This term was also ultimately eliminated from the words of the statute.
3. It has been construed as assigning strict liability because 311 of the CWA, to which the 101(32) definition refers, has been uniformly understood as strict liability.
 - a. Senator Helms had the same objection to construing CERCLA as strict liability as he had in regards to joint+several liability, but *Chem-Dyne* didn't care, for the same reasons stated below.
4. The court in *NY v. Shore Realty* found no fault element in liability because to do so would render the affirmative defenses under 107(b) virtually superfluous, since they are fault-based.

B. **Joint and Several Liability**

1. Liability is joint and several (as long as the damage is one, indivisible harm).
2. Liability is defined in 101(32), only by reference to the same standard of liability in 311 of the CWA.

101(32) does not explicitly define liability as joint and several. In fact, those terms were originally included in the bill, but were deleted before its enactment. Also, since 311 harm rarely involves multiple parties at fault, it did not aid in interpretation of joint and several liability under CERCLA.

3. *US v. Chem-Dyne* held that the liability is joint and several (meaning that all PRPs are liable for the whole thing. They stated that specifying this might result in inequities sometimes.
 - a. federal common law dictates that responsibility will be joint and several whenever the damage is one, indivisible harm.
 - b. Additionally, the Fed. Water Poll. Control Act, which uses strikingly similar language, has been interpreted to assign joint and several liability.

c. The *Chem-Dyne* court acknowledged that Senator Helms felt the ultimate elimination of joint and several from the terms of the statute indicated congressional intent not to assign such liability, but the court felt that his opinion should be accorded little weight, since he was an opponent of the bill.

C. **Liability is retroactive.**

1. Although the Act has an effective date of 12/1/80 (302(a)), liability extends to disposal and responses that occurred before that date. The effective date is the point at which the whole scheme kicks in. *US v. Nepacco*.

2. Because the entire purpose of the Act was to clean up past disposal

3. Its not unfair to assign retroactive liability because the parties benefitted by the messy disposal in the past

D. **There must be a release or substantial threat of release.**
104(a)(1).

1. "release" defined in 101(22) has been construed very broadly. It does not even have to have leaked from the barrels, as long as the barrels have been disposed of in some way. *US v. Nepacco*.

E. Released stuff must be **Hazardous substance, pollutant or contaminant.**

1. "Hazardous substance" (101(14)) means
a. need only be released (it need not present an imminent danger). *Dickerson v. EPA*.
b. as under RCRA, but not anything exempt from RCRA. IOW, RCRA exemption does not make this stuff exempt under CERCLA. *Eagle-Picher*.
c. Exemptions in 101(14) are intended as general exemptions, including CERCLA.

2. "Pollutant or contaminant" (101(33)) means
a. really broad definition
b. must present imminent and substantial danger, according to 104(a)(1)(B)

F. Site must be a "**Facility**"

This basically applies to anywhere where the stuff has been left.

Exceptions: vessels, consumer goods.

G. Do not have to be on NPL for liability, though there may be such a requirement in order to use CERCLA funds. *NY v. Shore Realty*.

H. PRP has no right to demand the right to clean up the site. EPA can insist on doing it themselves and billing PRP.

III. The **National Priority List** (NPL)

A. List of things to be done

B. NPL is minimum guideline of sites to be cleaned up. *NY v. Shore Realty*.

C. Tending to other sites is okay. EPA can still sue for reimbursement. 105(a)(8)(B).

D. EPA not required to work on those sites on NPL first. EPA can defer.

IV. Potentially Responsible Parties (PRPs are defined in 107(a)(1)-(4).)

A. Owners and Operators of vessels or facilities. 107(a)(1).

1. PRP need not be both owner and operator.

2. Innocent purchaser exception: before SARA, CERCLA assigned liability even to purchasers who were totally innocent and unknowing of the disposal by the previous owner. SARA added provisions to give the innocent purchaser a defense.

a. 107(b)(3) makes as a defense that the sole cause of the disposal was a third party, but this defense does not apply to a party who was in a contractual relationship with the third party.

b. SARA added 101(35) (A) & (B), which define "contractual relationship", to not include one in which all of the disposal occurred prior to the current owner's ownership and the current owner did not know and had no reason to know of the disposal.

c. 101(35)(B) adds, however, an explicit duty to investigate, and 101(35)(C) assigns a duty to disclose on the seller.

d. This innocent purchaser exception retains CERCLA's

purposes of prompt discovery of disposal by giving incentive to investigate and disclose.

3. "Operator" allows managerial employees to be liable.

4. Corporate Ownership

a. EPA can pierce the corporate veil to hold parent companies liable if the corporate form is being used fraudulently for personal, rather than business, means.

b. Factors enabling EPA to do this are just like piercing veil in other contexts.

- 1) inadequate capitalization of sub
- 2) extensive control over sub by parent
- 3) commingling of funds of sub and parent
- 4) lack of separate corporate formalities, such as ledgers
- 5) diversion of sub funds to parent
- 6) non-functioning officers or directors of sub

5. Banks and other secured parties

a. 101(a)(20) specifically excludes non-managerial types who hold indicia of ownership primarily to protect security interests.

b. Participation in management can make such an owner a PRP.

c. Owners by foreclosure are under 101(a)(20), but liability can depend on how long and for what purpose the owner actually owns the facility.

1) *Maryland Bank & Trust* held a bank liable because it had owned the property for four years since foreclosure. Owning it for so long made it seem that the bank did not become an owner primarily to protect its interest, and thus did not fit into the exception. Why?

- a) financial institutions can protect themselves by making prudent loans
- b) if they were not held liable, they could buy really cheap land, use EPA taxpayer money as insurance, and sell the land expensively after government clean up.

2) *US v. Mirable* did not hold liable a bank that sold its foreclosed land four months after obtaining ownership. Clearly, this was an ownership to protect security interest.

3) Fleet Factor Test: Is lender **in a position** to influence the owner's handling of the waste? If yes, then PRP.

B. **Owners or operator as time of disposal** (with no mention of pollutants or contaminants). 107(a)(2).

C. **Persons arranging by contract, agreement or otherwise for disposal** of hazardous substances (with no mention of pollutants or contaminants). Employees who arrange for disposal can be liable under this.

D. **Persons accepting transport to disposal** of hazardous substances (again, with no mention of pollutants or contaminants).

V. Challenges to CERCLA Liability

A. **Generally, no pre-enforcement challenges**

1. PRPs can only challenge after response. *Dickerson*.
2. Exceptions: 113(h)(1)-(5)
 - a. party liable can challenge post-clean up response costs, damages, or for contribution (after cleanup).
 - b. Can challenge court order to enforce clean up, but not EPA order to clean up.
3. Refusal
 - a. If you do not cooperate, can be subject to \$25,000/day fine. If EPA has to clean, can be subject to treble damages.
 - b. Non-compliance with sufficient cause (objective reasonableness), do not have to pay fines

B. **Post-enforcement challenges**

1. Can claim cleanup was not cost-effective, and therefore was in violation of CERCLA.
 - a. 105(a)(7) requires the NCP to be cost effective
 - b. 104(a)(1) requires removal and remediation to be consistent with NCP.

C. **Affirmative Defenses**

(again, no mention of pollutants and contaminants, just hazardous substances)

1. release caused solely by act of g-d
2. release caused solely by act of war
3. release caused solely by a third party (see above)
4. any of above

D. **Multiple PRP problems: Contribution and Indemnification: 113(f)**

1. court can allocate burdens of contribution
2. Before SARA, court could only assign to non-named PRP to the extent of that party's fault. Now, under SARA 113(f), court can allocate in any way which is equitable, even up to 100% for non-named party.
3. Factors announced in *Amoco v. Borden* as consideration in the allocation:
 - a. amount of hazardous substance involved
 - b. degree of toxicity
 - c. degree of party's involvement in transportation, storage or disposal
 - d. degree of care exercised
 - e. degree of cooperation with gov't
 - f. price paid and discounts granted
4. Indemnification: PRPs may enter into agreements to indemnify each other but 107(e)(1) provides that such agreements will not limit any party's liability to the EPA.

E. **Settlements**

1. amount of reimbursement - good for party to agree to estimated costs, because these things inevitably rise
2. who will do it, how much must be detailed
3. incentive:
 - a. always lose in court
 - b. gain some control over costs
 - c. gets done with early
4. Settled party is immune from contribution actions by any other PRP or the gov't. § 122.