

Environmental Statutory Law

ECONOMICS AND THE ENVIRONMENT

1) Role of Prices and Markets

- a) Polluter Pay Principle - if you pollute you have to pay for the resource, shouldn't be able to use resource for free.
 - i) Creating market for pollution, if you wanna pollute air you have to pay for that right
 - ii) Problems:
 - (1) Rich co.s given right
 - (2) Difficult to tell what costs are, people might not know health problems etc until much latter
 - (3) Difficult to tell what source is, could have multiple factories spewing
 - (4) Bad air could spread to other places, don't know what repercussions
 - (5) Hold-outs - some people might say regardless of price, they won't allow pollution.
 - (6) Who assigns the rights? Is the baseline you have a right for clean air and they pay to pollute, OR is baseline the facility has the right to emit and you pay so they don't.

2) Cost Benefit Analysis

- a) Cost Benefit Analysis
 - i) Can monetize env costs as well
 - ii) CB analysis looks at net value to society outside of individual costs and benefits. (Eg. cost to Gwinich indians, benefit to specific oil co.s)
 - iii) Leopold - can't look at it in terms of CB analysis - should view from ethical perspective what's best for the environment, not whats best from the perspective of self-interest.
 - iv) Force co.s to **internalize the externalities** - consider the env costs they are imposing on others through their activities
 - v) **Free Access Problem** - people weigh private benefits greater than public costs >> they will over exploit resources when given free access.
 - vi) **Coase Theorem** - pollution problems can be left to private market solutions when polluter and pollutee can bargain for the appropriate level of polluting activity.
 - vii) **Free Riders** - if you force the public to bargain for non-pollution, there will be a problem of some people benefiting but not paying for those benefits.

3) Ecological Perspectives

- i) Leopold - Land Epic
 - (1) Feasible?
 - (a) Educate people to value.
 - (2) Guidance?
 - (a) Look at bigger picture, long term affects, interconnectedness of ecology, may effect things beyond immediate physicalities or temporal perspectives during which things happen
 - (b) Vague - when to use resources when not to use resources
 - (c) Expecting other people to share their world-views
 - (3) Concepts:
 - (a) Look at broader consequences, look at unintended consequences.
 - (b) Devaluing for thing over time, present value discounted (lottery analogy 3 mil now or 30 mil over time)
 - (c) Value of land, land as property - land becomes valuable by working on by adding a human dimension to it. Traditional view that leopold holds is that land holds value w/o human intervention.
 - (d) Traditional valuations of econ don't work, doesn't take into account moral, philosophical values for environmentalism

4) Common Pool Resources

- i) Tragedy of the Commons
 - (a) Carrying Capacity or common lands - how much yield can land sustain. Problems arise when use of common > carrying capacity
 - (b) Each individual rationally choose personal most beneficial course of action, to increase use to increase profits.
 - (c) Individual actions or not made w/o knowledge of repercussions to larger group.
 - (d) People get locked into individual behaviors bc there is no cost to you, and you don't want others to benefit at your expense.
- (2) Solutions:
 - (a) Everyone's better off if we negotiate and let everyone know that its better for everyone to keep at - but how do you enforce it. People may always sneak in and be a free-rider
 - (b) Change econ incentive, pay people not to add cattle.

5) ANWR

- a) Interests
 - i) States rights v. Fed gov't rights?
 - ii) Native peoples rights?
 - iii) Econ Benefits > Env Costs
 - iv) Increasing Long Term Dependence on Oil

6) Environmental Justice

SOURCES OF ENV LAW

1) Common Law Roots

- i) General Rule - can use your property any way you see fit, nuisance law is a limitation of that.
- ii) Trespass - conduct that resulted in physical invasion of property could be resolved thru trespass law
 - (1) Reasonably foreseeable or intentional invasion. (One case FL emission deemed physical invasion = to trespass Martin v. Reynolds Metals)
- iii) Nuisance - actions interfere w/ the property rts of others.
 - (1) Cool Analysis - nature of the interference w/ property rts vs. nature and utility of actor's conduct
 - (2) Moral Outrage - whether certain interests had been invaded, not on the conduct that produced the invasion.

a) **Private Nuisance** – invasion of the interest in the use and enjoyment of land

- i) **ELEMENTS:**
 - (3) Private – RS2 §821D – a nontrespassory invasion of another's of interests in the private use and “ “
 - (a) RS §822 - Brought by **private parties** w/ property rights and privileges
 - (b) Requires showing of **significant harm**
 - (c) Interference must be **intentional and unreasonable** or actionable under strict liability
 - (i) RS2 §826 (b) intentional invasion is unreasonable if either the:
 - 1. Gravity of the harm > the utility of the actor's conduct OR
 - 2. The harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible. (Embracing notions of moral outrage as well as feasibility and risk-benefit analysis)

ii) **NOTES:**

- (1) Remedy: US courts more inclined to balance env damage vs. value of polluting activity to promote industrial growth, many cts reluctant to award injunctions if they involved activities of considerable econ value.
- (2) Analysis
 - (a) Interference w/ another's interest in use and enjoyment land (different than trespass = physical invasion)
 - (b) Resulting in SIGNIFICANT harm
 - (i) Intentional & Unreasonable
 - 1. **Intent** - Foreseeability test - actual knowledge or should have knowledge, reasonable to foresee the consequences of action
 - 2. **Unreasonable** - Burdens Costs outweigh the benefits
 - a. Harm
 - i. Extent of harm

- ii. Character of harm
- iii. Social value of use that's invaded
- iv. Suitability of use invaded to character of locality
- v. Burden person harmed avoiding harm
- b. Benefit
 - (ii) Negligent
 - (iii) Abnormally dangerous Activity (CB p.73, 81)
- (c) Remedy:
 - (i) Damages: Decrease market value of land
 - (ii) Injunction: Requires 2d balancing of hardships to parties.

(3) Significant Harm

- (a) Where fear is unreasonable, unsubstantiated you can't recover for loss of market value to property (p. 82 - Atkins case)
- (b) Burden is on person exposed to prove more probable than not harm is significant
- (c) Harm calculated from standpoint of the one person bringing the suit (can't consider harm to general public) v. benefit to large co.

iii) CASES:

Case:	Madison v. Ducktown Sulphur
Facts:	D co. smelting copper ore releasing poisonous gas into air killing plants and crops of neighboring Ps
Rule:	1) Judgment for damages in this class of cases is matter of absolute right where injury is shown 2) However, decree for an injunction is subject to courts discretion, and will only be given after full and careful consideration of all elements of injury
A:	<ul style="list-style-type: none"> • Smelting activity has significant econ value, jobs, taxes, property worth \$2million. Result of injunction would be to close factory and allow appropriation of property w/o compensation. • D's tried to develop technology to stop pollution, but couldn't

b) Public Nuisance

i) ELEMENTS:

- (1) Public – RS2 §821 (B) an unreasonable interference w/ a right common to the general public
 - (a) offenses against the state arising from actions that interfered w/ public property
 - (b) Action must be unreasonable
 - (i) Involves significant interference w/ the public health, safety, comfort or convenience
 - (ii) Is illegal OR
 - (iii) Is of a continuing nature or has produced a long-lasting effect on the public that the actor has reason to know will be significant
- (2) Subject to abatement actions by govt authorities or private parties who suffered special injury
- (3) Historically targeted non-resident polluters
- (4) Cts seldom ordered abatement of polluting activity

ii) NOTES:

- (1) Causation
 - (a) Really hard to prove specific causation - specific D caused specific injury to specific P. Could be other causes of cancer, death, disease. Could be multiple causes. Humans don't live in controlled laboratory environment. That's why nuisance law insufficient
 - (b) Have to prove not just association but causation
- (2) Private Party: "Special injury" requirement - can bring suit if they can allege nuisance has harmed them in a manner not share w/ the general public.
- (3) Why Nuisance law insufficient?
 - (a) Who bears the burden of proof - P has to prove activity is harmful.
 - (b) Private nuisance - can only sue for harm to individual property interests, if you are not a property owner you cannot bring a private nuisance action
 - (c) Econ balance - tends to favor large econ actors and their activities
 - (d) Individual has little incentive to sue individually but there are lots of transaction costs for bringing class action suit
 - (e) Issue of causation - how do you prove harm from specific activity when there are multiple harms, causes of illness, pollutants travel great distances, temporal disconnect.

- (f) Institutional competence, cts often reluctant to weigh in on what's feasible, unanticipated benefit or consequences, reluctant to tell co.s how to manage pollution control in the absence of regulation to tell them how to rule. Like to defer to specialized knowledge of agencies.
- (g) Public nuisance actions are resource intensive.

iii) **CASES:**

Case:	MO v. IL
Facts:	Chicago erects canal to dump cities waste into Miss Riv. People in St. Louis get typhoid and sue
Rule:	<ul style="list-style-type: none"> ■ Where P is sovereign power and allows similar activity to that which it complains. D has a right to appeal and prove that P's own conduct is not causing the injury ■ "Reverse Golden Rule" the affected state cannot demand that the source state adhere to a higher standard than the affected state applies to its own citizens

Case:	GA v. TN Copper Co "Ducktown 2"
Facts:	Same case as Ducktown except GA brings suit for damage to state lands and lands of its citizens
Rule:	Ct issues injunction bc State is more entitled to relief than a private party - State even though citizens own the land is a "quasi-sovereign" and has independent interest in all the earth and air w/in its domain

2) Regulatory Legislation

a) **NOTES:**

i) Three models of

- (1) **Fed Assistance** \$ to encourage states to regulate
- (2) **Preemption** of State Law - fed gov't steps in and say we take over (FIFRA, TSCA)
- (3) **Cooperative Federalism** - CWA, CAA, where fed gov't enacts natl standards and laws allow for the implementation and enforcement to be carried out by state agencies, provided states show they adopted laws that are = or more stringent
 - (a) If states don't carry out, fed gov't authorized to take over
 - (b) Rationale: States can be more responsive and innovative
 - (c) Criticism: Race for the bottom, states competing for business to come it >> lower standards. State Leg. More susceptible to capture by special interests
 - (d) Exceptions: ESA, Superfund
 - (e) 10th & 11th Amendment: Model of Coop federalism predominant in most fed laws. Tells states you have the option of regulating in lieu of the fed gov't >> not violation of 10th Amend
 - (f) Unfunded Mandates Act: If Congress passes a law they have to give more consideration to \$ impacts, subject to special vote by congress, does not actually prohibit unfunded mandate
 - (g) Devolution:
 - (i) Challenges:
 1. Econ of scale in having natl regulatory programs
 2. Natl programs better able to deal w/ transboundary pollution
 3. Fairness and = protections concern to provide baseline standards for all Americans, no unequal levels of env risk
 4. Easier to focus public attention at natl leve
 - (ii) Proponents:
 1. Unfair to set standards and require states to pay
 2. Unfunded Mandate Reform ACT 1995, anything >50mil stricken unless funding provided. Fed agencies required to study cost and benefits for leg costing >100 mil

ii) Preemption: CL can coexist or supplement regulatory statutes. Sometimes statutes preempt CL

- (1) CASE: **IL v. City of Milwaukee** – CWA. Even though WI CL required more strictly controlled discharges SC found CWA preempted state CL nuisance law. Congress intent to enact all-encompassing water pollution regulation scheme
- (2) CASE: **Intl Paper Co. v. Oulette** – VT lake front residents pissed bc NY Co. emitting pollutants into lake.
 - (a) RULE: Fed leg does not have to explicitly say they are preempting state law. If statute is sufficiently comprehensive to make reasonable inference that Congress left no room for supplementary state action, state action should be preempted.
 - (b) TEST: State law invalid if it conflicts w/ fed statute, and will be found to conflict if it "stands as an obstacle to the accomplishment and execution of the full purposes and obj of Congress".
 - (c) ANALYSIS:
 - (i) Goal of Congress to create uniform standards for discharge from point source. Allowing states to hold different standards would interfere w/ purpose and obj.
 - (ii) Fed agency weigh costs and benefits and state could disrupt by compelling different compliance schedule. Aggrieved individual could bring suit pursuant to the source state CL, NY. Just can't bring suit about NY point source in VT

- (3) **Express preemption** - written in statute
 - (4) **Implied preemption** - infer they mean't to preempt state law, doesn't make sense unless state law preempt
 - (5) **Direct Conflict** - can't comply w/ both, CL preempted, FedL supreme
- ii) Bases For Control
- (1) **Health/Environment** - goal stated in health enviro terms. Set standard and work backwards to meet that standard. (Eg. Clean Air Act)
 - (2) **Technology** (Feasibility) - what is it permissible to do w/in capabilities of technology. . Look and see what best performing industry has achieved and impose that on everybody in similar industry. (Eg. Clean Water Act)
 - (a) Best Available Technology - whats available, how achievable, cost?
 - (b) Technology Forcing - forced industry to come up w/ technology to get to a certain standard
 - (3) **Balancing** - gains of proposed standard vs costs (Eg. FIFRA)
- iii) Types Of Regulation
- (1) **"Command and Control"** - (used derisively of critics of env regulations) - env often prescriptive, EPA will say this is how we want you to affect env standards. Use this technology, reduce to certain emission level.
 - (a) Design standard - de facto tech specifications
 - (b) Performance Standard or Emissions limits
 - (c) Ambient Standard or Harm-based Standard - level of environmental quality to be achieved or maintained
 - (d) Products Ban
 - (2) **Market based** - specify level of control, but leave allocation to industry. Permit co.s to buy and sell emissions rights, using market forces to ensure pollution is reduced (Eg. Clean Air Act)
 - (a) Pollution Taxes or Emissions Charges - polluter pays principle as added incentive for reducing pollution
 - (b) Subsidies - tax breaks to incentivize co.s to invest in lowering emissions
 - (c) Deposit Refund - impose fee and return fee when product recycled
 - (d) Tap and Trade systems, gov't says we impose limit on facility and you figure out how to meet that limit. If you are below that limit you can trade your excess to other co.s that have not met.
 - (3) **Info disclosure** (Eg. NEPA - only requirement that gov't analyze and disclose what it is doing, better disclosure will
 - (a) Planning or Analysis Requirements - requiring studies be done on env impact before action taken
 - (4) **Liability based** (Eg. Superfund - doesn't impose regulations but just liability for clean-up costs)
- iv) Regulatory Process
- (1) Congress identifies target area
 - (2) Instructs admin agency to implement statute
 - (3) Law translated to policy through admin agencies under watch of judiciary
 - (a) Rule = another source of law, not a statute
 - (b) Delegation Doctrine - Cong can't delegate leg authority to an agency
 - (4) Admin Procedure Act - outlines ground rules for agency action, agencies have considerable discretion
 - (a) Agencies must provide 1) public notice of proposed rulemaking actions 2) opportunity for public comment 3) publication of final rules, concise statement of basis and purpose
 - (i) Formal = trials w/ cross exam, testimony, witnesses, discovery etc. - take a lot longer, more expensive, exception unless statute specifies formality most adopted through informal
 - (ii) Informal - ongoing conversation between agency and public
 - (5) Dissatisfied w/ implementation, Congress provided remedies to force agency action
 - (a) Citizens Suits - citizens can bring suit against agency official when official fails to perform non-discretionary duty
 - (i) Most env laws provide that citizens has the right to sue. (***big difference bt statutory right to sue and Const. standing to sue under Art III, see 1e in outline
 - (b) Citizen Petitions - citizens can petition for initiation of rulemaking proceedings, used infrequently, agencies not required to respond in certain time
- v) Procedure
- (1) Admin Procedure Act (APA) 5 USC §553 - requires the agency provide 1) public notice of proposed rulemaking action 2) opportunity for public to submit written comments 3) publication of final rule + concise statement of basis and purpose
- vi) Judicial Review
- (1) Ct. review is more deferential standard to agency decision. Agency viewed as expert, not ct.
 - (2) STANDARD = **Chevron Deference**: arbitrary, capricious, an abuse of discretion - was agency reasonable, rational?
 - (a) STEP ONE: Has Congress directly spoken to answer question at hand – plain meaning of statute
 - (b) STEP TWO: Reasonableness of agency interpretation, permissible construction of statute?
 - (i) Ct cannot substitute its own interpretation of statute
 - (3) Rationale:
 - (a) Agency has scientific expertise

- (b) Congress left gap that they intended agency to fill
 - (c) Ct.s are not accountable to the voters, leg should make policy decisions
 - (4) CASE: **Overton Park** – Prior to deference cts reviewed agency actions with “thorough, probing, in-depth” review
 - (5) CASE: **VT Yankee** - citizen suit challenge to Atomic EC grant of license to nuclear power plant. SC said ct cannot require agency to reach the “best” or “perfect” result.
- vii) **Federalism Concerns:** Most environmental laws promulgated under the Commerce Clause
- (1) CASE Lopez: SC overruled statute regulating sale of guns near schools. Ct found that regulation was designed for school safety NOT regulation of commercial activity.
 - (a) TEST = Does law “substantially affect” the regulation of the economy or commercial activity

3) Statutory Interpretation

a) NOTES:

- i) Plain Meaning – Dictionary.
- ii) Legislative History
 - (1) Committee Rpts
 - (2) Markup transcripts
 - (3) Cmmt debate and hearing transcripts
 - (4) Actual floor debate
 - (5) Leg silence to confirm prior judicial interpretation, or rejection specific amendments: Sometimes useful, but risky
- iii) Structure/Syntax
- iv) Canons of Construction - General presumptions about what legislatures mean when they enacted statute
 - (1) Examples
 - (a) Rule Against Surplusage - if leg put a word or phrase in a bill they did it for a reason, didn’t intend it to be surplus
 - (b) Noscitur a Sociis - Find out meaning of phrase based on how general or restrictive other terms in phrase are. Words in sequence should be considered in relation to other.
 - (2) Criticized
 - (a) Don’t represent what leg did in *specific* instance - can be applied too mechanically
 - (b) Two opposing cannons on almost every point
 - (3) More important in state ct decisions where limited leg history - where plain meaning is not clear
- v) Chevron Doctrine - Where statutory intent unclear, deference to implementing agency’s interpretation so long as it is reasonable

b) CASES:

Case:	American Standard
Facts:	Lead from faucet leaching into tap water, against Prop 65?
Rule:	<ul style="list-style-type: none"> 1) Plain Meaning <ul style="list-style-type: none"> a) Source = point of origin, procurement, or emanation → faucet fits into definition 2) Legislative/Voter Intent <ul style="list-style-type: none"> a) Broad intent, public want protection against carcinogens in water. Wouldn’t have wanted gap in regulatory scheme 3) Structure - Canons of Construction <ul style="list-style-type: none"> a) Rule against surplusage – No reason to differentiate bt present and future source, would be surplus 4) Chevron Deference <ul style="list-style-type: none"> a) Science Advisor sent letter, but no formal agency decision. Ct reluctant to give deference bc more likely to be private opinion vs. authoritative agency decision

STANDING

- i) Constitutional: Federal Courts limited to hearing "CASES AND CONTROVERSY's"
- ii) Statutory: Fed Statute authorizes citizens to bring CITIZEN SUITS - "any person adversely affected or aggrieved by final agency action may sue"

b) ELEMENTS

i) Injury in Fact

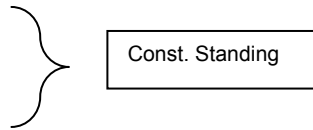
- (1) Imminent
- (2) Concrete

ii) Causation: Injury Fairly traceable to D

iii) Redressable Harm

iv) Zone of Interest - Statutory, Congress can expand or contract according to statute.

- (1) Eg. ESA "any person can sue" - Ct argues that that language in ESA implies that zone of interest test is not a limitation for standing in citizens actions suits under the ESA.
- (2) NEPA doesn't have broad "any person can sue" language



c) NOTES:

i) Policy Goals: Why do we limit who can get into FC?

- (1) Limit # of people who can sue.
- (2) Adversarial system: people have to have enough of an interest to litigate, sharp zealous interest in pursuing the case
- (3) Limits the cts power to hear real disputes. Prevents the cts from expanding or contracting CL, judge made law. Ct. should not hear political disputes or generalized grievances against the gov't, purpose is to resolve IMMEDIATE disputes bt the parties.
- (4) Supports larger doctrine of Separation of Powers: FC cts of limited jx, not maj elected body shouldn't have wide ranging authority

ii) Injury in Fact:

(1) CONCRETE → Fried doesn't have any concrete plans to go back

(a) Recreational, aesthetic injury = sufficient (**Mineral King, Lujan**)

- (i) Have to be in close physical proximity, enough to enjoy the resource
- (ii) Physical proximity doesn't make sense for other non-econ interests, such as value of endangered species. Lower cts have been satisfied w/ other avenues of argument
 - 1. However flaw in argument, is that environmental laws are designed to protect something other than pure use value.

(iii) **Ecological Rts foundation vs. Pacific Lumber.** → 9th cir no fixed formula for how often you have to use a resource to allege injury in fact.

(iv) Do not have to show ACTUAL Harm to the ecosystem. ONLY have to show injury to P not the environment

(b) Existence value NOT sufficient - derives pleasure from fact that grandchildren can see, and that they are there roaming free ≠ Standing. (**Lujan**)

(c) Ecosystem nexus, Econ Nexus arguments: NOT perceptible enough, too intangible. (**Lujan**)

(d) Vocational Nexus - Lujan grudging acknowledgment, that person works or observes w/ particular animal faces conceivable harm. 1044. Can have an interest in working w/ and observing animals sufficient (**Lujan**)

(2) IMMINENCE → Imminent = Likely to happen

(a) "some day intentions -- w/o any description of concrete plans... do not support a finding of the actual imminent injury that our cases require." (**Lujan**)

iii) Types of Citizen Enforcement

- (1) Suits vs. Firms that violate law (Eg. CWA §505(a1))
- (2) Suits vs. govt for failure to perform mandatory duty (Eg. CWA §505a2)
- (3) Suits v. govt to review legality of agency action (authorized by APA)

iv) Mootness Doctrine

(1) Compliance before trial ≠NOT MOOT.

(2) Remedial Measures have been taken that ensure violations will not recur

- (a) Ct.s look to see that underlying violation has Stopped, have to show that it is "absolutely clear" that you won't ever offend again. D's are not allowed to continually evade judicial review, by claiming voluntary compliance. Show by:

(3) GF Allegation:

- (a) P's filing suit must give 60 days notice of intent to sue
- (b) After 60 days P can file but must make good faith allegation of ongoing violation
 - (i) Violation occurred on or after filing of complaint OR

(ii) Likelihood of intermittent and sporadic violations

d) **CASES:**

Case:	Sierra Club v. Morton (Mineral King)
Facts:	Disney wants to put ski resort in Sequoia
Rule:	Person suing must have 1) Injury in Fact + 2) Zone of Interest 1) Can be injury to aesthetic, recreation or environmental interest, but must be himself injured 2) Organization interest is sufficient if has direct stake in outcome a) Members themselves would have standing OR b) Interests are "germane to org's purpose"
Dissent:	People should be able to assert the rights of inanimate objects → trees, mtns, animals (likens to boat, or corp)

Case:	Lujan
Facts:	Challenge to DoI for finding that agencies don't need to consult w/ Dept when destroying habitat of ES outside US
Rule:	Injury in fact = party must be himself injured "directly effected" ● Has to be "actual or imminent" injury not just "someday intentions" ● Ecosystem nexus insufficient ● Vocational Nexus may be sufficient but not if party simply observes or works with animal anywhere in the world
Dissent:	● Injury to someone who studies and enjoys species = harm ● "Imminence" of the injury should be measured by timing and likelihood of threatened environmental harm rather than when individual would use it ⇒ Injury to ability to study and observe would occur moment that animal destroyed ⇒ Requiring plane ticket = empty formality

Statutory Standing

Case:	Gwaltney
Facts:	Polluters discharging in violation of CWA
Rule:	Citizen action suit not authorized for completely past violation, can sue if can make good faith allegation that violations are "continuous" (on date of complaint) or that violations are "intermittent" and likely to occur again in the future ✳ Redressability - have to show that if you win as a P the injury you are complaining about will have to be remedied. If they are still "IN violation" redressability is easier to prove bc shows that cts verdict can force them into compliance. ✳ Note case Steel Co. - Gwaltney says if not continuous or intermittent violation then no statutory standing. Steel Co. case said if a co. in compliance before trial there is no constitutional standing bc there is no redressability

Con Standing

Case:	Laidlaw
Facts:	Violations of CWA suit is NOT moot for lack of redressability if D comes into compliance after complaint filed
Rule:	Damages to treasury does make redressability bc will deter from future violations. Does not specifically overrule Steele Co.

Con Standing

Case:	Steele Co.
Facts:	" " – IS moot for lack of redressability – D came into compliance prior to complaint filed
Rule:	● Even under CAA where allowed to sue for past violations... if \$ goes to US treasury, penalties do not remedy P's harm. Not damages P personally receives.>> Harm not remediable. Doesn't deter ● Technically only applies to the facts of this case – but could extend to people who come into compliance after complaint filed. → if believe that citizens are just enforcing generalized grievances and have no more interest get no more benefit than generalized public.

SUPERFUND

1) Background

a) ELEMENTS

- i) **Release or threatened release** (defined broadly - anyway that substance can get into environment)
 - (1) Defn of disposal (who's responsible party - what does it mean to be an owner at the time disposal occurred)
 - (2) No threshold amount - any amount.
 - (3) Exemption of federally permitted releases under CWA, etc.
 - (4) Retroactive liability
- ii) **Hazardous Substance** (broad again - if it represents an imminent and substantial danger to public health)
 - (1) Does not cover petroleum or nuclear materials.
- iii) **From vessel or facility** (very broad - any site or area where a hazardous sub has come to be located)
- iv) **PRP: D defined as responsible party** under §107 (a)
 - (1) Current Owner (107a) – Liable whether or not you are culpable
 - (2) Owner/Operator at time of disposal
 - (3) Person who Ktd for disposal or treatment
 - (4) Person who accepted material for transport or disposal
- v) Which has led to the **incurrence of response costs** (investigation, clean-up, relocation of community, etc.)
- vi) **Not inconsistent w/ the NCP** - lower standard for gov't, for private parties have to show "consistent w/ NCP"
 - (1) Cost effective measures pursued
 - (2) Appropriate extent to removal, remediation
 - (3) Public Comment
- vii) **Defenses:**
 - (1) Release caused solely by 1) Act of God 2) Act of War 3) Innocent Landowner - 3rd party w/ whom the def has not Ktual relationship (107b - difficult as D to satisfy last prong)

b) PRINCIPAL PROVISIONS:

- i) §101 - Definitions
- ii) §103 - Notification Requirements
- iii) §105 - NCP
- iv) §106 - Abatement
- v) §107 – Liability
 - (1) PRPs - JSL
 - (a) Current Owners
 - (b) Generator
 - (c) "Arranged For"
 - (d) Transporter
 - (2) Damages - Innocent Party and Gov't can seek damages under this section
 - (a) Cost of removal
 - (b) Damages to Natural Resources
 - (c) Health Assessments
- vi) §113 - Contribution (for other PRPs)
- vii) §111 & 112 – set up of Superfund

c) NOTES:

- i) Direct extension of CL principles of **Strict Liability**
 - (1) W/o requirement of individual causation
 - (2) Imposes liability scheme for past contamination designed to clean up contaminated sites and to deter future releases.
 - (3) No provision for victim compensation
- ii) **Purposes:**
 - (1) To stimulate rapid cleanup of abandoned waste sites
 - (2) And to ensure that parties responsible pay the costs of that cleanup
 - (3) Allows gov't to:

- (a) Can take action to remedy hazards at a site
- (b) Order parties to do the same
- (c) Spend money on clean up from fed superfund
- (d) Other parties can also sue responsible parties for those responsible parties that contaminated land
- (e) Bring cost recovery actions to get reimbursement

iii) **Procedure:**

- (1) EPA required to investigate and rank sites on Natl Priorities List (NPL)
- (2) Natl Contingency Plan (NCP) – procedures gov't and private individuals must follow when carrying out clean-up. General procedures. Specifics are developed on case by case basis.

2) Innocent Landowner

i) **ELEMENTS:** (101 (35b))

(1) PART I

- (a) Bi - D must have undertaken **All Appropriate Inquiry** into previous ownership and uses of facility in accordance w/ generally accepted good commercial and customary standards and practices.
- (b) Bii & iii – Factors that constitute **Reasonable Inquires** –
 - (i) Specialized knowledge of D
 - (ii) Relationship of purchase price v. value of property
 - (iii) Commonly known info
 - (iv) Obviousness of Contamination
 - (v) Ability to be able to detect by appropriate inspection
- (c) Biv - **Before 5/97** - less stringent
- (d) Bv - **RESIDENTIAL PROPERTY** less stringent requirement

(2) PART II (107 b3)

- (a) D exercised **Due Care**
- (b) AND took **Precautions against Foreseeable Acts** of 3d parties – guarded land against further contamination

(3) **Bona Fide Purchaser EXEMPTION** - D purchases land w/ knowledge that it is contaminated can escape liability if:

- (a) Person made all appropriate inquiry into previous ownership and uses - you did a good job of scoping out what was involved
- (b) Person exercises appropriate care to stop and prevent releases, limit human exposure to haz substances. (Don't have to clean up just make sure doesn't get worse)
- (c) Cooperate w/ gov't for cleanup (not liable to pay, just have to give them access, comply w/ physical steps, etc)
 - (i) 107r (4) (2) windfall lien - When you sell property gov't can recover difference in purchase price and sale price that is a result of their cleanup.

iii) **CASES:**

Case:	NY v. Shore Realty
Facts:	Guy buys contaminated property and claims shouldn't be liable bc he didn't dump.
Rule:	<ul style="list-style-type: none"> ⊛ Strict liability on owner w/o regard for causation. ⊛ Defenses: Innocent Landowner - Release caused by 3d party w/ whom D had NO Ktual relationship + 1) D exercised due care + 2) D took precautions against further contamination ⇒ D NOT Innocent Landowner because he failed to take precautions against future dumping
Noted:	⊛ Unocal CASE: "disposal" ≠ passive migration

3) Operator Liability:

i) **"ACTUAL CONTROL" TEST:** (*US v. Gurley*)

- (1) Individual had the authority to determine method of disposal
- (2) Actually exercised that authority by personally performing tasks, OR directing others to

ii) **DEFN:**

- (1) **Operator** under Superfund = anyone who operates a facility.
 - (a) SC looks to dictionary, operator = to run or operate. To manage, direct or control the operations of a facilities environmental operations. Control and determine compliance, where wastes are disposed of = liability as operator

- iii) **CASE: Best Foods** – Does CERCLA liability extend to parent co. of subsidiary.
 - (1) Have to pierce the corporate veil:
 - (a) Direct Parental Operation: Exercise of direction over facilities activities. Joint Venture?
 - (b) Control: Parent’s supervision over the subsidiary. Serving on Board ≠ operation.

4) Generator Liability - “arranging for disposal of haz sub at facility”

- i) **ELEMENTS:**
 - (1) Shipped Haz Mat to facility
 - (2) Haz Mat like those shipped where found at the site
- ii) **TESTS: (???)**
 - (1) **Narrowest holding: Independent Contractor** - can be liable for independent Ktr status, if you pay someone to do something but still have control over what they are doing, you can still be liable vicariously for what they are doing. Liability based on fiduciary, agent relationship. Virtually all cts will find for liability in a similar context. Independent Ktr benefited from cause of contamination and should be held liable.
 - (2) **Broad Argument: Objectively Reasonable (Foreseeable)**. CASE: **Aceto** - K calls for handling or disposal of waste or it is inherent to K, likely or foreseeable in an Obj way that some disposal will occur, whether or not you intend for it to occur.
 - (a) “Sham Sale” - GE sells used transformer oil to provide drag strip to keep down dust, oil had dangerous PCBs.
 - (b) Useful Product - (Arco case - note 8, p.303) sells rubber products to co. to be used in useful way, not liable bc selling finished product that might have a haz constituent... no objly foreseeable reason that disposal may occur.
 - (3) **Ability to Control**
 - (a) Paradigm “arranged for” liability - D is done w/ waste, gives it to someone else to dispose of.
 - (b) ACETO extends to cases in which done w/ product and should objly foresee disposal will occur.
 - (c) Does not extend to cases in which you are selling finished product not for the purpose of disposal
 - (d) Note 9, 303 - if you go to break replacement place, are you potentially liable under superfund as a generator liability. Do you have any ability to control? NO, extremely unlikely that ct will find liability.

- iii) **NOTES:**
 - (2) De Micromis Generators: enacted STATUTORY EXEMPTION for small generators

iv) **CASES:**

Case:	Aceto
Facts:	Aceto Kd w/ Aidex to mix pesticides, Aidex spills and contaminates sites. Is Aceto liable
Rule:	Contamination was likely for foreseeable to occur therefore Aceto liable as generator. Congress intended broad remedial liability. Can be liable even if didn’t know waste would be disposed of at facility

2) Joint and Several Liability

- i) **ELEMENTS:**
 - (1) **Burden on Proof on PRP** (Potentially Responsible Party)
 - (2) Where there are 2+ actors acting independently responsible for single harm - liability = joint and several
 - (3) EXCEPTIONS:
 - (a) **Harms are divisible**
 - (b) **Reasonable basis for apportionment** (Summers v. Tice)
 - (i) Volumetric:
 - 1. (Note 3, 317 **Bell** case), 3 separate owners of dry cleaner, discharged chemicals over 3 separate times into same groundwater - Bell case unusual bc one chemical, one source, and volumetric contributions were clear. Volumetric contributions, reasonable basis to divide up costs
 - (ii) Total Leakage (Eg. Containers intact – didn’t leak, would have to fingerprint each individual drum)
 - (iii) Reactivity
 - (iv) Can’t argue what costs were spent cleaning up.
 - 1. Don’t know if chemicals react when mixed in chemical soup
 - 2. Some chemicals might be more toxic in lower concentrations

- (v) Distinct clean-up: solid waste v. chemical waste
- (vi) Geographic Separation (CASE: **Beezer Materials** note 12, 317)
- (vii) Below background levels (CASE: **Alcan** case, note 11 p.316, 317). Possible to apportion down to zero liability that when below background level and if mixed w/ other chemicals didn't create other haz subs
- (viii) De minimus argument, de micromus very small generators are exempt as a matter of law

ii) **NOTES:**

- (1) Burden of Proof: showing there should be exception to JSL is on burden of tortfeasor.
- (2) De Minimus: low background levels ≠ de minimus. De minimus = small volume of chemicals, no concentration w/ other chemicals to produce higher amounts Statutorily exempt.
 - (a) P bears burden on showing minimum significance of their responsibility

iii) **CASES:**

Case:	O'Neill v. Picillo
Facts:	Guys uses his pig farm for haz mat disposal. 25 D's to apportion \$5.8million in clean up costs. 3 D's JSL:
Rule:	<ul style="list-style-type: none"> 1) Apportionment requires showing that the harm is divisible - harm ≠ cost of clean up, BUT environmental contamination that prompts response costs 2) Courts can allocate response costs bt liable parties in consideration of equitable factors (See Gore Factors)

Case:	Vertac I - US v. Hercules
Facts:	Hercules purchased property from defunct pesticide manufacturer H produced argent orange for gov't. Vertac current owner. Site very contaminated. H contests ruling of JSL
Rule:	<ul style="list-style-type: none"> ● Distinct Harms = geographic, temporal, volumetric separability ● Evidence must be concrete and specific

3) Contribution and Allocation

i) **ELEMENTS**

- (1) Once you have parties that are JSL they can sue each other for contribution under §113f
- (2) Ct has discretion on how to allocate liability based on equitable factors. Eg. volume, toxicity, degree of care
 - (a) **Gore Factors** (p.76, 83-4)
 - (i) Harm → Volume; Toxicity
 - (ii) Fault → Degree of Involvement, Care, Cooperation w/ govt
 - (iii) Distinguishable harms
 - (iv) Financial Resources
 - (v) Econ benefits received
 - (vi) Knowledge and or acquiescence
 - (vii) K

ii) **NOTES:**

- (1) **Very discretionary determination**, ct can use any factors, or all factors, depends on whatever ct thinks is equitable solution
- (2) **Gore Factors** don't work as well when comparing fault of owner's vs. arranger. Will find less liability unless there is sloppy practices
 - (a) Other factors: detrimental reliance. Who benefited from disposal
- (3) **Orphan Shares**: PRP's who have gone out of business or who cannot be located leave behind orphan shares of liability. All remaining PRPs held liable for 100% of response costs including orphan shares.

iii) **CASES:**

Case:	Vertac II
Facts:	Same as above except action for contribution NOT questioning of JSL. Court finds H liable for 97.4% of cost and Uniroyal 3d party liable for 2.6%.
Rule:	<ul style="list-style-type: none"> ● H has greatest responsibility <ul style="list-style-type: none"> ⇒ Owned and operated longest ⇒ Chemical soup - harm cannot be apportioned, cross contamination and commingling. ⇒ Cooperated w/ EPA ⇒ H exercised commendable safety and env programs. ● Uniroyal lesser responsibility

- ⇒ K'd w/ Vertac for production of chemical - indirect and limited in time.
- ⇒ Volumetrics most significant factor - produced much less volume
- ⇒ U benefitted from contamination, and was aware that contamination might occur.
- ⇒ U did not cooperate w/ EPA

4) Settlement and Cleanup

i) ELEMENTS

- (1) **Scenario 1 = EPA SUES PRPs IN COURT** - EPA or state sues one or more parties in ct, can sue after spent \$ or sue to compel co. to cleanup site. In 99% of cases EPA wins, strict liability, retroactive, JSL.
- (2) **Scenario 2 (more typical) = PRPs SETTLEMENT w/ EPA** - bc they are going to lose if they litigate, and other advantages to settlement
 - (a) Seek contribution protection - 113(f2)
 - (b) But settling party can still sue other parties for contribution for settling amount
 - (c) EPA "thumb screws" approach - EPA settles, the sooner you settle the better deal you get (O'Neil case)
 - (d) "Reopener" provisions -122(f6A) EPA reserves the right to go after you again for unforeseen costs and contamination
 - (e) De minimus - 122g - settle w/ small contributing parties first, shouldn't put these parties thru costly time consuming litigation. Generally don't have reopeners
- (3) **Scenario 3 (more and more common) = SUIT BY PRIVATE PARTIES v PRPs** - private cost recovery actions.
 - (a) Gov't has gone after the most contaminated sites
 - (b) Fed gov't running out of \$ to do their own cleanup
 - (c) Any party, even liable party, can sue to recover cleanup costs - 107(a4B) "any other person"
 - (d) 113f - rite of contribution; most cts hold have to sue under 113f, **only INNOCENT parties not responsible can file under 107**
 - (i) Key difference actions under 113 is governed by equitable liability NOT JSL, like under 107. Burden on P, harder to recover \$ have to show portion D responsible
 - (e) Private have to show "consistent w/" NCP.
 - (i) Gov't actions - D has to show NOT "inconsistent w/" NCP.
 - (f) If they outsource, they say they can clean it up more cheaply than the gov't.
 - (g) Not allowed to recover attys fees

ii) NOTES:

- (1) **NPL** - list of most contaminated sites in the country, highest priority
- (2) **Response Actions:**
 - (a) Removal - short term actions to deal w/ threat to env and PH
 - (b) Remedial - longer term actions to provide permanent solution
 - (i) Distinction is more theoretical than practical, hard to say which is which
- (3) **Natl Contingency Plan** - procedures that govern cleanup, analyze risk, public involvement.
 - (a) Does not establish site specific remedies
- (4) **Statutory Preferences:**
 - (a) Protectiveness - of human health and env
 - (b) Permanence - preference for treatment or other permanent remedies as opposed to containment, offsite transport
 - (c) ARARs - other standards that are "legally applicable" (eg. contamination of drinking water, there are laws that say what is safe amount of chemical in drinking water) make what's clean up complicated.
 - (d) Cost Effective
- (5) **Clean-up Discretion:** Still a lot of discretion for each individual site, no exact risk levels that should be present, no strict guidelines
- (6) **Future Use:** EPA generally doesn't consider "future use" but states do take that into account, including CA. factory vs. residential use.
- (7) **Voluntary cleanup statutes** - provide incentives for owners to voluntarily cleanup sites so they aren't liable for extended CERCLA, or state superfund liability. Big thrust is to encourage property owners that they would otherwise be afraid of cleaning up bc they would be liable for full CERCLA JSL.
 - (a) State superfund statutes = ARARs → state cleanup requirements, those have to be complied with in the course of a federal clean-up. Generally state superfunds law less stringent

5) Brownfields

- a) **DEFN:**
- i) **Brownfields** = abandoned, under utilized, contaminated sites in urban areas. 150-400K.
 - (1) Not on NPL
 - (2) Haven't been cleaned up in part bc of concern over superfund liability
- b) **NOTES:**
- i) What's an **appropriate level of cleanup**?
 - (1) Comply w/ US EPA standards, no relaxed clean-up depending on future use
 - (2) Or state standards – allow less strict cleanup for industrial purpose
 - (3) Containment/Cap → may not be any money in the future to clean up entirely.
 - ii) **Who should decide?**
 - (1) Voters, community preferences
 - (2) Lower standard, who cares about the future consequences. → Contra Costa mandates local employment in hazardous waste production.
 - (3) What is the communities leverage → is the community better off, consignment to industrial use, less intensive industrial development.
 - iii) **Fed oversight** over state?
 - iv) What **incentives** are appropriate?
 - (1) Tax breaks, regulatory breaks
 - (2) Trade Air Emission - work w/ other polluters in the area, declining Cap on total Emissions, so as not to penalize the last developer. Gov't should set standards.
 - v) Bigger problem that these spaces undeveloped?
 - (1) Depressing in literal and econ. sense.
 - vi) Benefit to Community?
 - (1) Quota - local residents should be employed → how many jobs, how much taxes.
 - vii) What's a good policy?
 - (1) Holding to higher standard of cleanup - even if it means losing industrial development

6) Has it Worked

- (1) **Critics:**
- (a) Incentives?
 - (a) Some critics say that a lot of \$\$\$ spent on CERCLA sites that pose a low level of risk. → however don't deal w/ a lot of non-quantifiable problems w/ these sites
 - (b) Level of risk should vary by community and future use?
 - (c) Communities final say?
 - (d) States should have more of role than Fed gov't?
 - (e) Too stringent, litigation driven w/ high transaction costs
 - (f) Discourages development → don't want to take the risk of JSL on cleanup they had nothing to do w/
 - (g) Liability is broad - place undue amount of cleanup on relatively innocent party, NOT FAIR
 - (h) A lot of \$ goes to admin/transaction costs and NOT cleanup.
 - (i) Uncertainty about clean up levels - case by case determination
 - (j) Uniform standards for all - simple easy to administer, however, doesn't take into account water bodies, dangers, uses, etc.
 - (k) Possibility that Oil and chemical co.s were exempted because of the tax, now they have escaped liability and the tax. (Browner editorial)
- (2) **Good:**
- (a) Availability of \$ in Superfund, (Congress not reauthorized, Bush opposes, funded by tax on oil and chemical industries)
 - (b) Higher incentives to identify polluted land, and take actions to clean it up
 - (c) Deterrent affect
 - (d) Flexibility in clean up
 - (e) JSL - Speeds up the process, if you had to prove each persons individually liable, would eat up time and resources; Also deterrent for smaller producers could be liable for larger harm; powerful when used in conjunction w/ trust fund; making sure that everyone is a gatekeeper → if everybody is potentially liable, you have an incentive to see that contamination doesn't occur bc you are on the hook for entire liability

- (3) Reform:
- (a) Take away petroleum exception
 - (b) Reauth of trust fund, used in negotiations as incentive for co.s to clean up → like in Brownfield cleanup
 - (c) More cost efficient clean up, faster cleanup
 - (d) Minor reforms by Congress in 2000 - exempts bona fide prospective purchasers, deals w/ disincentive to develop contaminated property.; also exempted de micromis parties.
 - (e) JSL still hotly debated
 - (f) Future land use hotly debated
 - (g) Use Cost benefit analysis???
 - (h) Focus on properties that pose the greatest risk???
 - (i) Renew superfund tax???

CWA

1) RELEVANT SECTIONS:

- a) §101 – Goals
- b) §301 – Effluent Limits
- c) §303 – WQS and TMDLs
- d) §307 – Toxic Effluent Standards → BAT, BPT, etc
- e) §319 – NPS
- f) 402 – NPDES Permits
- g) §404 – Wetlands

2) ANALYSIS:

i) Effluent Limits

- ii) Point Source – PS polluters need permit to discharge or unlawful
- (1) NPDES Permits- Effluent Limitations
 - (a) Set by Weighing Factors: Category of Industry, Nature of Industry, Nature of Manufacturing Process, Existing Categories, Age of Facility, Impact of Control Measures, Similar controls applied from other industries, Costs of Achieving. (Can put 50% of industry out of business ≠ arbitrary and capricious)
 - (i) Most stringent requirements for “new sources” – best of the best
 - (ii) BAT → Most stringent
 - 1. Applies to: factories, sewage treatment, storm water discharges
 - 2. Analysis: No balancing, just consideration of costs. Standards do not have to be economically achievable
 - (iii) BCT → mid-level restriction.
 - 1. Analysis: Must be reasonable relationship between costs of attaining and benefits derived
 - (iv) BPT → interim technologies – baseline minimum standard
 - 1. Analysis: cost / benefit balancing taking into consideration weighing factors (above).
 - 2. If Co. can't meet BPT they must go out of business
 - (v) Transferring Technology from other Industry, EPA must show: 1) available 2) transferable 3) reasonable prediction will work
 - (2) DMR – monitors compliance and reported to gov't agencies and public
 - (3) Cooperative Federalism: If states don't issue permits Fed can take over

iii) WQS – if effluent limitations on PS regulated industries not enuf, can be subject to further regulation to meet WQS

- (1) Minimum Goal: All waters be fishable / swimmable
- (2) Types Covered: Both PS and NPS. Even Covers water bodies polluted solely by NPS Pollution (**Pronsolino**)
- (3) Procedure:
 - (a) Waters → states identify waters w/in their boundaries for which effluent standards insufficient to meet WQS
 - (b) TDMLs (§303 d)→ states establish carrying capacity waters can handle of certain pollutants to be suitable for uses
 - (c) Uses (§304) → goals to have water suitable for fishable, swimmable, etc.
- (4) Federal Role:
 - (a) Help w/ Best Practices. Recommend [] levels, but states don't have to follow can be lower
 - (b) Can provide Funding

iv) Non-PS – regulated by states, very ineffective

- (1) Types of NPS: urban runoff, ag runoff, smaller CAFOs
- (2) EPA role: can give subsidies, best practices management programs, can make report to Congress, can review state assessment plans, but CAN'T force states to implement.

v) POTWs – successful bc large gov't expenditure

- (1) Types: Local sewage treatment facilities regulated separately from industrial PS pollutants
- (2) Management: Less Stringent. Primary = gravity, Secondary = Biological.
- (3) Weakness: allows industrials to circumvent effluent limitations,

vi) **Exempted** – Ag runoff, Return flows from Irrigated Ag, Runoff from Mining Ops and Oil and Gas Exploration

3) **DEFN:**

- i) **Point Source** = confined and discrete conveyance, identifiable, controllable (ditch, channel, pipe, tunnel, conduit, container, CAFO)
- ii) **Non-Point Source** = anything ≠ PS.
- iii) **Pollutant** = virtually any waste material
- iv) **Waters** = waters of US, surface water, NOT ground water

4) **NOTES:**

- i) **Goals:**
 - (1) Restore and maintain the physical and biological integrity of the nations water sources
 - (2) Protect fish, wildlife, recreation
 - (3) Eliminate pollutant discharges
 - (4) NO toxic discharges

5) **CASES:**

Point Source	
Case:	Villegas Case – US v. Plaza Health
Facts:	Guy dumps blood vials in storm drain wash up on beach
Rule:	Point source ≠ person. Case tests outer limit on defn of PS
Analysis:	1) <u>Plain Meaning</u> : “addition by any person” if PS meant person, person would be redundant 2) <u>Canon of Construction</u> : Rule of Leniety – criminal case must draw all inferences in favor of D
Dissent:	1) Creates huge loophole where industrial polluter can use employees to throw into ocean 2) Villegas disposal was “discernible, confined and discrete conveyance”

TMDLs	
Case:	Pronsolino
Facts:	Runoff coming from timber harvesting – interpretation of “aren’t stringent enuf” applies to NPS only polluted waters.
Rule:	Have to set TMDLs for water bodies polluted solely by NPS pollutants.
Analysis:	1) <u>Chevron Deference</u> : if statute not clear give deference to any reasonable inferences drawn by EPA 2) <u>Plain Meaning</u> : broad goals of CWA. WQS provisions forward looking, don’t care why not meeting WQS just want to meet them in the future 3) <u>Structure</u> : Even though WQS only reference sections about PS pollution, ct finds Congress intended broad systemic solution

6) **WETLANDS** (§404) – separate regulations

- a) **Regulation:** Prevents discharge of dredge material to fill wetlands of navigable waters to convert to dry land
 - i) Wetlands = saturated soil conditions, periodically inundated by water, wetlands vegetations
 - ii) Navigable Waters = adjacent too, physically bordering, even if not directly contiguous (**Riverside Bayview**)
 - iii) Not Covered:
 - (1) Draining wetlands (**Tulloch**);
 - (2) Isolated wetlands – not adjacent to navigable waters (**SWANC**)
- b) **Permitting:**
 - i) Alternatives Test → if practicable alternatives would reduce or eliminate impact to wetland permit denied
 - (1) Considerations of cost, existing technologies, logistics of overall project
 - (2) If developer could have purchased different property at time of *entry into market* (**Bersani**)
 - (3) Profit NOT ONLY consideration, cause would always be cheaper to fill wetland
 - ii) Water Dependence → Presumption NOT, builder has to prove otherwise (eg. Pier, slip)
 - (1) Corps take their own independent judgment as to whether water dependent, not framed by applicant
 - iii) No discharge if would cause violation of:
 - (1) WQS
 - (2) Toxic Effluent Standards
 - (3) ESA
 - (4) Applicable State Law.
 - (5) Cause significant degradation to waters of US
 - iv) Mitigation - Minimizing Elimination any adverse impact on Ecology
 - (1) Corps Policy = NO net Loss of Wetlands
 - (2) Sequence of Mitigation: 1) avoiding 2) minimizing 3) compensation

- (a) Mitigation Banks factors: 1:1.8 acres; close geographical proximity, functions, must be equivalent acreage and functional value; Econ Justice Factor; Wildlife.
 - (i) Recreating Nature not exact Art
 - (ii) Not enough follow-up to ensure that developers actually create wetlands, and they are really functionally equivalent

c) **CASES:**

Case:	Riverside Bayview
Facts:	Construction of housing complex by filling in wetlands. What does navigable waters mean?
Rule:	Wetlands adjacent to navigable waters are regulatable. "Physically bordering navigable waters, even if not directly continuous"
Analysis:	1) <u>Chevron Deference</u> : EPA's interpretation reasonable if look to broad goals of CWA to protect WQ and hydrological cycles (biological, physiological, and chemical integrity) 2) <u>Legislative Intent</u> : Congressional silence. Army Corps gave broad defn to wetlands and Congress thought about overturning but didn't = ratification

Case:	SWANC
Facts:	Gravel pit filled w/ water where migratory birds hang out
Rule:	Army Corps defn of wetlands to include regulation to wetlands not adjacent to navigable waters but visited by migratory birds is beyond scope of statute.
Analysis:	1) <u>Canons</u> : have to give some meaning to word "navigable" 2) <u>Intent</u> : Congressional silence ≠ approval. Didn't acquiesce to ALL waters being encompassed by CWA just waters that were hydrologically linked to navigable waters 3) <u>Chevron Deference</u> : no ambiguity in statute >> have to give clear construction to statute, agency not entitled to deference when no ambiguity 4) <u>Constitutional Issue</u> : DICTA – ct finds no constitutional support for regulating migratory bird habitat under Commerce Clause. Says that you have to look to underlying purpose of the statute. Statute designed to protect migratory bird habitat not to regulate commercial activity. Limit Congress powers to strict adherence to "substantially affects" interstate commerce.

NEPA

1) CATEGORY OF PROJECT

a) **What triggers:**

- i) Major Federal Action → funds approved, federal rule, policy statement, construction or development Proposals for legislation
 - (1) Small portion SPLIT. If very small portion of project has federal handle SPLIT over whether you need to do an EIS for that small portion, whether whole project becomes subject to NEPA.
- ii) Significantly affecting the Environment (See **Hanley**)

b) **Categorical Exemption:** Minor Projects or Emergency Projects – NO EIS needed

c) **Possible Environmental Impact?**

- i) Environmental Assessment (EA): Tertiary review to see if there would be ANY significant impact.
 - (1) **Hanley 2 Part Test:**
 - (a) Context: Extent to which action will cause adverse env effects > (in excess) of those already existing in the area
 - (b) Intensity: Absolute Quantitative impacts
 - (i) Beneficial and Adverse
 - (ii) Affects on public Health and Safety
 - (iii) Unique Characteristics of the Geographic Area
 - (iv) Highly Controversial (bt experts, not mere neighborhood opposition)
 - (v) Will establish precedent
 - (vi) Cumulative impacts
 - (vii) National Register of Historic Places
 - (viii) Endangered Species
 - (ix) Violation of Fed, State, Local law.
 - 1. Certification by one agency that will comply NOT sufficient to comply w/ NEPA (**Calvert Cliffs**)
 - 2. Converse if project can be shown to violate a fed law – generally considered to be a trigger for doing an EIS
 - (2) FONSI: If NO significant impact don't have to do EIS
 - (a) Mitigated FONSI appropriate when:
 - (i) Adequate mitigation factors completely compensate for environmental impacts
 - (ii) AND mitigation factors are part of proposal of EA analysis, modified prior to implementation
 - (b) No monitoring requirement to see that mitigation measures actually used or effective
 - (3) OR EIS - If ANY potential for adverse impact must do EIS

d) **Categorical Inclusion:**

- i) Environmental Impact Statement (EIS):

2) EIS PROCEDURE:

a) **Draft EIS**

- i) Must be concise, clear and to the point
- ii) Analytic rather than encyclopedic
- iii) Written in plain language

b) **Comment Period**

- i) Must read and respond to comments from public in meaningful way

c) **Final EIS**

- d) **Agency Decision:** merely procedural, agency have to fully consider env impacts but NO substantive requirement that they take the most environmentally sensitive route.

3) EIS TIMING: – When to do EIS?

- a) Has to be proposal (**Kleppe**). Proposal = time agency has goal and reviewing alternatives (**CEQ**)

- b) Go no-go stage – close enuf to be practically useful, but not so close to be merely rationalization for decision already made. (**Metcalf**)

- c) Point of Commitment: Agency must retain discretion to stop project from going forward

- i) Can tier and do different levels of env review at each point in project, BUT have to retain authority to stop project based on outcomes of more thorough Env review. (**Sierra Club v. Peterson**)

4) SCOPE

a) **Actions:**

- i) Connected Actions: (**Thomas v. Peterson**)

- (1) If one triggers the other
- (2) If one can't proceed w/o the other
- (3) Independent parts of a whole

- ii) Cumulative Actions (**Kleppe**)

- iii) Similar – intimately related in timing or geography

b) **Impacts** = Direct, Indirect or Cumulative

- i) Something is reasonably foreseeable future project = you have to analyze combined impacts, does NOT have to be formally proposed but merely contemplated. (**Laurel Heights**)

- ii) Cumulative impacts = Agency must assess combination of impacts with other *reasonably foreseeable* past, present or future project, even those done by other agencies. (**Fritofson**)

c) **Alternatives:**

- i) No Action

- ii) Other Reasonable

- (1) Depends on definition of "Purpose of Project": (**VT Yankee**)

- (a) Doesn't have to be every conceivable alternative – "merely feasible"

- (b) If something agency not expected to know – doesn't have to consider (eg. Energy Conservation in the 70s)

- (c) Obligation of public to make known alternatives

- (d) Would "reasonable minds inquire further"

- iii) Mitigation– EIS must discuss mitigation measures, need not actually take them

- (1) Adequate Mitigation: (**Robinson v. Methow Valley**)

- (a) Enough detail to show that it was adequately considered = "reasonably complete discussion of mitigation measures" To show the public that important env values have been considered. 1) Make sure agency decision makers fully informed 2) Ensure public that those values were considered

- (b) NEPA does not impose substantive requirement that mitigation measures actually be implemented

- (c) Don't have to do a Worse Case Analysis – Only have to use "generally accepted scientific methods" = scientifically respectable treatment of unknowns

- (d) Don't need to test whether mitigation measures will be effective, just need complete discussion

- iv) Rule of Reason

- (1) Full range of possibilities, increments

- (2) Reasonable = practical and feasible from a technological and econ standpoint

- (3) One alternatives must be NO action. (gives baseline)

- (4) If alternatives are too remote and speculative agency can reject, BUT they must explain why not practicable

- v) Who Defines SPLIT:

- (1) **Simmons:** Agency has to exercise INDEPENDENT JUDGMENT as to the general goals of project (7th cir)

- (2) **Busey:** Where applicant has proposed something, the agency cannot rewrite the proposal, the agency has to give deference to the applicant's proposal. Agency has to consider only what applicant has proposed as their goals.

- (a) PROBLEM: Applicant can propose such a narrow project to write out possibility of any other alternatives besides No action.

d) **Environmental Justice**

- i) Translation: Of entire document for ESL communities

- ii) Executive Order - EIS must consider: (**Nuclear Regulatory**)

- (1) Disproportionately high effects on env or health
- (2) Affects on low income communities
- (3) Multiple and cumulative exposures.
- (4) Opportunities for community input.
- (5) Wherever NEPA to accomplish goal to minimize disproportionate impacts on low income and communities of color. To inform their discretion NOT to require more work than under NEPA

5) **NOTES:**

a) **Duties under NEPA**

- i) Agencies must give AFFIRMATIVE obligation to consider environmental impacts
- ii) Procedural requirements must be complied w/ to the “fullest extent possible”
- iii) NEPA ≠ “paper tiger” agency must consider EIS thru out review process (**Calvert Cliffs**)

b) **Goals: VERY BROAD**

- i) Intergenerational duty to preserve
- ii) Environmental Justice
- iii) Biological Diversity

c) **Pros**

- i) Have to take into consideration env impacts that you might not have done before
- ii) Infuses env values into agencies
- iii) Makes Env. Impact statements public, public disclosure
- iv) Preventative rather than mediatory - Makes agencies look for env impacts before take action,

d) **Cons**

- i) Review not done by 3d party, problems of agency bias
- ii) Lack of substantive requirements – NO teeth
- iii) Rubber stamping procedural activity
- iv) Inefficient, time consuming, delay
- v) Tool misused by env orgs to delay development and drive cost of development up.

6) **CASES:**

NEPA Procedural Requirements ONLY	
Case:	Stryker’s Bay
Facts:	HUD putting in low-income housing. 9 alternates, none acceptable
Rule:	<ul style="list-style-type: none"> ✳ NEPA is designed to ensure “a fully informed and well considered decision” BUT it doesn’t mandate that agency take most env sensitive route. “NEPA prohibits uniformed rather than unwise decisions.” ✳ Env destructive project can go forward as long as there is full disclosure ✳ Have to comply w/ procedural requirements, don’t have to implement the env protective solution

Scope of EIS	
Case:	Kleppe
Facts:	Regional EIS for multiple coal mining projects
Rule:	<ul style="list-style-type: none"> • No Regional EIS needed bc only Contemplated regional development not enough, only speculation. • Fed agencies have a lot of discretion in determining scope of EIS. Similar activity, not formally connected >> don’t need to do regional EIS, decision entitled to great deference •
CEQ defn:	<ul style="list-style-type: none"> • Proposals = exist at stage of development of action when agency has a GOAL and preparing to make a decision on alternative means to accomplish that goal.

Timing of EIS	
Case:	Sierra Club v. Peterson
Facts:	Issuing oil drilling permits but don’t retain rt to stop project if EIS says would have significant env impacts
Rule:	<u>Point of Commitment</u> : Agency must do impact statement prior to point of decision, before they’ve made a irreversible commitment (feasibility go-no-go stage)

Timing of EIS	
Case:	Metcalfe v. Daley
Facts:	Whale hunt by Makaha Indians
Rule:	Have to issue EA at go-no-go point. Can’t use EA to rationalize decision they’ve already made.
Analysis:	Agency already entered into K w/ tribe, predisposed to find FONSI. Have to do EA at point before you’ve made an irreversible commitment, OR have to Ktually allow themselves a way out if EA says significant impact

Connected Actions	
Case:	Thomas v. Peterson
Facts:	Road and Timber sales need to EIS together
Rule:	Have to do single EIS for <u>Connected Actions</u> – 1) If one triggers the other 2) If one can't proceed w/o the other 3) Interdependent Parts of a whole.
Analysis:	<ul style="list-style-type: none"> • Can't do separate studies because that would be stacking the deck, agency isn't going to waste resources already spent on a road that would be useless w/o the timber sales. Agency can't segment larger project into little projects each which wouldn't have a significant impact but project as a whole would. • Cumulative actions must be proposed. Different from Similar Actions which are reasonably foreseeable to have environmental consequences together bc of common timing or geography.

FONSI – What are Adverse Impacts	
Case:	Hanley
Rule:	Threshold Q: Whether action is likely to impact environment? If yes or in gray area do EIS.
Analysis:	<ul style="list-style-type: none"> • Highly Controversial ≠ neighborhood opposition = expert disagreement • Does cause violation of federal law = trigger for doing EIS – (will put water body out of compliance w/ CWA?) • The certification by one agency responsible for certain type of env regulation ≠ compliance w/ NEPA. Agency doing NEPA review has independent obligation to look at project as a whole.

Foreseeable Future Project	
Case:	Laurel Heights
Facts:	UCSF moving pharmacy to Laurel Heights
Rule:	If something is foreseeable as a future project, you have to analyze those reasonable foreseeable impacts. They don't have to be formally proposed

Foreseeable Future Projects	
Case:	Fritofson
Facts:	
Rule:	At both the state in determining whether the action will be significant. Supposed to look <u>past present and reasonably foreseeable</u> projects to see if projects impacts will be cumulative. Analysis to do for single project is more broad than the analysis under Kleppe (multiple projects in single EIS – projects have to be proposed and suitable scope)

Alternatives	
Case:	VT Yankee
Facts:	
Rule:	<ul style="list-style-type: none"> • Don't have to consider every conceivable alternative – just “merely feasible” • Don't have to consider alternatives agency isn't supposed to know about (eg. Energy conservation in 70's) • Challengers must make sufficient showing that “reasonable minds would inquire further” about alternatives not generally well known • Broader the project – the broader the scope of alternatives that need to be analyzed.

Alternatives	
Case:	Simmons (7th Cir)
Facts:	Water supply project
Rule:	Agency has to exercise INDEPENDENT JUDGMENT as to the general goals of the project
Rationale:	<ul style="list-style-type: none"> • Applicant can propose such a narrow project and write out possibilities of any alternatives besides Go and No Action • Person creating goals is biased, agency should be required to take a neutral stance, rethink some of the assumptions

Alternatives	
Case:	Busey (DC cir)
Facts:	Toledo Airport
Rule:	Where applicant has proposed something, the agency cannot rewrite the proposal, the agency has to give deference to the applicant's proposal. Agency has to consider only what applicant has proposed as their goals
Rationale:	<ul style="list-style-type: none"> • Agency has not place tinkering w/ project goals • Agencies determination of what the principal goal of the project, may not be the predominant goals of the applicant. • In this case predominant goal was econ development of Toledo, not just building an airport anywhere

Executive Order – Environmental Justice	
Case:	Nuclear Regulatory
Facts:	Uranium enrichment plant in poor community in LA, reroute road 8 miles where most people walk
Rule:	Agency can't take generalized analysis of project, must consider and consult w/ the local populations that will be particularly affected and consider any disproportionate env or health effects. Have to consider other cumulative impacts on low-income communities

Mitigation – Rule of Reason	
Case:	Robinson v. Methow Valley
Facts:	Mule deer case – agency proposes zoning and tax incentives as mitigation
Rule:	<ul style="list-style-type: none"> • NEPA requires - enough detail to show that it was adequately considered a “reasonably complete discussion of mitigation measures”. . 1) Make sure agency decision makers fully informed 2) Ensure public that those values were considered • NEPA does not require mitigation measures actually be implemented or that they would be effective • Do NOT have to do worse case scenario – just scientifically respectable treatment of unknowns

ENDANGERED SPECIES ACT

i) ANALYSIS

a) **Listing of Species** = animals get NO protection unless listed

- i) **Factors:** Listing species ENDANGERED DUE TO:
 - (1) Habitat destruction
 - (2) Overutilization
 - (3) Disease, predation
 - (4) Inadequacy of existing
 - (5) Natural or man-made factors effecting continued existence
- ii) **Endangered** = in danger of extinction throughout all or significant portion of range
- iii) **Threatened** = likely to become endangered w/in foreseeable future
 - (1) Any species eligible, allows for listing of geographically isolated populations of vertebrates.
 - (2) Has to be based on best scientific commercially available info – doesn't have to be conclusive (**Defenders of Wildlife v. Babbitt**)
 - (3) All or nothing statutes – if listed, whole panoply of protection applies. If not, none of the protections apply. Too much and too little.

b) **Designation of Critical Habitat** (concurrently)

- i) Critical Habitat = Areas w/in a geographical area on which are found physical and biological features **essential to** conservation of species
- ii) Purpose of designation: Once habitat is defined as critical, imposes substantive duty on agencies NOT to approve any actions that will jeopardize species or destroy habitat
- iii) Ordinarily when you list species have to designation critical habitat to extent prudent and determinable:
 - (1) EXCEPTIONS: (**NRDC v. DoI**)
 - (a) Would increase risk to the species
 - (b) OR Designation wouldn't benefit species.
 - (i) Congress intended these exception to be invoked only in RARE circumstances

c) **Substantive Duties** (§7)

- i) **No Jeopardy** - No fed actions can jeopardize listed species
 - (1) Jeopardy loosely defined to allow for killing of individual critters so long as you don't impact their long term survival
- ii) **Duty to avoid adverse modification of critical habitat:** Some critical habitat can be destroyed so long as it doesn't diminish habitat's value for survival and recovery of species
 - (1) Critical Habitat = necessary for species survival. Provides unique food, shelter, or breeding needs.
 - (2) Potential geographical habitat ≠ critical habitat
- iii) **Programs to Conserve** - Agencies must develop and implement recovery plan for conservation, survival of species (in theory, agency has only done this in a small # of situations)
- iv) God Squad Exemption –

d) **Procedural Duties imposed on Applicant Agency** (§7)

- i) **Initial Inquiry** – Are species present?
 - (1) Have to ask FWS whether species are present or LIKELY to be present (in yes, continue)
 - (2) Agency CANNOT rely on their own experts have to ask FWS (**Peterson**)
- ii) **Biological Assessment** – Are species likely to be affected? (if yes, continue)
 - (1) More like EA – simple statement, done by proponent of project
 - (2) Must provide period of public comment

- (3) Done w/ FWS oversight
- (4) Failure to do BA is NOT harmless error = integral to enforcement of ESA. (**Peterson**)
- iii) Biological Opinion – Jeopardy / No Jeopardy Opinion
 - (1) Conducted by FWS
 - (2) If Jeopardy found agency must designate reasonable and prudent alternatives that won't jeopardize species
 - (a) ANALYSIS: using best sci evidence available regarding possibility of jeopardy to species
 - (i) Will destroy or seriously alter habitat
 - (ii) Jeopardize = reduce appreciably the likelihood of survival and recovery (eg. Destroying habitat used for critical purposes like feeding and breeding)
 - (b) If No alternatives → project must stop
 - (c) If feasible alternatives agency can STILL be made to adopt additional mitigation measures
- e) **God Squad Exemption:** Narrow exemption if: (**TVA v. Hill**)
 - i) No reasonable Alternatives
 - ii) Benefits of action outweigh benefits of any alternative action consistent w/ conservation of species or habitat
 - iii) Action in public interest and of regional or nat'l significance
 - iv) No irreversible or irretrievable commitment of resources
- f) **§9 - Prohibition on Takings**
 - i) Applies to:
 - (1) ANY Person, Not just federal gov't.
 - (2) ANY habitat, not just critical habitat
 - (3) ANY individual critter – (distinct from §7)
 - (4) NO specific intent required – can't knowingly violate, don't have to know its illegal, just know that you are killing or injuring.
 - ii) Taking = can't harm, hunt, harm, collect listed species
 - iii) Harm
 - (1) Act which actually kills or injures wildlife:
 - (a) Can be direct or indirect (**Palila**)
 - (b) Act must be proximate cause of harm, harm must be "foreseeable" (**Sweet Home**)
 - (2) Habitat modification which kills or injures wildlife:
 - (a) Harm CAN = habitat modification which impairs significant behavioral patterns such as breeding, feeding or sheltering
 - (b) Harm to habitat that COULD be used for species recovery to speculative (O'Connor on **Palila**)
 - (c) Omission ≠ harm
 - iv) When has HARM occurred? SPLIT:
 - (1) ACTUAL injury or death of protected animal required (**Sweet Home**)
 - (2) Circumstantial evidence that pop. Is declining is sufficient
 - (3) Harm to behavioral patterns have to be imminent not just merely speculative
- g) **Habitat Conservation Plans - §10**
 - i) Applies §7 concepts to state planning – allows incidental takes for lawful activity
 - ii) Ideal → projects could be developed if sufficient mitigation measures adopted to leave species better overall
 - iii) §10 designed to give incentives to developers to use plans because quite expensive and time consuming
 - iv) Process:
 - (1) Applicant submits application to FWS or NMFS
 - (2) Agency Agencies evaluate to determine whether HCP meets the criteria (§10a1d)
 - (a) Likely **Impact** from activities resulting in "taking"
 - (b) **Mitigation** measures that will offset impacts (monitoring, etc)
 - (c) **Alternatives**
 - (d) **Other Measures** agency determines is necessary and appropriate (catch-all) lets agency on case by case basis require additional things.
 - (3) 30 day public comment period
 - v) Overlap w/ §7
 - (1) §10 does not refer to plants
 - (2) Explicitly have to look at cumulative effects as under §7
 - (3) Have to use "best available" sci data
 - vi) Allows incidental takes - pursuant to lawful activities
 - (1) Can't authorize direct purposeful take (eg. Hunting)
 - (2) Take cannot appreciably reduce the survival and recovery of the species in the wild, same as §7 no jeopardy requirement (cannot take into account captive breeding)
 - vii) Mitigation: Applicant has to "to the max. extent practicable" minimize and mitigate impact to animal
 - (1) If developers say too expensive to mitigate agency can't take on face value. Has to be some reason why mitigation measures not practicable. Has to be economically or technologically prohibitive (**Gerber v. Norton**)
 - viii) Funding: Applicant has to ensure adequate funding for the plan (**NWF v. Babbitt**)
 - ix) No Surprises Doctrine: Once permit plan is approved FWS cannot come back and require additional mitigation measures or more \$, absolute freezing in time of HCP.
 - (1) Distinction between changed and unforeseeable circumstances.

- (a) Changed circumstances must be reasonably foreseeable and encompassed in plan
- (b) Unforeseeable circumstances are not the responsibility of the applicant - Even in the event of new science, natural disaster, etc. No changes are allowed unless applicant agrees.

h) **Citizen Enforcement**

- i) Citizens can bring against fed govt for failure to list and designate critical habitat.
- ii) Can bring actions against persons who violate the law

i) **3d Party Liability**

- i) **Proximate Cause:** 3d party must be proximate cause of taking. 3d party can be liable if it is reasonably foreseeable that taking would occur.
 - (1) Agency can be liable for licensing activity which results in taking. Must be activity that cannot occur w/o high probability taking will occur (**Strahan v. Coxe**)

2) **DEFN:**

- a) **Endangered** = in danger of extinction throughout all or significant portion of range
- b) **Threatened** = likely to become endangered w/in foreseeable future
- c) **Critical Habitat** = Areas w/in a geographical area on which are found physical and biological features **essential to** conservation of species
- d) **Jeopardy** = loosely defined to allow for killing of individual critters so long as you don't impact their long term survival
- e) **Taking** - can't harm, hunt, harm, collect listed species
- f) **Harm** = act which actually kills or injures wildlife. Can include sufficient habitat modification which kills or injures wildlife

3) **NOTES:**

- a) **Goals:** Cites anthropocentric rationales - benefits to humans
 - i) Scientific
 - ii) Recreational, etc.
- b) **Policy of Designating Critical Habitat** – Clinton admin no designation bc say they are protecting critical habitat w/o specifically defining it as such
 - i) Political opposition - suddenly designate whole counties, can bring to the fore the potential econ impact
 - ii) Risk of vandalism - creates these incentives to find and kill species.
 - iii) Administrative costs.
 - iv) Money used for habitat designation has come out of the listing budget.
 - v) Clinton admin says it doesn't really help the species that much. Does no jeopardy duty mean you can kill individual species → because jeopardy is defined so loosely

4) **CASES:**

Constitutional Issues	
Case:	Gibbs v. Babbins
Facts:	Is takings clause as applied to private landowners to prevent taking of red wolf uncon = NO
Rule:	TEST: "Substantially Affecting" interstate commerce - species doesn't have to move across state lines. (lots of species that don't migrate across state lines)
Analysis:	<p>Economic Activity:</p> <ul style="list-style-type: none"> • <u>Scientists</u>, some of interstate activity is scientists coming in and working w/ and observing the wolves. Come to study reintroduction. Has affect beyond the local effect. • <u>Hunting</u> - If wolves recover we can hunt and kill them and take their pelts can be sold interstate. • <u>Tourists</u> - howling events, people come to see wolves howl. <ul style="list-style-type: none"> ○ Ct said it doesn't matter that howling only occurs in fed lands and this is private land, bc wolves come from private land to howl on fed land • <u>Agricultural Impacts</u>: reg in place to target takings that are econ motivated to protect livestock >> still related to interstate commerce even though this is negative • <u>Aggregate - Part of Comprehensive Scheme to regulate Econ Activity</u>: Even if individual activity has relatively little econ impacts, together w/ all the other regulation of ES, part of comprehensive scheme to regulate taking of species, if you remove this you undermine scheme that regulates econ activity as a whole (upheld as valid reason where above not as prevalent GDH v. Norton)

Applies retroactively	
Case:	TVA v. Hill
Facts:	Snaildarter prevents completion of million \$ dam project, ct analyze meaning of §7a2
Rule:	Once found that ES would go extinct have to stop project have to grant injunction cannot make equitable remedy. Can't Balance interests.
Analysis:	<ul style="list-style-type: none"> • <u>Plain Meaning</u>: "carry out" applies retroactively. Otherwise would have been explicitly stated that it did not like in NEPA/

	<ul style="list-style-type: none"> • <u>Intent</u>: Wanted species to be protected at whatever the cost. Prior version including language to protect “as far as practicable” not included in passed version • <u>Canons</u>: If you don’t include you are impliedly excluding. Didn’t include in list of exemptions projects that have already started, or expensive projects • <u>Congress Appropriations</u>: Can’t allow appropriations to repeal law, bc not done by whole Congress but by Cmtee. In order to repeal law need evidence that Congress knew and intended to change existing law.
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Listing	
Case:	Defenders of Wildlife v. Babbitt
Facts:	FWS fails to list Canadian Lynx as Endangered, ct finds decision arbitrary and capricious
Rule:	Scientific study found 4 out of 5 factors of endangerment existed 1) Habitat destruction significant and pop. In decline 2) Overutilization – animal being poached and fur sold 3) Treaties to save not working 4) Particularly vulnerable because dependent on hare which being eaten by other animals. Ct says agency can’t ignore scientific evidence >> FWS decision not to list is not entitled to deference.

Designation of Critical Habitat	
Case:	NRDC v. Dept of the Interior
Facts:	Gnat catcher bird listed but Dol fails to designate critical habitat citing that it would 1) increase risk to species as people would destroy habitat if knew it existed and 2) Wouldn’t benefit the species bc majority of land is private.
Rule:	1) Dol could only point to 11 instance where habitat was destroyed as result of designation, not justification 2) Designation of federal land would be substantial and would benefit some animals though maybe not entire species

Procedural Requirements	
Case:	Thomas v. Peterson
Facts:	Fire road in Wolf habitat, proponent of project doesn’t conduct BA.
Rule:	<ul style="list-style-type: none"> • <u>Step 1</u>: Proponent of project has to ask FWS if protected species present • <u>Step 2</u>: Proponent must conduct BA to see if likelihood that species will be affected <ul style="list-style-type: none"> ◦ This is integral part of enforcement of ESA and failure ≠ harmless error • <u>Step 3</u>: BO – jeopardy / No jeopardy Opinion • <u>Step 4</u>: Alternatives to mitigate harm → If no alternatives = project must stop

Harm	
Case:	Babbitt v. Sweet Home
Facts:	
Rule:	<ul style="list-style-type: none"> • Harm includes habitat modification that kills or injures protected wildlife • Harm can be direct or indirect action, harm must be foreseeable, apply standard proximate cause

HCP	
Case:	Gerber v. Norton
Facts:	
Rule:	TEST: Applicant must to the “maximum extent practicable” minimize and mitigate impact to animal. <ul style="list-style-type: none"> • Agency cannot take applicants word that mitigation measures are not practicable. Must be some evidence to record that they are not practicable and why • Standard = technologically or economically prohibitive
Notes:	NWF v. Babbitt → Applicant must guaranty funding for project

3d Party Liability	
Case:	Strahan v. Coxe
Facts:	Fishing gear permitted by Dept of Marine Fisheries killing whales. Dept liable for take
Rule:	<ul style="list-style-type: none"> • Traditional proximate cause would make Dept liable bc foreseeable that activity will result in a taking. No independent supervening 3d party activity here • You can’t do this activity w/o causing the whales to be entangled - its like giving someone a license to do something that is harmful and or illegal