Environmental Law – Fall 2016

Statutory Law:

- Most of environmental law is statutory based, so first to determine whether the statute applies, you must determine if the statute has been **triggered**
- Determine whether there is a specific exemption excluding this type of action from being covered under the statute.

1. What is the trigger?
    - What conditions must exist for this particular statute to apply
2. Does the trigger apply here?
    - Definitions? – tries to avoid confusion
    - Exclusions/exemptions? – does this scenario not apply for any given reason?
3. What does the statute prohibit?
4. What happens if the statute is violated?
    - What are the next steps?

Interpreting Statutory Provisions:

a. Plain meaning
    - first mode of interpretation turned to by the courts
    - Unambiguous plain meaning of statute, courts will apply the intended purpose
b. Congress' intent
c. Legislative history
    - Gives insight into what congress intended
d. Common Law fillers

Citizens Suits & Standing

Notice

- Must give notice to the violator before commencing suit.

Hallstrom v. Tillamook

F: Petitioners owned a dairy farm next to a landfill. Believed the landfill violated a federal law. Told the landfill they were going to sue in 1981. A year later in 1982 the farm sued. Provided notice to agencies in 1983 after suit was commenced.
I: Whether compliance with the 60-day notice provision is a necessary provision, or does the court have discretion.
R: There are exceptions to the 60-day notice (like dangerous and hazardous conditions), but in general the 60 day provision must be met. The reasoning behind this is to (1) allow the agency to step in to actually enforce the law and (2) to allow the party violating the statute to fix the issue prior to litigation.
T: Statutory language is clear → notice requirement is not discretionary, and notice must be given prior to commencing suit.

- Rationale is to strike a balance between citizen suits and overburdening courts.

Citizen Suit

- Citizen can sue people who are violating an act and/or the federal agency in charge with implementing the act for failing to enforce the act
- Administrative Procedure Act – person suffers a legal wrong because of an agency, entitled to judicial review, but can only look for relief other than monetary damages

Standing

- Federal courts only have the power to hear "cases" or "controversies" as they have a limited jurisdiction

Sierra Club v. Morton

F: Disney wanted to build a ski resort on the side of a mountain. Sierra Club objected, stating that they would be adversely affected, and they wanted to stop the action.
I: Whether the Sierra Club had a personal stake to obtain an actual injury when there was a noneconomic injury.
R: Yes, although Sierra was not enduring an economic loss, aesthetic and environmental interests are still deserving of protection.
T: An injury does not need to be an economic loss, rather the injury can be an aesthetic, enjoyment, recreational loss type of injury to give standing.

Lujan v. Protectors of Wildlife

F: Endangered Species Act sought to protect endangered species, even extending into foreign nations. Kelly and Skillbred once traveled overseas to Egypt and Sri Lanka to see a Nile Crocodile and Elephant and they claim that the FWS and NMFS are not doing enough to protect the listed animals. They say they "hope and intent to return to the country," but have no definite plans in the future.
I: Whether the parties have standing to bring a citizen's suit under the endangered species act.
R: No, with only hopes and intentions, there is not a concrete injury. There is not enough imminence to lead to standing as "some day" intentions will not create imminence.
T: **Test for standing:**

1. Injury in Fact
   a. Concrete and particularized to the plaintiff
   b. Actual and imminent
2. Causal connection
   - Between the injury and the conduct complained of whuich is fairly traceable to the defendant's challenged action
3. Redressable
   - Favorable decision by the court would fix the injury

Summers v. Earth Island

F: US Forest Service had a regulation that allowed them to sell off any forest that was burned. 238 acres burned, and they look to salvage it. Plaintiff who had standing settled out. No longer had standing. A member of Earth Island said they enjoyed the forests, however he cannot say if he will use the particular parcels being sold b/c he does not know where the future fires will be.

I: Whether there is standing.
R: No, no standing because the one party who had standing settled out, so the standing is gone. To say that there might be an injury in the future is not imminent enough to find an injury.
T: Must have standing through the entire suits, including when parties settle out.
D: Wants to loosen up imminent to be more of a "realistic threat".

- Whether it is likely in the future that a member of the club will be affected by the sales.

Massachusetts v. EPA
F: State of MA bring a lawsuit to force the EPA to regulate greenhouse gases because Massachusetts could lose high value property along their coast due to heating of the world. Argument by EPA that everyone is to blame here, so this injury is not particularized because everyone is being injured.
I: Whether Massachusetts has standing to bring this suit on behalf of its citizens.
R: Yes, states have a unique ability to bring suits on behalf of their citizens as they have a further obligation to protect them from harm. The injury was concrete and particularized because just everyone is being affected, does not mean that these specific people being affected should be barred from bringing an action.
T: States have a unique ability to bring suits on behalf of their citizens as they have more of an obligation to protect their citizens.

- There is standing here because the argument that everyone being affected does not make the injury particularized is invalidated by the court.

D: Injury is not imminent enough because this process would take such a long time. Doesn't believe global warming is real. Also says that limiting specifically motor vehicle emissions would have such a small affect that there would be a redressability issue.

NEPA

- Generally seen as a procedural statute, not meant to pronounce certain outcomes, but rather to make sure the process is fair.
- Applies to **FEDERAL AGENCIES** who undertake projects that would impact the environment

Trigger: Is the proposed FEDERAL ACTION a *major federal action significantly affecting the quality of the human environment*? (NEPA § **102**)

Environmental Impact Statement – Do an EIS when the agency doing the major action's own regulations would normally say they should do an EIS. - **1507.3**

- "Major" – generally if it could be major, then it is major – **1508.18**

Environmental Assessment: Do the EA if you think it will be a major action but you are unsure of the significant impact. If there is a significant impact, then you do an EIS. If there is no significant impact then there is a FONSI, or finding of no significant impact.

- "Significantly" defines at **1508.27**, largely relies on intensity and context
- EA is essentially a mini-EA, and if it is a close call, probably makes more sense to do the EIS

Is it a federal action?

    - Federal agencies and *private agencies that are subject to significant federal control* (*Mayaguezanos* test & CEQ **1508.18**)
1. Is federal approval a prerequisite to the action taken by the private actors?
2. Does the federal agency possess some form of authority over the outcome?
    - If yes to both, then there is federal control, making a major federal action

What goes into an EIS?
- NEPA § 102 trigger lays out what to put in
- Alternatives – *Methow* - **1502.14**: Heart of the act, should have a reasonable number of alternatives
    - Include a no action alternative
    - Include appropriate mitigation measures (**1508.20**)
    - Agency not required to choose the least damaging course of action
    - Do not need a worst case scenario analysis

When to engage in the EIS process?
- "At the earliest possible time" - *Makah Whaling* – **1501.2**
- Do the EIS/EA ASAP before any commitment of resources to ensure unbiased and unconflicted reports.
- Ensures projects are not suspended in litigation
- Needs to be done before the go-or-no-go stage before any irretrievable dispense of resources

Metcalf v. Daley (Makah Whaling)
F: NOAA gave the Makah's approval to start whaling before engaging in the EIS process. They undertook the EIS process after beginning to whale. Petitioners sought an injunction.
I: Whether the EIS should have been undertaken before the agreement to allow the Makahs to whale again was signed.
R: Yes, the EIS process should be undertaken as soon as possible to avoid bias, and make sure there is not any waste of committed resources. Here, since the EA was done after the agreement was signed, the court feared it was biased so they made them redo the EA.
T: the EA/EIS process should be undertaken at the earliest time possible, to ensure there is no bias or and irretrievable dispense of resources.

Mayaguezanos v. US
F: Nuclear uranium ship that passed through a straight owned by the U.S. near Puerto Rico. British liner carrying the material from Europe to Japan. Mayaguezanos feared spillage one day, so they sued the U.S. under NEPA for not conducting an EIS and allowing the liner to pass through. The U.S. owned an interest in the straight that the liner was passing through.
I: Whether the U.S. had enough control over the private entity to constitute a major federal action.
R: No, the U.S.' failure to act did not constitute a major federal action. The government did not control whether the ship passed through the straight or not, so they did not have control over the ship.
T: Two-Prong test to determine control for a major federal action:
1. Is federal approval a prerequisite to the action taken by the private actors?

2. Does the federal agency possess some form of authority over the outcome?
    - If yes to both, then there is federal control, making a major federal action

Metropolitan Edison Company v. People Against Nuclear Energy
F: Power plant shutdown due to damage to reactor. No radiation escaped, but serious concerns in the surrounding town were raised. Plant sought to turn back on one of the two reactors, and the town freaked out, sought for an EIS.
I: Whether psychological effects of fear to the environment is enough to be a significant impact.
R: No, psychological effects on individuals in the area is something that can be considered when conducting an EIS, but it poses a great risk when psychological effects are the only impact on the environment. Court focuses on the adjective of "environment." No actual threat to the environment here, just the hysteria from the people. Needs to be an effect on the environment, and not some fear of an issue with the environment – too attenuated.
T: Psychological effects of environmental damage alone are generally not enough to find a significant environmental impact.

Robertson v. Methow Valley Citizens
F: Forest Service gave a permit to make a ski resort. EIS contained some mitigation alternatives, but was challenged by Methow because they stated it did not contain a complete mitigation plan to protect the mule deer, including a worst case scenario analysis.
I: Whether mitigation measures in an EIS need to contain fully developed mitigation measures and a worst case analysis.
R: No, NEPA does not mandate particular results, and therefore does not make you choose the least damaging course of action. Does require a no action, but does not require a worst case scenario. There is no specific number of alternatives, just that mitigation must be discussed.
T: NEPA does not require fully developed mitigation measures, just that mitigation was considered. Also does not require a worst case scenario analysis.

Endangered Species Act

Trigger: **Section 4** –
Listing: (a)(1) listing of an endangered or threatened species due to 5 factors
- **4(b)(1)(A)** – take into consideration best scientific and commercial data available to him when listing species. No economic evaluation considered.
    - *TVA v. Hill* – no cost benefit analysis when listing species, because species benefit could be incalculable.
    - Citizens can petition to have species added

Critical Habitat: (a)(3)(A)(i) - Listing of critical habitat *concurrently* with listing of species
- **4(b)(2)** – take into consideration best scientific data available after considering *economic impact*, national security impact, and other relevant impacts when designating **critical habitat**.
- **4(6)(c)** - Supposed to list at the time of listing, but rarely happens, USFWS has discretion
- Defined in **§ 3** as the area occupied by the species at the time of listing, can include areas outside the area occupied by the species, if it is critical to conservation.
    - *Otay Mesa (Fairy Shrimp)* – when listing the animal, the court could consider whether it is economically feasible to consider a particular parcel of land.

- Does not need to include the entire area where he species lives, areas can be added and removed

Federal Agencies: **Section 7** –

- **7(a)(2)** – if a federal agency is considering to fund, authorize, or carry out a new action, they begin with the informal consultation process
  - *Informal consultation process* – Figure out if a species is listed in the area, and if it is complete a *Biological Assessment (BA* – 7(c)) to determine if the species will be adversely affected.
  - Relevant agency reviews the BA, and if they determine there will be no affect, they can go ahead with the process.
  - If the agency thinks it will affect the listed species, they must go through the formal consultation process, which consists of a *Biological Opinion (BO* – 7(b))
  - These are reviewed under the best scientific date available.
  - If there will be a taking, you need to fill out an incidental take permit, and if the action is denied, the only thing to do is petition to the God Squad ().
  - God Squad essentially determines whether or not that species will go extinct or not. – *Endangered Species Committee* **7(e)**
- Discretionary dilemma – (*National Association of Home Builders v. Defenders of Wildlife*) - § 7 applies only to actions when an agency has discretion. Federal agency must have discretion when acting towards a private/state entity's actions in order to trigger a "federal action" and § 7.
  - Statute mandating someone to do something, no requirement to comply with § 7 of ESA

People/Private Entities: **Section 9** –

- **9(a)(1)** – unlawful for any person in the U.S. to take any species listed
- "Take" defined in definitions **§ 3(19)** as harass, *harm*, pursue, hunt, shoot, kill, trap, capture, or collect, or attempt to engage in any of this conduct.

What does "harm" mean?

- Defined in the CFR regulations from the Interior Department as including significant habitat modifications, that would significantly impair essential behavioral patterns such as breeding, feeding, and sheltering. **50 CFR § 17.3**
- *Babbit v. Sweet Home* – take should be defined broadly to include habitat degradation and modification, indirect actions can cause injuries, purpose of the ESA is to protect against all types of harm (not just direct harm), incidental take permits make it clear that indirect effects were meant to be covered
  - Scalia dissent: all the words around harm in the definition of take are direct actions, so why would this one word "harm" be different than the other words around it.

Issue of Licensing

- *Strahan v. Coxe* - If a state (for purposes of ESA it is a private entity under § 9) issues licenses for something (such as fishing) and it injures another animal (like whales), then this will be considered a take.
- Court find that indirect causes of injuries can also be considered a take.

Exceptions: **Section 10** –

- Federal agencies can only apply for an incidental take permit, while private individuals are able to apply for more exceptions under § 10.
- **10(a)(1)(B)** – secretary shall issue an exception to the take prohibition under section 9 (to a private person) as long as the take is incidental and not the purpose of the proposed action.
- **10(a)(2)(A)** – Incidental Take Provisions – what will the impact be, "minimize and mitigate such impact", alternatives.
- No single formula for developing mitigation however, agency must base mitigation policies on biological or other good reasons AND clearly explain why this is a good reason or adequate funding.

TVA v. Hill

F: Dam built, invested $100 million, surrounding area didn't want the dam, so some person found a snail darter and said that if the dam was completed, the snail darter would become extinct. Petitioned to have the snail darter added. TVA said that the dam was basically done, and it was too late.

I: Whether the Secretary of the Interior should consider cost-benefit when determining whether or not to list a species.

R: No, the ESA does not allow the agency to get around the regulations. If there is an endangering of a species, then it should be listed. There is no cost benefit analysis considered when listing, as seen in § 4. Benefit of a species in the future could be incalculable.

T: No cost-benefit analysis when listing species, as the value of a species is incalculable.

Northern Spotted Owl v. Hodel

F: Northern spotted owl was not listed as endangered. Many scientists and others petitioned to have the owl listed as endangered. USFWS own scientist suggested they list it as endangered. The USFWS failed to list the owl.

I: Whether the owl should have been listed.

R: An agency action is arbitrary and capricious where the agency failed to articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. The agency here does not have any grounds for not listing the owl. They went against their own scientist's word, and all the comments. The USFWS ignored expert opinion and just went with conclusory statements that have no support or rationale that the owl will not go extinct.

T: Arbitrary and capricious standard to listing, but the US Fish and Wildlife Services must articulate valid reasoning for/against listing a species, especially when there are experts saying one way or another.

Otay Mesa v. Department of Interior (Fairy Shrimp)

F: Fairy shrimp listed in 1997. 4 shrimp spotted in a tire rut on the plaintiff's property in 2001. 143 acers of the plaintiff's property is listed as critical based on the one sighting in 2007. Shrimp can live in dried up pool for years, and then hatch once the pool fills up again.

I: Whether the plaintiff's property should have been included in the critical habitat.

R: No, the property must be occupied *at the time of listing*, not 4 years later. The court can consider economic factors when listing. Furthermore, the USFWS did not rationalize their

reasoning for listing the critical habitat. Here, the USFWS did not rationally explain the scientific reasoning for their action.
T: Can consider economic factors when listing critical habitat.
- USFWS must rationally explain their scientific reasoning for their action, especially if there is an expert that suggests otherwise.

National Home Builders v. Defenders of Wildlife
F: EPA was giving power to Arizona to promulgate NPDES permits. Defenders say this could affect the pima cactus and pygmy owl. EPA has to give the ability to Arizona as long as they meet the qualifications.
I: Whether the ESA should have been considered, thus invoking § 7 federal action.
R: No, unless the federal agency has discretion to act, then the ESA should not be considered and not considered a major federal action. If a statute mandates a federal agency to do something, this would not trigger § 7, there must be some discretion in how the federal agency acted.
T: Federal agency must have discretion when acting towards a private/state entity's actions in order to trigger a "federal action" and § 7. Mandated to do something → no federal action.

Strahan v. Coxe
F: Lobster pot fishing licenses permitted by MA (state aka private actor under § 9) to catch lobsters, but the ropes would injure whales. Sought to have MA not be able distribute these licenses anymore, as they were causing a taking.
I: Whether MA was the cause of this taking.
R: Yes, by issuing these licenses, they were allowing the injuries to occur. The fisherman could not fish without the licenses, so MA was the proximate cause of the injury. Indirect causes can be considered a take.
T: Indirect causes, such as licensing from a state, can be considered a take under § 9.

Babbit v. Sweet Home
F: Loggers and forest industry sought to challenge the secretary's interpretation of "harm" which included habitat modification and degradation. This would hurt their business as there was a woodpecker and owl that lived in the forest where they operated.
I: Whether "harm" under the definition of "take" includes indirect affects to the habitat.
R: Yes, take should be defined broadly to include habitat modification and impairing behavioral patterns. Indirect actions can cause injuries, purpose of the ESA is to protect against all types of harm (not just direct harm), incidental take permits make it clear that indirect effects were meant to be covered.
T: Harm defined broadly to include habitat modifications and impairment to behavior patterns. Indirect harms covered as well.
D: Scalia dissent: all the words around harm in the definition of take are direct actions, so why would this one word "harm" be different than the other words around it.

Sierra Club v. Babbit (Alabama Beach Mouse)
F: Alabama beach mouse listed as endangered. Wanted to build homes on the beach, would decimate the population. Had funding set aside for mitigation. Challenged that it wasn't enough. No basis supporting the reasoning that this funding was enough.

I: Whether the mitigation was reasonable.
R: No, the FWS did not rationally explain why their funding was the way it was, and it was inconsistent. Can have a specific value for mitigating the impact, but the FWS must rationally explain why this value is adequate.
T: Agencies should minimize and mitigate their incidental takings. Can issue these ITPs but they must consider mitigation and they must rationally explain their decision for mitigation/funding.

Clean Water Act

Trigger: **Section 1311** –

- **1311(a)** – unless in compliance with the listed sections (NPDES, dredge/fill, aquaculture) the *discharge of any pollutant* is unlawful.
- *Discharge of a pollutant* defined in the definitions section (**§ 1362(12)**) as the **addition of any pollutant to navigable waters from any point source**.
- *LA County Flood Control v. NRDC* - Not a discharge of a pollutant when previously contaminated water comes from one part of a body of water, through an engineered improvement and then back into the same body of water. No obligation on city to clean the water.
- A person CAN pollute if they have a NPDES permit (**1342**), Dredge and fill permit (**1344**), or Aquaculture permit (**1328**).
- **Pollutants** listed in definition at **1362(6)**

Addition Definition –

- *Dubois v. U.S. Dept. of Agriculture* (*Loon Pond* Case) - To be an addition under the CWA, there needs to be distinct (not naturally connected) water bodies.
- Water from one place that has different chemical, biological, and agricultural make up to another place would be an addition.

Point Source –

- **1362(17)** any discernable, confined, and discrete conveyance including but not limited to a pipe… (list) from which pollutants may be discharged.
- Does **NOT** include agricultural storm water discharges
- *Decker v. NEDC* – Can include storm water run-off when it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Applies to more permanent industrial facilities.

Navigable Water –

- **1362(7)** – waters of the United States, including the territorial seas.
- Definition of navigable waters is defined by 3 cases
    - *Riverside v. Bayview Homes* – Congress has the power to control adjacent wetlands to traditionally navigable waters
    - *SWANCC* – isolated ponds that have no significant nexus between the adjacent wet lands and the larger body of water are not navigable waters, rejected migratory bird rule
    - *Rapanos* – Majority (Scalia) – two part test: (1) permanent body of water, and (2) continuous surface connection.

- Concurrence (Kennedy) – significant nexus test - Looks at the role of the wetland, and sees if it plays a significant factor in the physical, chemical, biological makeup. If it does, then it is a navigable water.

NPDES Permit – § 1342

- States can receive permitting authority
- Permits distributed through states do not trigger federal action.
- Permits distributed through ESA (such as MA) trigger ESA.
- States are in the driver role to issue permits/limitations, but the ESA can step in when the states aren't doing their job.
- Require compliance with tech based effluent limitations – national standard
- Also require compliance with water quality standards – set by the states, approved by EPA

Effluent Limitations – 1311 & 1362(11)

- States promulgate the standards, but the standards are based on factors that the EPA said are relevant.
- All NPDES permits must take into account technology-based effluent limitations standards → different standards depending on the industry/age of facility/pollutant, a different type of limitation would be imposed with different criteria
- Higher standards for new facilities and more toxic pollutants
- **1314(a)** States promulgate water quality standards, that are approved or denied by EPA.
    - When setting these standards, the states should designate the use of the water, the numeric water quality criteria, and include an anti-degradation policy
- States set limitations based numerical values based on scientifically defensible methods.
- Anti-degradation Policy – water quality should never go below the standard it was at when the CWA was promulgated.
- *NRDC v. EPA* - the EPA should approve water quality standards when the states' decision is scientifically defensible and protective of designated uses. EPA's role is an oversight role, and do not second guess the states' decisions.

Dubois v. Department of Agriculture (Loon Pond Case)

F: Ski resort at Loon Mountain. Pumped water from down at the bottom to the top of the mountain. Ponds were not naturally connected. Water from the bottom pond biologically and chemically much different than the pristine mountain at the top.

I: Whether there was an addition of water to the mountain at the top when it was just water being added to the pond.

R: Yes, there was an addition because water from a biologically much different pond was being added to another pond. To have an addition under the CWA, there needs to be meaningful distinct water bodies. It will be an addition if the water bodies are not naturally connected and the bodies have much different chemical, biological, and agricultural make up. Here, the pristine pond at the top as much ecologically cleaner and different than the one at the bottom being pumped into it.

T: To have an addition under the CWA, there needs to be meaningful distinct water bodies. It will be an addition if the water bodies are not naturally connected and the bodies have much different chemical, biological, and agricultural make up.

LA County Flood Control v. NRDC
F: Water from a river, when it overflowed was directed into these large cement overflow reservoirs. The water was then directed back into the same river at a different point. Water was contaminated before it got into the overflow reservoirs, and then also exited contaminated.
I: Whether the City of LA was responsible to filter the water, even though it is going from the river, and back into the same river.
R: No, not a discharge of a pollutant when previously contaminated water comes from one part of a body of water, through an engineered improvement and then back into the same body of water. No obligation on city to clean the water. The city was not further contaminating it, and as a matter of causation, it is not the responsibility to filter water that is previously contaminated if it is going back into the same source at a different point.
T: Not a discharge of a pollutant when previously contaminated water comes from one part of a body of water, through an engineered improvement and then back into the same body of water.

Decker v. Northwest Environment Defense Center
F: Rainwater was running down these logging roads and into streams and rivers. Brought a lot of crushed rock and sediment with it.
I: Whether the channeled storm water required a NPDES permit as it was related to industrial activity.
R: No, here the transportation of logs for the logging industry was not considered industrial activity. The court found more permanent facilities was considered industrial activity. They found the logging industry was not industrial activity.
T: Can include storm water run-off when it is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Applies to more permanent industrial facilities.

NRDC v. EPA
F: State deviated from the stands set by the EPA. Maryland and Virginia issued standards that were higher than the EPA's suggested limit. Question of how much guidance the EPA's suggestion should play in setting the standard.
I: Whether the EPA should not approve the limit set by Maryland and Virginia.
R: No, the EPA should approve water quality standards when the states' decision is scientifically defensible and protective of designated uses. EPA's role is an oversight role, and do not second guess the states' decisions. Maryland and Virginia had a reason for setting their standard at what they did because of the fishing industry.
T: EPA should approve states' set standards when they are scientifically defensible and protective of designated uses. EPA plays an oversight role.

- States have a lot of discretion in setting their standards, and when the EPA approves these standards, a court is going to be very hesitant in overturning these standards because they are highly scientific and technical so the court defers to the experts.

American Paper Institute v. EPA
F:

I:
R:
T:

Clean Air Act

- CAA is a system of cooperative federalism, where the EPA sets the standards for how much pollution a state must conform to (NAAQS) and then the states develop a plan to achieve this standard (SIP).
- Six listed Criteria Pollutants: Ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxides, lead* (lead added to list later after litigation)

Trigger: **Section 108**

- Establishes list of criteria pollutants that are prohibited from being released in the air to attain air quality standards.
- Pollutants restricted from mobile and stationary sources.

National Ambient Air Quality Standards (NAAQS) –

- **§ 109 -** Standards set by the EPA that the states should attain
- Designates *primary* and *secondary* standards. Primary protect health, secondary protect welfare.
- Standards set are *technology-based standards* – meaning the standards are set to force the sources producing pollution to develop technology that would reduce pollution to attain the standards.
- States must reach these standards, but how they do it is up to them. They can exempt or accommodate a certain industry, grant a variance, or challenge the refusal in court. As long as the states total pollution is under the standard, how they meet that goal is up to them. Can be more stringent in some areas, and looser in others.

State Implementation Programs (SIPs) –

- **§ 110 -** States should have primary authority to reach the standards set by the EPA.
- States must submit a plan, which delineates the air quality control standards which will be maintained in each region in the state.
- If the EPA does not find the states plan to be satisfactory, the EPA can write a Federal Implementation Plan.
- Designates each region as attainment, non-attainment, or unclassifiable.
- States can choose which regions will attain certain standards under the AQCRs
- 13 requirements states must reach to have their plan passed by the EPA
- *Union Electric v. EPA* - EPA cannot consider claims of technological and economic infeasibility when approving or rejecting a SIP, and the states are forces to develop technology to reach the NAAQS.

Air Quality Control Regions (AQCRs) –

- **§ 107** – states delineate regions, and designate each region as attainment, non-attainment, or unclassifiable.

- For each criteria pollutant, states much classify each AQCR as attainment, non-attainment, or unclassifiable.

Mobile Sources –

- **§ 202** – regulates "any air pollutant" that would reasonably endanger public health or welfare
- *Massachusetts v. EPA* - meant to be more broad than the traditional list of pollutants, includes greenhouse gases.
- Under the traditional definition of "air pollutant" in § 302, greenhouse gases, and specifically carbon dioxide fit.

Stationary Sources –

- **§ 302(z)** – basically anything that is not a mobile source, doesn't move. Also defined as "any air pollutant" → issue of whether this includes GHGs
- *Utility Air Regulation v. EPA* - although in mobile sources defines "air pollutant" as including GHGs, stationary sources definition of the same "air pollutant" phrase does not include GHG.
- "anyway sources" → if this particular stationary source already needs a permit, the sources GHGs will also be monitored
    - this is how the EPA can get monitor GHGs through this backdoor method
- Old sources are sometimes grandfathered in, but new sources must be permitted and fit the regulations
- "Bubble Concept" – existing plant that contains several pollution-emitting sources may install or modify one piece of equipment without meeting permit conditions IF the overall emissions from the plant won't increase (basically must be offset somewhere else)
    - Total emissions coming from a stationary source is one source, even if there are multiple sources emitting pollution.

Attainment v. Nonattainment

- Technology-based emissions limitations for Stationary Sources
    1. Type of pollutant
    2. Location: attainment v. nonattainment region
    3. Existing v. new source
    4. Major v. non-major source (**definitions**)

Nonattainment Region – not attaining the goals – text pg. 678

- Existing stationary source: reasonably available control technology
- New/modify a major source: over 100 tons of pollutant → need permit
    - Lowest achievable attainment rate.

Attainment Region – text pg 691

- Prevention of Significant Deterioration (PSD) permit
- Air quality is already good, and don't want it to get worse, so new facilities need a permit to pollute
- Major – 250+ tons/ yr of any air pollutants or 100+ tons/yr certain pollutants
- Facility is subject to tech-based permits –
- PSD permits are Best Available Control Technology

Standard for Court in Reviewing Federal Agency Statute Interpretations
Chevron Test

1. Has congress spoken clearly on the issue?
- Yes, give intent to the unambiguous intent of congress
2. If the statute is silent or ambiguous, then is agency interpretation a permissible construction of the statute?
- Yes → court does not substitute its own rule making
- Deferential arbitrary and capricious standard

Union Electric v. EPA
F: Union Electric said they could not attain the standards set. They argued that by the way the statute is written, as saying "as expeditiously as practicable", that non-attainment of the NAAQS was okay because it was not practicable for them to reach the standard.
I: Whether it is permissible for Union Electric to not meet the standard set by EPA.
R: No, EPA cannot consider claims of technological and economic infeasibility when approving or rejecting a SIP. The CAA technology forcing statute, meaning the act was designed to force people to reach these minimum standards. No flexibility in meeting the standards in their regulations.
T: EPA cannot consider claims of technological and economic infeasibility when approving or rejecting a SIP, and the states are forces to develop technology to reach the NAAQS.

Massachusetts v. EPA
F: Massachusetts sought to force the EPA to regulate greenhouse gases, specifically carbon dioxide, as it is dangerous and causing global warming. EPA refused, stating that the carbon dioxide does not fit the traditional definition of "air pollutant" under the CAA.
I: Whether carbon dioxide is "air pollutant" under the CAA.
R: Yes, carbon dioxide is an air pollutant and should be regulated by the EPA because under the definition of mobile sources it says any air pollutant. Air pollutant is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." Carbon dioxide fits this standard.
T: Carbon dioxide is an air pollutant under the definition of mobile sources of the CAA, as this list is intended to be more broad.

Utility Air Reg. v. EPA
F: Under the definition of the CAA, a stationary source is defined as "any source of an air pollutant". Under the previous ruling od Mass v. EPA, this would assume that the EPA can regulate GHG from stationary sources also.
I: Whether the EPA can regulate GHGs from stationary sources.
R: No, it is a permissible definition to allow the EPA to regulate GHGs under mobile sources, and not under stationary sources. This definition of any air pollutant would encapsulate too many sources, like smaller shopping centers, apartment buildings, and schools. CAA sought to regulate major sources of pollution, so by regulating the smaller facilities, this was not the goal of the CAA.
T: Although in mobile sources defines "air pollutant" as including GHGs, stationary sources definition of the same "air pollutant" phrase does not include GHG.

- "anyway sources" → if this particular stationary source already needs a permit, the sources GHGs will also be monitored
- This is how the EPA can get monitor GHGs through this backdoor method

Chevron v. NRDC
F: Two different definitions of stationary sources in two different parts of the CAA. Challenging the bubble concept.
I: Whether the court should defer to the EPA's interpretation of a stationary source.
R: Yes, Congress' intent was clear to expand the EPA's power. Therefore, the court should defer to the interpretation of the EPA.
T: When the meaning of a statute is ambiguous, the court should defer to the agency's interpretation, as they have the mandate from Congress, and the expertise to make decisions. Standard of review is arbitrary and capricious.

Clean Power Plan

- EPA's recent plan to reduce carbon pollution from power plants, which are the nation's largest producer of carbon pollution.
- Aim was to reduce the effects of climate change
- Reduce 3,600 premature deaths, 1,700 heart attacks, 90,000 asthma attacks, and 300,000 missed work and school days.

F:
I:
R:
T: