Environmental Enforcement
Cases and Materials
2012 Supplement

Joel A. Mintz
Clifford Rechtschaffen
Robert Kuehn

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

A Brief Introduction to this Supplement

With the exception of a single case, we have compiled this Supplement to update the first edition of this casebook—which was published in 2007—by including a selection of edited excerpts from pertinent judicial opinions along with some post-case notes that summarize other such cases. (The sole exception is *United States v. Wasserson*, a 2005 Third Circuit decision that illustrates an important point of law that we want to highlight for students of environmental enforcement.)

As the reader will discover, there have been some important changes in or additions to those aspects of environmental enforcement law that are covered in casebook chapter 2 (concerning reporting, investigation, and information gathering), 3 (administrative enforcement), 4 (civil judicial enforcement), 5 (enforcement of waste site liability), 6 (criminal enforcement), 7 (citizen enforcement), and 9 (alternatives to traditional enforcement methods). Although not exhaustive, the materials included in this Supplement reflect our judgments as to which of those recent legal changes and additions have the greatest significance for law students and practitioners in the field. We also attempted to include cases and notes that we thought are "teachable," and that are consistent with the materials initially included in the book.

For the reader's convenience, we have indicated, above each item in the Supplement, the place where we think it most logically "fits" into the cases, problems, and notes and questions found in the first edition. We have also approached editing the Supplement cases in the same manner as we edited the original book. We hope you find this Supplement of value and, as with the casebook itself, your comments and suggestions on its content and utility (and that of the book as a whole) are always welcome.

Finally, we would like to thank Clifford Villa, an adjunct professor at Seattle University School of Law and an attorney with the Office of Regional Counsel of the U.S. Environmental Protection Agency (EPA) Region 10, for his thoughtful suggestions regarding our casebook.

Professor Joel A. Mintz
Nova Southeastern University Law Center
Fort Lauderdale, Florida

Professor Robert Kuehn
Washington University School of Law
St. Louis, Missouri

Professor Clifford Rechtschaffen
Golden Gate University School of Law
San Francisco, California

June, 2012.

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Chapter 2, Section D.4

Insert on p. 71 after Notes and Questions 2:

3. In *People v. Maikhio*, 253 P. 3d 74, 51 Cal. 4th 1074, 126 Cal. Rptr. 3d (Cal. 2011), the California Supreme Court adopted an approach similar to that taken by the Louisiana Supreme Court in the *McHugh* case. In *Maikhio*, a state fish and game warden observed the defendant fishing from a pier with a handline and catching either a lobster or a fish that the defendant placed in a small black bag by his side. Although the game warden could not identify the item the defendant placed in his bag, the warden was aware that, although it was unlawful to do so, such handlines were often utilized in that location to catch spiny lobsters. The warden followed the defendant, stopped his car a few blocks from the pier, and asked the defendant if he had any fish or lobsters in his car. When the defendant denied having any, the warden spotted the black bag on the floor of the car, opened the bag, and discovered a spiny lobster. The warden issued a citation to the defendant, who was later charged with a misdemeanor under the state's fish and game requirements. Reversing some lower court rulings, the California Supreme Court upheld the search in question as being consistent with relevant California statutes and administrative regulations (which allow even random, suspicionless searches by game wardens) and with the Fourth Amendment. The Court reasoned that the state's interest in preserving and protecting wildlife constitutes a special and important state interest, the administrative regulations that serve that interest could not be enforced adequately if a warden could only stop anglers and hunters whom the warden reasonably suspected had violated fish and game laws, and the impingement upon privacy engendered by such a stop and demand procedure is minimal.

Chapter 3, Section B.2

Insert on p. 82 after Notes and Questions:

SACKETT
v.
ENVIRONMENTAL PROTECTION AGENCY
132 S. Ct. 1367 (2012)

Justice SCALIA delivered the opinion of the Court.

We consider whether Michael and Chantell Sackett may bring a civil action under the Administrative Procedure Act, 5 U.S.C. § 500 et seq., to challenge the issuance by the Environmental Protection Agency (EPA) of an administrative compliance order under § 309 of the Clean Water Act, 33 U.S.C. § 1319. The order asserts that the Sacketts' property is subject to the Act, and that they have violated its provisions by placing fill material on the property; and on this basis it directs them immediately to restore the property pursuant to an EPA work plan.

The Clean Water Act prohibits, among other things, "the discharge of any pollutant by any person," § 1311, without a permit, into the "navigable waters,"—which the Act defines as "the waters of the United States." If the EPA determines that any person is in violation of this restriction, the Act directs the agency either to issue a compliance order or to initiate a civil enforcement action. § 1319(a) (3). When the EPA prevails in a civil action, the Act provides for "a civil penalty not to exceed [$37,500] per day for each violation." And according to the Government, when the EPA prevails against any person who has been issued a compliance order but has failed to comply, that amount is increased to $75,000—up to $37,500 for the statutory violation and up to an additional $37,500 for violating the compliance order.

The particulars of this case flow from a dispute about the scope of "the navigable waters" subject to this enforcement regime. Today we consider only whether the dispute may be brought to court by challenging the compliance order—we do not resolve the dispute on the merits….

The Sacketts … own a ⅔–acre residential lot in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures. In preparation for constructing a house, the Sacketts filled in part of their lot with dirt and rock. Some months later, they

received from the EPA a compliance order. [The order found, among other things, that the Sacketts' property contained jurisdictional wetlands subject to regulation under the Clean Water Act, and that by discharging fill material into navigable waters without a permit, the Sacketts were in violation of section 301 of the Act.]

The order directs the Sacketts, among other things, "immediately [to] undertake activities to restore the Site in accordance with [an EPA-created] Restoration Work Plan" and to "provide and/or obtain access to the Site ... [and] access to all records and documentation related to the conditions at the Site ... to EPA employees and/or their designated representatives."

The Sacketts, who do not believe that their property is subject to the Act, asked the EPA for a hearing, but that request was denied. They then brought this action in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief….The District Court dismissed the claims for want of subject-matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed…. We granted certiorari.

The Sacketts brought suit under Chapter 7 of the APA, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. We consider first whether the compliance order is final agency action….By reason of the order, the Sacketts have the legal obligation to "restore" their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to "records and documentation related to the conditions at the Site." Also, " 'legal consequences ... flow' " from issuance of the order. For one, according to the Government's current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding…. The issuance of the compliance order also marks the " 'consummation' " of the agency's decisionmaking process"…. As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further agency review….

The APA's judicial review provision also requires that the person seeking APA review of final agency action have "no other adequate remedy in a court," 5 U.S.C. § 704. In Clean Water Act enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA under 33 U.S.C. § 1319. But the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability….The Government relies on § 701(a) (1) of the APA, which

excludes APA review "to the extent that [other] statutes preclude judicial review." The Clean Water Act, it says, is such a statute.

Nothing in the Clean Water Act expressly precludes judicial review under the APA or otherwise….The APA, we have said, creates a "presumption favoring judicial review of administrative action," but as with most presumptions, this one "may be overcome by inferences of intent drawn from the statutory scheme as a whole." The Government offers several reasons why the statutory scheme of the Clean Water Act precludes review….'

The Government argues that, because Congress gave the EPA the choice between a judicial proceeding and an administrative action, it would undermine the Act to allow judicial review of the latter. But that argument rests on the question-begging premise that the relevant difference between a compliance order and an enforcement proceeding is that only the latter is subject to judicial review. There are eminently sound reasons other than insulation from judicial review why compliance orders are useful. The Government itself suggests that they "provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance." It is entirely consistent with this function to allow judicial review when the recipient does not choose "voluntary compliance." The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice.

The Government also notes that compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action. It suggests that Congress therefore viewed a compliance order "as a step in the deliberative process[,] ... rather than as a coercive sanction that itself must be subject to judicial review." But the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction. And it is hard for the Government to defend its claim that the issuance of the compliance order was just "a step in the deliberative process" when the agency rejected the Sacketts' attempt to obtain a hearing and when the next step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). As the text (and indeed the very name) of the compliance order makes clear, the EPA's "deliberation" over whether the Sacketts are in violation of the Act is at an end; the agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject.

The Government further urges us to consider that Congress expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing, but did not expressly provide for review of compliance orders. But if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all….

Finally, the Government notes that Congress passed the Clean Water Act in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

* * *

We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Notes and Questions

1. Justice Ginsberg filed a brief concurring opinion in this case. Ginsberg expressed her agreement with the Supreme Court's holding that the Sacketts were entitled to litigate their jurisdictional challenge to EPA's regulatory authority as to their property without delay. However, she was careful to point out that the Court's opinion left unresolved the question of whether the Sacketts could also challenge the terms and conditions of EPA's order at the pre-enforcement stage.

2. Justice Alito also concurred. Alito stated that the reach of the Clean Water Act is "notoriously unclear," because Congress had failed to define clearly what it meant by the statutory phrase "waters of the United States." He opined that "[t]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune." Alito criticized EPA for never promulgating a rule that provides a "clear and sufficiently limited" definition of waters of the United States. In his view, "only clarification of the reach of the Clean Water Act can rectify the underlying problem."

3. Did the government's attorneys make a strategic error in this case by adhering to the view that regulated entities which fail to comply with an EPA administrative order may effectively be subject to a double penalty—i.e. a penalty for violating the underlying statutory requirement and a separate, additional penalty for failure to comply with the order itself? Why do you think EPA and the U.S. Department of Justice might have advanced that interpretation of the Clean Water Act's enforcement provision? Strategic considerations aside, in your opinion is that position appropriate and justifiable?

4. The Supreme Court's unanimous opinion in *Sackett* appears to leave unresolved a number of questions. For example, from the face of the opinion it is difficult to tell whether *Sackett* merely creates a statutory right to pre-enforcement judicial review of EPA administrative orders that raise issues of regulatory authority and jurisdiction or whether the Court was contemplating that its opinion be read more broadly, with respect to challenges to the Agency's Clean Water Act administrative orders. Also left unresolved following *Sackett* is whether the rationale of the decision should be applied to administrative orders issued under the authority of other federal environmental legislation and, if so, how and to what extent is it applicable. In all likelihood, federal courts will be called upon to address these issues in the future litigation.

Chapter 4, Section D.1

Insert on p. 138 after Notes and Questions 3:

4. Military training activities of the U.S. Navy were again challenged in *Winters v. Natural Resources Defense Council*, 555 U.S. 7 (2008). In that case a group of environmental organizations sued the Secretary of the Navy, seeking to enjoin the Navy's use of mid-frequency active sonar in training exercises which, they alleged, would cause serious harm to 37 protected species of marine mammals present in the ocean waters off the Southern California coast. Reversing the rulings of the lower federal courts, the U.S. Supreme Court vacated a preliminary injunction in the case. Citing *Weinberger* and other decisions, the Court held that a preliminary injunction is an "extraordinary remedy," and plaintiffs who seek it must demonstrate that irreparable injury is "likely" in the absence of an injunction, as opposed to being a mere "possibility." It also ruled that even if the plaintiffs did demonstrate a likelihood of irreparable injury in the case, such an injury was outweighed by the public interest in military preparedness and the Navy's interest in training its sailors in anti-submarine warfare. The Court acknowledged that military interests do not always trump other considerations. Nonetheless, it held that in cases where the plaintiffs seek injunctive relief against military activities, courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

Chapter 5, Section C.3

Insert on p. 173 after United States v. Alcan Aluminum Corp. case and before the Notes and Questions:

In the next case, the Supreme Court endorsed the *Chem-Dyne* approach to joint and several liability while also signaling greater acceptance of the ability of a party to demonstrate a reasonable basis to apportion CERCLA costs. The Court also clarified the extent to which "arranged for" liability under section 107(a)(3) could be imposed on a seller who knows that its product will be leaked, spilled, or disposed into the environment.

BURLINGTON NORTHERN AND SANTA FE RAILWAY CO.
v.
UNITED STATES
129 S. Ct. 1870 (2009)

Justice Stevens delivered the opinion of the Court.

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in response to the serious environmental and health risks posed by industrial pollution. The Act was designed to promote the "'timely cleanup of hazardous waste sites" and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination. These cases raise the questions whether and to what extent a party associated with a contaminated site may be held responsible for the full costs of remediation.

In 1960, Brown & Bryant, Inc. (B&B), began operating an agricultural chemical distribution business, purchasing pesticides and other chemical products from suppliers such as Shell Oil Company (Shell). Using its own equipment, B&B applied its products to customers' farms. B & B opened its business on a 3.8 acre parcel of former farmland in Arvin, California, and in 1975, expanded operations onto an adjacent .9 acre parcel of land owned jointly by the Atchison, Topeka & Santa Fe Railway Company, and the Southern Pacific Transportation Company (now known respectively as the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company) (Railroads). . . .

During its years of operation, B&B stored and distributed various hazardous chemicals on its property. Among these were the herbicide dinoseb, sold by Dow Chemicals, and the pesticides D-D and Nemagon both sold by Shell. . . . When B&B purchased D-D, Shell would arrange for delivery by common carrier, f.o.b. destination. . . .

Over the course of B&B's 28 years of operation, delivery spills, equipment failures, and the rinsing of tanks and trucks allowed Nemagon, D-D and dinoseb to seep into the soil and upper levels of ground water of the Arvin facility. In 1983, the California Department of Toxic Substances Control (DTSC) began investigating B&B's violation of hazardous waste laws, and the United States Environmental Protection Agency (EPA) soon followed suit, discovering significant contamination of soil and ground water. Of particular concern was a plume of contaminated ground water located under the facility that threatened to leach into an adjacent supply of potential drinking water.

Although B&B undertook some efforts at remediation, by 1989 it had become insolvent and ceased all operations. That same year, the Arvin facility was added to the National Priority List, and subsequently, DTSC and EPA (Governments) exercised their authority under 42 U.S.C. §9604 to undertake cleanup efforts at the site. By 1998, the Governments had spent more than $8 million responding to the site contamination; their costs have continued to accrue.

In 1991, EPA issued an administrative order to the Railroads directing them, as owners of a portion of the property on which the Arvin facility was located, to perform certain remedial tasks in connection with the site. The Railroads did so, incurring expenses of more than $3 million in the process. Seeking to recover at least a portion of their response costs, in 1992 the Railroads brought suit against B&B in the United States District Court for the Eastern District of California. In 1996, that lawsuit was consolidated with two recovery actions brought by DTSC and EPA against Shell and the Railroads.

The District Court conducted a 6-week bench trial in 1999 and four years later entered a judgment in favor of the Governments. In a lengthy order supported by 507 separate findings of fact and conclusions of law, the court held that both the Railroads and Shell were potentially responsible parties (PRPs) under CERCLA-the Railroads because they were owners of a portion of the facility, see 42 U.S.C. §§9607(a)(1)-(2), and Shell because it had "arranged for" the disposal of hazardous substances through its sale and delivery of D-D, see §9607(a)(3). . . .

To determine whether Shell may be held liable as an arranger, we begin with the language of the statute relevant here. Section 9607(a)(3) applies to an entity that "arrange[s] disposal . . . of hazardous substances." It is plain from the language of the statute that CERCLA liability would attach under §107(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination. Less clear is the liability attaching to the many permutations of "arrangements" that fall between these two extremes—cases in which the seller has some knowledge of the buyers' planned disposal or whose motives for the "sale" of a hazardous substance are less than clear. In such cases, courts concluded that the determination whether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a "disposal" or a "sale" and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions.

Although we agree that the question whether 9607(a)(3) liability attaches is fact intensive and case specific, such liability may not extend beyond the limits of the statute itself. Because CERCLA does not specifically define what it means to "arrang[e] for" disposal of a hazardous substance, we give the phrase its ordinary meaning. In common parlance, the word "arrange" implies action directed to a specific purpose. Consequently, under the plain language of the statute, an entity may qualify as an arranger under §9607(a)(3) when it takes intentional steps to dispose of a hazardous substance.

The Governments do not deny that the statute requires an entity to "arrang[e] for" disposal; however, they interpret that phrase by reference to the statutory term "disposal," which the Act broadly defines as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water." 42 U.S.C. §6903(3); see also §9601(29) (adopting the definition of "disposal" contained in the Solid Waste Disposal Act). The Governments assert that by including unintentional acts such as "spilling" and "leaking" in the definition of disposal, Congress intended to impose liability on entities not only when they directly dispose of waste products but also when they engage in legitimate sales of hazardous substances knowing that some disposal may occur as a collateral consequence of the sale itself. Applying that reading of the statute, the Governments contend that Shell

arranged for the disposal of D-D within the meaning of §9607(a)(3) by shipping D-D to B&B under conditions it knew would result in the spilling of a portion of the hazardous substance by the purchaser or common carrier. Because these spills resulted in wasted D-D, a result Shell anticipated, the Governments that Shell was properly found to have arranged for the disposal of D-D.

While it is true that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes, knowledge alone is insufficient particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product. In order to qualify as an arranger, Shell must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of the transfer process by one or more of the methods described in §6903(3). Here, the facts found by the District Court do not support such a conclusion.

Although the evidence adduced at trial showed that Shell was aware that minor, accidental spills occurred during the transfer of D-D from the common carrier to B&B's bulk storage tanks after the product had arrived at the Arvin facility and had come under B&B's stewardship, the evidence does not support an inference that Shell intended such spills to occur. To the contrary, the evidence revealed that Shell took numerous steps to encourage its distributors to *reduce* the likelihood of spills, providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those who took safety precautions. Although Shell's efforts were less than wholly successful, given these facts, Shell's mere knowledge that spills and leaks continued to occur is insufficient grounds for concluding that Shell "arranged for" the disposal of D-D within the meaning of §9607(a)(3). Accordingly, we conclude that Shell was not liable as an arranger for the contamination that occurred at B&B's Arvin facility….

Having concluded that Shell is not liable as an arranger, we need not decide whether the Court of Appeals erred in reversing the District Court's apportionment of Shell's liability for the cost of remediation. We must, however, determine whether the Railroads were properly held jointly and severally liable for the full cost of the Governments' response efforts.

The seminal opinion on the subject of apportionment in CERCLA actions was written in 1983 by Chief Judge Carl Rubin of the United States District Court for the Southern District of Ohio. United States v. Chem-Dyne Corp.,

572 F. Supp. 802 (S.D.Ohio, 1983). After reviewing CERCLA's history, Chief Judge Rubin concluded that although the Act imposed a "strict liability standard," it did not mandate "joint and several" liability in every case. Rather, Congress intended the scope of liability to "be determined from traditional and evolving principles of common law[.]" The Chem-Dyne approach has been fully embraced by the Courts of Appeals.

Following Chem-Dyne, the courts of appeals have acknowledged that "[t]he universal starting point for divisibility of harm analyses in CERCLA cases" is §433A of the Restatement (Second) of Torts. In other words, apportionment is proper when "there is a reasonable basis for determining the contribution of each cause to a single harm."Restatement (Second) of Torts §433A(1)(b).

Not all harms are capable of apportionment, however, and CERCLA defendants seeking to avoid joint and several liability must bear the burden of proving that a reasonable basis for apportionment exists. . . .

Neither the parties nor the lower courts dispute the principles that govern apportionment in CERCLA and both the District Court and Court of Appeals agreed that the harm created by the contamination of the site, although singular, was theoretically capable of apportionment. The question then is whether the record provided a reasonable basis for the District Court's conclusion that the Railroads were liable for only 9% of the harm caused by contamination at the Arvin facility….

[T]he District Court ultimately concluded that this was a "classical 'divisible in terms of degree' case, both as to the time period in which defendant's conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination" Consequently the District Court apportioned liability, assigning the Railroads 9% of the total remediation costs.

The District Court calculated the Railroads' liability based on three figures. First, the court noted that the Railroad parcel constituted only 19% of the surface area of the Arvin site. Second, the court observed that the Railroads had leased their parcel to B & B for 13 years, which was only 45% of the time B&B operated the Arvin facility. Finally, the court found that the volume of hazardous-substance-releasing activities on the B&B property was at least 10 times greater than the releases that occurred on the Railroad parcel, and it concluded that only spills of two chemicals, Nemagon and dinoseb (not D-D), substantially contributed to the

contamination that had originated on the Railroad parcel and that those two chemicals had contributed to two-thirds of the overall site contamination requiring remediation. The court then multiplied .19 by .45 by .66 (two-thirds) and rounded up to determine that the Railroads were responsible for approximately 6% of the remediation costs. Allowing for calculation errors up to 50%, the court concluded that the Railroads could be held responsible for 9% of the total CERCLA response cost for the Arvin site.

The Court of Appeals criticized the evidence on which the District Court's conclusions rested, finding a lack of sufficient data to establish the precise proportion of contamination that occurred on the relative portions of the Arvin facility and the rate of contamination in the years prior to B&B's addition of the Railroad parcel. The court noted that neither the duration of the lease nor the size of the leased area alone was a reliable measure of the harm caused by activities on the property owned by the Railroads, and—as the court's upward adjustment confirmed—the court had relied on estimates rather than specific and detailed records as a basis for its conclusions.

Despite these criticisms, we conclude that the facts contained in the record reasonably supported the apportionment of liability. . . . Although the evidence adduced by the parties did not allow the court to calculate precisely the amount of hazardous chemicals contributed by the Railroad parcel to the total site contamination or the exact percentage of harm caused by each chemical, the evidence did show that fewer spills occurred on the Railroad parcel and that of those spills that occurred, not all were carried across the Railroad parcel to the B&B sump and pond from which most of the contamination originated. The fact that no D-D spills on the Railroad parcel required remediation lends strength to the District Court's conclusion that the Railroad parcel contributed only Nemagon and dinoseb in quantities requiring remediation….

For the foregoing reasons, we conclude that the Court of Appeals erred by holding Shell liable as an arranger under CERCLA for the costs of remediating environmental contamination at the Arvin, California facility. Furthermore, we conclude that the District Court reasonably apportioned the Railroads' share of the site remediation costs at 9%. The judgment is reversed, and the cases are remanded for further proceedings consistent with this opinion.

Chapter 5, Section E

Insert on p. 184 just before United States v. Atlantic Research Corp.:

Left open by the Court in *Cooper Industries* was whether a potentially responsible private party could instead recover its response costs under the liability provisions in CERCLA section 107(a) (which allows for cost recovery actions by "any other person" in addition to the government and Indian Tribe) or whether the party must exclusively rely on the contribution procedures in section 113(f). The Supreme Court resolved a split in the circuit courts on this issue in *United States v. Atlantic Research Corp*.

UNITED STATES
v.
ATLANTIC RESEARCH CORP.
551 U.S. 128 (2007)

Justice Thomas delivered the unanimous opinion of the Court.

Two provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)—§§107(a) and 113(f)—allow private parties to recover expenses associated with cleaning up contaminated sites. 42 U.S.C. §§9607(a), 9613(f). In this case, we must decide a question left open in Cooper Industries, Inc. v. Aviall Services, Inc.: whether §107(a) provides so-called potentially responsible parties (PRPs), 42 U.S.C. §§9607(a)(1)-(4), with a cause of action to recover costs from other PRPs. We hold that it does.

Courts have frequently grappled with whether and how PRPs may recoup CERCLA-related costs from other PRPs. The questions lie at the intersection of two statutory provisions—CERCLA §§107(a) and 113(1). Section 107(a) defines four categories of PRPs, 42 U.S.C. §§9607(a)(1)-(4), and makes them liable for, among other things:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and]

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. §9607(a)(4)(A)-(B).

Enacted as part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), §113(f) authorizes one PRP to sue another for contribution in certain circumstances. 42 U.S.C. §9613(f). . . . In Cooper Industries, we held that a private party could seek contribution from other liable parties only after having been sued under §106 or §107(a). This narrower interpretation of 113(f) caused several Courts of Appeals to reconsider whether PRPs have rights under §107(a)(4)(B), an issue we declined to address in Cooper Industries. After revisiting the issue, some courts have permitted section 107(a) actions by PRPs. However, at least one court continues to hold that section 113(f) provides the exclusive cause of action available to PRPs. Today we resolve this issue.

In this case, respondent Atlantic Research leased property at the Shumaker Naval Ammunition Depot, a facility operated by the Department of Defense. At the site, Atlantic Research retrofitted rocket motors for petitioner United States. Using a high-pressure water spray, Atlantic Research removed pieces of propellant from the motors. It then burned the propellant pieces. Some of the resultant wastewater and burned fuel contaminated soil and groundwater at the site.

Atlantic Research cleaned the site at its own expense and then sought to recover some of its costs by suing the United States under both §107(a) and 113(f). After our decision in Cooper Industries foreclosed relief under §113(f), Atlantic Research amended its complaint to seek relief under §107(a) and federal common law. The United States moved to dismiss, arguing that §107(a) does not allow PRPs (such as Atlantic Research) to recover costs. The District Court granted the motion to dismiss, relying on a case decided prior to our decision in Cooper Industries, Dico, Inc. v. Chemical Co., 340 F.3d 525 (8th Cir. 2003).

The Court of Appeals for the Eighth Circuit reversed. Recognizing that Cooper Industries undermined the reasoning of its prior precedent, the Court of Appeals joined the Second and Seventh Circuits in holding that §113(f) does not provide "the exclusive route by which [PRPs] may recover cleanup costs." The court reasoned that §107(a)(4)(B) authorized suit by any person other than the persons permitted to sue under §107(a)(4)(A*).* Accordingly, it held that section 107(a)(4)(B) provides a cause of action to Atlantic Research. To prevent perceived conflict between §107(a)(4)(B) and 113(f)(1*),* the Court of Appeals reasoned that PRPs that "have been subject to §§106 or 107 enforcement

actions are still required to use §113, thereby ensuring its continued vitality." We granted certiorari, and now affirm.

The parties' dispute centers on what "other person[s]" may sue under §107(a)(4)(B). The Government argues that "any other person" refers to any person not identified as a PRP in §§107(a) (1)-(4). In other words, subparagraph (B) permits suit only by non-PRPs and thus bars Atlantic Research's claim. Atlantic Research counters that subparagraph (B) takes its cue from subparagraph (A), not the earlier paragraphs (1)-(4). In accord with the Court of Appeals, Atlantic Research believes that subparagraph (B) provides a cause of action to anyone except the United States, a State, or an Indian tribe—the persons listed in subparagraph (A). We agree with Atlantic Research….

Statutes must "be read a whole." Applying that maxim, the language of subparagraph (B) can be understood only with reference to subparagraph (A). The provisions are adjacent and have remarkably similar structures. Each concerns certain costs that have been incurred by certain entities and that bear a specified relationship to the national contingency plan. Bolstering the structural link, the text also denotes a relationship between the two provisions. By using the phrase "other necessary costs," subparagraph (B) refers to and differentiates the relevant costs from those listed in subparagraph (A).

In light of the relationship between the subparagraphs, it is natural to read the phrase "any other person" by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe. The phrase "any other person" therefore means any person other than those three. See 42 U.S.C. §9601(21) (defining "person" to include the United States and the various States). Consequently, the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs….

Moreover, the statute defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs. Hence, if PRPs do not qualify as "any other person" for purposes 107(a)(4)(B), it is unclear what private party would. The Government posits that §107(a)(4)(B) authorizes actions for "innocent" private parties—for instance, a landowner whose land has been contaminated by another. Even parties not responsible for contamination may fall within the broad definition of PRPs in §§107(a)(1)-(4)….The Government's reading of the text logically

precludes all PRPs, innocent or not from recovering cleanup costs. Accordingly, accepting the Government's interpretation reduces the number of potential plaintiffs to almost zero, rendering §107(a)(4)(B) a dead letter….

Section 113(f) explicitly grants PRPs a right to contribution. Contribution is defined as the "tortfeasor's right to collect from others responsible for the same tort where the tortfeasor has paid more than his or her proportional share, the shares being determined as a percentage of fault." Black's Law Dictionary 353. Nothing in § 113(f) suggests that Congress used the term "contribution" in anything other than this traditional sense. The statute authorizes a PRP to seek contribution "during or following" a suit under §106 or §107 (42 U.S.C. §9613(f)(1)). Thus, §113(f) permits suit before or after the establishment of common liability. In either case, a PRP's right to contribution under §113(f)(1*)* is contingent upon an inequitable distribution of common liability among liable parties.

By contrast, section 107(a) permits recovery of cleanup costs but does not create a right to contribution. A private party may recover under §107(a) without any establishment of liability to a party. Moreover, §107(a) permits a PRP to recover the costs it has "incurred" in cleaning up a site. When a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred.

Accordingly, remedies available in §§107(a) and 113(f) complement each other by providing causes of action "to persons in different procedural circumstances." Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under §106 or §107(a). And §107(a) permits recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a judgment may pursue §113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under §107(a). As a result, though eligible to seek contribution under §113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under §107(a*)*. Thus, at least in the case of reimbursement, the PRP cannot choose the 6-year statute of limitations for cost-recovery actions over the shorter limitations period for §113(f) contribution claims….

Because the plain terms of §107(a)(4)(B*)* allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action. We therefore affirm the judgment of the Court of Appeals.

Insert on p. 184 in Notes and Questions, replacing Note 1:

1. The *Atlantic Research Corp*. case now sets forth the two paths that confront a PRP other than the United States, a state, or an Indian tribe. As the Court explained, if a PRP is a party to a judgment or settlement agreement under CERCLA, it can pursue a contribution action against other PRPs under section 113(f), but not a cost recovery action under section 107. On the other hand, if the private party PRP incurs its own response costs in addressing releases or threatened releases from a site, it can sue other PRPs under 107(a) to recover its necessary costs of response.

Insert on p. 184 in Notes and Questions, adding Note 2:

2. *Atlantic Research Corp.* expressly did not decide whether a party that incurs cleanup expenses pursuant to a consent decree following a suit under § 106 or § 107(a) may bring an action to recover those costs under § 107(a). 551 U.S. at 139 n.6. All of the U.S. Courts of Appeals that have addressed that issue since *Atlantic Research* have held that § 113(f) provides the exclusive remedy for a liable party compelled to incur response costs pursuant to a settlement under § 106 or § 107. *See, e.g., Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230 (11th Cir. 2012); *Morrison Enter., LLC v. Dravo Corp.,* 638 F.3d 594 (8th Cir. 2011), *cert.denied*, 132 S.Ct. 244 (2011); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.,* 602 F.3d 204 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 646 (2010); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010).

Chapter 5, Section G

Insert on p. 201 in Notes and Questions, replacing existing Note 1:

1. The district court later granted summary judgment in favor of EPA on GE's "pattern and practice" constitutional claim. *General Electric Co. v. Johnson*, 362 F.Supp. 2d 327 (D.D.C. 2005). On appeal, the D.C. Circuit held that the statute and the way EPA administers it did not violate the Due Process Clause because recipients of a unilateral administrative order under CERCLA may obtain a pre-deprivation hearing by refusing to comply and forcing EPA to sue in federal court. *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C.Cir. 2010). The Supreme Court denied certiorari.

Chapter 6, Section B.3

Insert on p. 216 before Notes and Questions*:*

The following case illustrates the use of the federal aiding and abetting statute in environmental prosecutions, and the potential criminal liability of a defendant who turns a blind eye to how its waste is being disposed.

United States v. Wasserson
418 F.3d 225 (3rd. Cir. 2005)

McKee, Circuit Judge:

Gary Wasserson was the president and chief executive officer of Sterling Supply Company, located in Philadelphia, Pennsylvania. . . . Sterling had a warehouse in Philadelphia where it stored cleaning products consisting of cleaners, soaps and detergents, as well as equipment and business records. When Sterling went out of business in 1994, the warehouse contained hundreds of containers of chemicals, including napthene, acetone and perchloroethylene. . . .

Charles Hughes was a Sterling employee from 1980 through 1994. . . . According to the government, in August of 1999, Wasserson asked Hughes to hire someone to remove the remaining materials at Sterling's warehouse. . . . [but] neither Wasserson nor Hughes, his representative, provided Davis or Will-Hall [the companies hired to dispose of the materials] with the required hazardous waste manifest identifying the items for disposal. Similarly, no one informed Davis or Will-Haul that the drums and containers contained hazardous waste and therefore had to be transported to, and disposed of at, a permitted facility pursuant to the RCRA.

Wasserson was indicted by a federal grand jury and charged with three counts of violating the RCRA: causing, and aiding and abetting, the transportation of hazardous waste without a manifest, in violation of 42 U.S.C. §6928(d)(5) and 18 U.S.C. §2 (Count One); causing, and aiding and abetting, the transportation of hazardous waste to facilities which were not authorized to store or dispose of hazardous waste, in violation of 42 U.S.C. §6928(d)(1) and 18 U.S.C. §2 (Count Two); and causing, and aiding and abetting, the disposal of hazardous waste without a permit, in violation of 42 U.S.C. §6928(d)(2) and 18 U.S.C. §2 (Count Three).

A jury convicted Wasserson of all three counts at the end of a three-day trial. Thereafter, Wasserson filed a motion for new trial . . . arguing that 42 U.S.C. §6928(d)(2)(A) only applied to owners and operators of disposal facilities, and that he could therefore not be convicted of violating that statute. . . .

The district court granted Wasserson's motion in part . . . on the court's conclusion that "one who merely generates but does not carry out the disposal of hazardous waste cannot be convicted under subsection (d)(2)(A)."

The government moved for reconsideration of the judgment of acquittal on Count Three arguing that it had charged Wasserson with aiding and abetting disposal of hazardous waste in violation of 42 U.S.C. §6928(d)(2)(A) and 18 U.S.C. §2. The district court disagreed, and this appeal followed. . . .

The government bottomed its aiding and abetting theory on the premise of Wassersons' willful blindness in handling the disposal of the hazardous waste. "A willful blindness instruction is often described as sounding in deliberate ignorance." "Such instructions must be tailored ... to avoid the implication that a defendant may be convicted simply because he or she should have known of facts of which he or she was unaware." "Willful blindness is not to be equated with negligence or lack of due care, for willful blindness is a subjective state of mind that is deemed to satisfy a scienter requirement of knowledge." "The instruction must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability."

Our review of the evidence in the light most favorable to the government leads us to conclude that there was clearly sufficient evidence for a reasonable jury to find that Wasserson was willfully blind to the ultimate destination of his hazardous waste.

Wasserson had owned Sterling since about 1980, and was actively involved in running the business. Although Sterling ceased operations around 1993 or 1994, Wasserson kept the warehouse. Wasserson knew the warehouse contained dry cleaning products, and Wasserson concedes that he knew the products constituted hazardous waste.

Wasserson also knew the requirements for handling hazardous waste and, particularly for handling hazardous dry cleaning chemicals. From about mid-1989

through 1990, Wasserson employed an environmental consultant, Michael Tatch, to advise him on a number of regulatory matters, including transporting hazardous waste. At one point, Wasserson was interested in expanding his business into hauling hazardous waste from dry cleaners. At another point, Wasserson asked Tatch about becoming a disposal facility, and Tatch reviewed the requirements for generators, haulers and disposers of hazardous waste with Wasserson.

Tatch also instructed Wasserson about the importance of manifests and their relevance to the regulatory framework governing hazardous waste. He told Wasserson that generators were required to manifest their waste, and that transporters had to sign those manifests and pass them along to those who took possession as well as to state agencies. Tatch described the information that a manifest must contain. He specifically covered the obligation of a generator of waste to provide a manifest if it generates more than 220 pounds of waste, and he advised Wasserson that it is the generator's responsibility to ensure that any waste leaving the generator's control has a properly completed and signed manifest.

Thus, as Wasserson stipulated, he knew that a completed manifest must accompany any hazardous waste shipped for disposal; that hazardous waste may only be transported to a facility that has a proper permit; and that a facility that disposes of hazardous waste must also have a proper permit to do so. Significantly for our purposes, Wasserson also knew that the proper disposal of hazardous waste was expensive.

Wasserson asked Hughes, his intermediary and employee, to find someone to clean out the trash in the warehouse. When Hughes reported back to Wasserson that Davis would clear everything out, including the hazardous wastes, Wasserson told Hughes to get it in writing because he did not want any problems.

In contrast to Wasserson's knowledge about the requirements for handling hazardous waste, Hughes knew nothing about hazardous waste disposal. Hughes had worked for Wasserson at Sterling from about 1980 as a truck or tractor-trailer driver making deliveries of dry cleaning supplies. Before Wasserson hired him, Hughes had also been a truck driver. After Sterling closed in 1993 or 1994, Hughes was Wasserson's chauffer for a few years. He also undertook various assignments for Wasserson, such as general clean-up of the warehouse, and helping load trucks for people interested in any of the goods at the warehouse. One of these assignments included hiring someone to get rid of the trash in the warehouse.

Before he hired Davis, Hughes had never been involved in disposing of Sterling's supply of hazardous waste. He knew nothing about the legal and technical requirements for a manifest. All that he did know was that if a manifest was needed on a job he drove, it was provided by "the office upstairs." Hughes did not participate in preparing any manifests. It was only after Davis disposed of the hazardous waste that Hughes first saw a manifest, which had been provided by a company called, "Onyx" that was eventually hired to perform a proper clean-up of the warehouse.

Given this evidence, Wasserson's level of knowledge about the legal requirements for handling hazardous waste, and Hughes's lack of knowledge; a jury could reasonably infer that Wasserson's failure to make proper inquiry and to provide a proper manifest were tantamount to willful blindness to the ultimate destination and disposal of the waste. Wasserson did not ask Davis, and Hughes did not even know to ask Davis, about the essential requirements for the proper transport and disposal of Sterling's hazardous waste. Wasserson did communicate directly with Davis's company, but only to ensure that Davis agreed to assume responsibility for the waste. Wasserson spoke to Davis's secretary, dictated those terms to her, and had her read them back to him and fax him the signed agreement. Thus, the jury could have believed that for the $13,000 he paid to Davis, Wasserson thought he could wash his hands of the trash, debris, and hazardous waste in his warehouse, and leave Davis "holding the bag."

As Wasserson knew, the warehouse that Davis agreed to clean was quite large, and the amount of debris and waste was significant. The areas to be cleaned included about 125 multi-drawer filing cabinets full of old papers and trash, plastic pipe, long crates, old machinery, old safes, about 500 multiple tier racks and three "huge" filters; and then there was the hazardous waste. A reasonable jury could conclude from this evidence that Wasserson's only concern regarding the hazardous waste was shifting legal responsibility to Davis.

Accordingly, it was reasonable for the jury to conclude that Wasserson knew that the hazardous wastes might well be disposed of at an unpermitted facility, or at least that he was willfully blind to that eventuality. *See United States v. Hayes International Corp.,* 786 F.2d 1499, 1504 (11th Cir. 1986) ("It is common knowledge that properly disposing of wastes in an expensive task, and if someone is willing to take away wastes at an unusual price or under unusual circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permit facility.").

For all of these reasons, we find that there is more than sufficient evidence to support the unlawful disposal conviction. Accordingly, we will reverse the district court's order granting judgment of acquittal on Count Three and reinstate the jury's verdict of guilty. . . .

Chapter 6, Section D.3

Insert on p. 234 after United States v. Sinskey and before Notes and Questions:

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One issue not addressed in the excerpts from the *Ahmad* and *Sinskey* cases is whether "knowingly" in section 309(c)(2)(A) of the Clean Water Act requires proof that the defendant knew that the water into which it discharged a pollutant was a "navigable water of the United States" as defined in the statute and regulations. Because the determination of whether a particular stream or wetlands is a "navigable water" raises complex technical and legal issues, requiring the government to prove knowledge of this element of the crime could pose a substantial challenge to prosecutors. The case below reflects the majority view on this issue.

UNITED STATES v. COOPER
482 F.3d 658 (4th Cir. 2007)

Wilkinson, Circuit Judge:

D.J. Cooper was convicted by a jury on nine counts of knowingly discharging a pollutant from a point source into waters of the United States, in violation of the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act ("CWA" or "the Act"). He claims that the district court should have granted an acquittal for lack of sufficient evidence, in part because the government failed to prove Cooper knew that he was discharging pollutants into waters of the United States. . . .

The CWA prohibits the knowing discharge of a pollutant from a point source to waters of the United States without a permit. See 33 U.S.C. §§1311(a), 1319(c)(2)(A), 1362(7), 1362(12). The Act defines "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source." Id. §1362(12). The term "pollutant" includes "sewage ... sewage sludge ... [and] biological materials ... discharged into water." Id. §1362(6). The term "point source" denotes a "confined and discrete conveyance," including any pipe "from which pollutants are or may be discharged." Id. §1362(14). "Navigable waters" are

defined as "waters of the United States," id. §1362(7), which are defined by regulation to include, among other things, "[a]ll interstate waters" and the "[t]ributaries of [such] waters," 40 C.F.R §122.2 (2006).

Defendant Cooper has been operating a sewage lagoon at his trailer park in Bedford County, Virginia, since 1967. In recent times the lagoon has served as the only method of human waste disposal for twenty-two of the trailers in the park. The lagoon treats sewage according to the following process: Solid materials settle to the bottom of the lagoon, while the fluid level rises until it reaches an overflow structure in the middle of the lagoon, from which it flows through a pipe into a chlorine contact tank. In the tank, an electric pump dispenses a solution of water and granular chlorine, which mixes with the sewage. The chlorinated fluid then flows through a discharge pipe, down a channel of a few feet, and thence into a small creek. . . .

[The Virginia Department of Environmental Quality] DEQ regulated discharges from the lagoon through a series of permits to Cooper, the last of which issued in 1997 and remained in effect until March 7, 2002. In March 2002, Cooper's discharge permit expired with Cooper having failed to file the necessary paperwork to receive a new permit. . . .

Nevertheless, discharges from the lagoon into the creek continued. DEQ sent Cooper many Notices of Violation and inspection reports stating that he was discharging illegally. . . . On October 21, 2004, Cooper was indicted on thirteen felony counts of knowingly discharging a pollutant into waters of the United States without a permit, in violation of 33 U.S.C. §§1311(a) and 1319(c)(2)(A). After his indictment, Cooper finally ceased discharging from the lagoon. . . .

After a three-day jury trial, on April 28, 2005 the jury found Cooper guilty on nine counts. The district court sentenced Cooper to 27 months' imprisonment, plus a $30,000 fine for each count of conviction, resulting in a total fine of $270,000. Defendant appeals. . . .

Cooper argues that the government failed to prove that Cooper knew the waters into which he discharged pollutants "were a tributary of a navigable water, or adjacent to a navigable water, or had a significant nexus to a navigable water." The premise of this claim is that, under 33 U.S.C. §§1311(a) and 1319(c)(2)(A), the government had to prove that Cooper was aware of the facts that establish the federal government's jurisdiction over the water for purposes of the CWA. For the reasons explained below, we reject this contention.

Cooper was convicted of knowingly discharging a pollutant without a permit from a point source to navigable waters, which are defined as waters of the United States. "Waters of the United States" in this statutory scheme operates as a jurisdictional element. A jurisdictional element of a federal offense states the basis of Congress' power to regulate the conduct at issue: its "primary purpose is to identify the factor that makes the [conduct] an appropriate subject for federal concern." United States v. Yermian, 468 U.S. 63, 68 (1984). Without a jurisdictional basis for its exercise of its authority, Congress would be acting beyond its enumerated powers under Article I, Section 8 of the Constitution. "Waters of the United States" in the CWA is a classic jurisdictional element, which situates Congress' authority to enact the statute in "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001).

It is well settled that mens rea requirements typically do not extend to the jurisdictional elements of a crime—that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." United States v. Feola, 420 U.S. 671, 677 n. 9 (1975); Yermian, 468 U.S. at 68-69. This court has long recognized this principle in construing jurisdictional elements of federal criminal statutes.

Congress legislates against this well-established backdrop, aware that jurisdictional elements generally assert federal jurisdiction but do not create additional statutory elements as to which defendants must have formed the appropriate mens rea in order to have broken the law.

In United States v. Feola, the Supreme Court recognized that it is possible, in exceptional circumstances, that Congress might intend for a jurisdictional element to have both a jurisdictional and substantive component, rather than being "jurisdictional only." The Court also suggested that the primary authority in answering this question is the intent of Congress as expressed in the statute itself. We thus turn to consider whether Congress has expressed an intention that "waters of the United States" in this case serve more than a jurisdictional function.

Of the four other circuits to have considered the scope of "knowingly" in § 1319(c)(2)(A), three have not extended it to "waters of the United States." See Sinskey, 119 F.3d at 715 ("knowingly" in §1319(c)(2)(A) only "applies to the

underlying conduct prohibited by the statute"); Hopkins, 53 F.3d at 541 ("knowingly" in § 319(c)(2)(A) means that defendant "knew the nature of his acts and performed them intentionally"); Weitzenhoff, 35 F.3d at 1284 ("knowingly" in §1319(c)(2)(A) refers to "knowingly engag[ing] in conduct that results in a permit violation"). The Fifth Circuit has held that "knowingly" applies to each element of the offense "[w]ith the exception of purely jurisdictional elements," without stating explicitly whether "waters of the United States" constitutes such a purely jurisdictional element. Ahmad, 101 F.3d at 391.

The CWA offers every reason to conclude that the term "waters of the United States" as it operates in this case is "nothing more than the jurisdictional peg on which Congress based federal jurisdiction." We begin as always with an examination of the statute itself. 33 U.S.C. §1319(c)(2)(A) makes it a felony for any person to "knowingly violate[ ] section 1311...." Section 1311(a) provides that "the discharge of any pollutant by any person shall be unlawful." Id. §1311(a). Section 1362(12) defines the "discharge of a pollutant" as the "addition of any pollutant to navigable waters," and section 1362(7) defines "navigable waters" as "waters of the United States." Id. §§1362(7), 1362(12). "Waters of the United States" is further defined by regulation. See 40 C.F.R §122.2.

The question, then, is whether Congress intended for the term "knowingly" in §1319(c)(2)(A) to extend, via §1311(a), to "navigable waters" in §1362(12), and thus to "waters of the United States" in §1362(7), with the result that the government must prove that Cooper was aware of the facts connecting the small creek to the regulatory definition of "waters of the United States." To say the least, the statute's string of provisions hardly compels such a reading. If Congress meant to overcome the customary understanding that mens rea requirements do not attach to jurisdictional elements, it would have spoken much more clearly to that effect.

The stated purposes of the Act provide further support for this view. As articulated by Congress, the principal goal of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). This purpose would be severely undermined if polluters could only be prosecuted for knowingly polluting the nation's waters when the government could prove they were aware of the facts conferring federal jurisdiction. Such a blanket rule would be absurd in many cases, including the present one. Cooper's deliberate discharge of human sewage into running waters is exhaustively recorded. He knew he was discharging sewage into them, he knew his treatment facilities were inadequate, and he knew he was acting without a permit. It seems unlikely that Congress intended for culpability in such an instance to turn upon whether the

defendant was aware of the jurisdictional nexus of these acts, any more than, for example, Congress intended conviction of a felon-in-possession offense to turn upon the defendant's knowledge of the interstate travels of a firearm. . . .

In sum, the creek's status as a "water of the United States" is simply a jurisdictional fact, the objective truth of which the government must establish but the defendant's knowledge of which it need not prove. The language of the relevant statutes—33 U.S.C. §§1311(a), 1319(c)(2)(A), 1362(7)—the congressional intent that text plainly reflects, as well as relevant precedent, all require this conclusion.

The judgment of the district court is hereby Affirmed.

Chapter 7, Section C

Insert on p. 271 after Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc. and before Notes and Questions:

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In a 2009 decision, while not calling *Laidlaw* into question, the Supreme Court underscored that the *Lujan v. National Wildlife Federation* precedents have continued strong vitality and rejected the plaintiffs' standing. In *Summers v. Earth Island Institute,* 555 U.S. 488 (2009), plaintiffs challenged a salvage sale of timber on national forest land and alleged that, pursuant to a Forest Service regulation governing small salvage sales, the Service had improperly exempted the sale from the agency's notice and comment and appeals processes. The plaintiffs submitted an affidavit from one member alleging that he had repeatedly used the site on which the sale was planned and had imminent plans to do so again. The government conceded that these allegations were adequate to establish standing for that site. After the trial court granted a preliminary injunction enjoining the sale, plaintiffs settled their challenge to the specific salvage sale, but continued with their challenge to the Forest Service regulation. To demonstrate standing to challenge the regulation, plaintiffs relied in part on the affidavit of another member who alleged that he had visited seventy national forests in the past and planned to visit them in the future, although he did not name any specific forests. The member also alleged that there were a series of projects in the Allegheny National Forest that were subject to the challenged regulations and that he had visited the forest in the past and "wants to go there" in the future, without specifying exactly when.

The Court found these allegations insufficient to show injury in fact. As to the first, the Court said there was no indication that the forests affected by the rule were the ones that the member would actually visit in the future. As to the second, the Court characterized it as only a "vague desire to return" to the forest, and that "such 'some day' intentions—without any description of concrete plans," is not an actual or imminent injury (citing *Lujan II).* In dissent, Justice Breyer argued that plaintiffs had shown a "realistic threat" that they would be harmed by the regulation, even if they did not specify the exact salvage sales that would be affected by it, given that the Forest Service admitted that it intended to conduct thousands of sales under the challenged regulation in the near future.

At the very least, *Summers* appears to mean that environmental plaintiffs only have standing to challenge programmatic decisions by the government in the

context of a specific project. Whether it will be read by the lower courts to otherwise tighten standing doctrine remains to be seen.

Chapter 9, Section B

Insert on p. 343, replacing Connecticut v. American Electric Power Co.:

AMERICAN ELECTRIC POWER COMPANY, INC.
v.
CONNECTICUT
131 S. Ct. 2527 (2011)

Justice Ginsberg delivered the opinion of the Court

We address in this opinion the question whether the plaintiffs (several States, the city of New York, and three private land trusts) can maintain federal common law public nuisance claims against carbon-dioxide emitters (four private power companies and the federal Tennessee Valley Authority). As relief, the plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually. The Clean Air Act and the Environmental Protection Agency action the Act authorizes, we hold, displace the claims the plaintiffs seek to pursue.

In *Massachusetts v. EPA,* 549 U.S. 497 (2007), this Court held that the Clean Air Act, 42 U.S.C. §7401 *et seq.,* authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. . . held that the Environmental Protection Agency (EPA) had misread the Clean Air Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. Greenhouse gases, we determined, qualify as "air pollutant[s]" within the meaning of the governing Clean Air Act provision; they are therefore within EPA's regulatory ken. Because EPA had authority to set greenhouse gas emission standards and had offered no "reasoned explanation" for failing to do so, we concluded that the agency had not acted "in accordance with law" when it denied the requested rulemaking.

Responding to our decision in *Massachusetts,* EPA undertook greenhouse gas regulation. In December 2009, the agency concluded that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," the Act's regulatory trigger. . . . EPA and the Department of Transportation subsequently

issued a joint final rule regulating emissions from light-duty vehicles, and initiated a joint rulemaking covering medium and heavy-duty vehicles. EPA also began phasing in requirements that new or modified "[m]ajor [greenhouse gas] emitting facilities" use the "best available control technology." Finally, EPA commenced a rulemaking under §111 of the Act, 42 U.S.C. § 7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants. Pursuant to a settlement finalized in March 2011, EPA has committed to issuing a proposed rule by July 2011, and a final rule by May 2012.

The lawsuits we consider here began well before EPA initiated the efforts to regulate greenhouse gases just described. In July 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York against the same five major electric power companies. The first group of plaintiffs included eight States and New York City, the second joined three nonprofit land trusts; both groups are respondents here. The defendants, now petitioners, are four private companies and the Tennessee Valley Authority, a federally owned corporation that operates fossil-fuel fired power plants in several States. According to the complaints, the defendants "are the five largest emitters of carbon dioxide in the United States." Their collective annual emissions of 650 million tons constitute 25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, and 2.5 percent of all anthropogenic emissions worldwide.

By contributing to global warming, the plaintiffs asserted, the defendants' carbon-dioxide emissions created a "substantial and unreasonable interference with public rights," in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. The States and New York City alleged that public lands, infrastructure, and health were at risk from climate change. The trusts urged that climate change would destroy habitats for animals and rare species of trees and plants on land the trusts owned and conserved. All plaintiffs sought injunctive relief requiring each defendant "to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade."

The District Court dismissed both suits as presenting non-justiciable political questions, but the Second Circuit reversed. On the threshold questions, the Court of Appeals held that the suits were not barred by the political question doctrine, and that the plaintiffs had adequately alleged Article III standing.

Turning to the merits, the Second Circuit held that all plaintiffs had stated a claim under the "federal common law of nuisance." For this determination, the

court relied dominantly on a series of this Court's decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry. see, *e.g., Illinois v. Milwaukee,* 406 U.S. 91, 93 (1972) (*Milwaukee I*) (recognizing right of Illinois to sue in federal district court to abate discharge of sewage into Lake Michigan).

The Court of Appeals further determined that the Clean Air Act did not "displace" federal common law. In *Milwaukee v. Illinois,* 451 U.S. 304, 316–319 (1981) (*Milwaukee II*), this Court held that Congress had displaced the federal common law right of action recognized in *Milwaukee I* by adopting amendments to the Clean Water Act. That legislation installed an all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively with interstate water pollution. The legislation itself prohibited the discharge of pollutants into the waters of the United States without a permit from a proper permitting authority. At the time of the Second Circuit's decision, by contrast, EPA had not yet promulgated any rule regulating greenhouse gases, a fact the court thought dispositive. "Until EPA completes the rulemaking process," the court reasoned, "we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'spea[k] directly' to the 'particular issue' raised here by Plaintiffs." We granted certiorari.

The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts,* which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions; and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts,* or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.

"There is no federal general common law," *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938), famously recognized. In the wake of *Erie,* however, a keener understanding developed. *Erie* "le[ft] to the states what ought be left to them," and thus required "federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states," *Erie* also sparked "the emergence of a federal decisional law in areas of national concern." The "new" federal common law addresses "subjects within national legislative power where Congress has so directed" or where the basic scheme of the Constitution so demands. Environmental protection is undoubtedly an area "within national legislative

power," one in which federal courts may fill in "statutory interstices," and, if necessary, even "fashion federal law." As the Court stated in *Milwaukee I* : "When we deal with air and water in their ambient or interstate aspects, there is a federal common law". . . .

Recognition that a subject is meet for federal law governance, however, does not necessarily mean that federal courts should create the controlling law. Absent a demonstrated need for a federal rule of decision, the Court has taken "the prudent course" of "adopt[ing] the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." And where, as here, borrowing the law of a particular State would be inappropriate, the Court remains mindful that it does not have creative power akin to that vested in Congress. . . . In the cases on which the plaintiffs heavily rely, States were permitted to sue to challenge activity harmful to their citizens' health and welfare. We have not yet decided whether private citizens (here, the land trusts) or political subdivisions (New York City) of a State may invoke the federal common law of nuisance to abate out-of-state pollution. Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders.

The defendants argue that considerations of scale and complexity distinguish global warming from the more bounded pollution giving rise to past federal nuisance suits. Greenhouse gases once emitted "become well mixed in the atmosphere;" emissions in New Jersey may contribute no more to flooding in New York than emissions in China. The plaintiffs, on the other hand, contend that an equitable remedy against the largest emitters of carbon dioxide in the United States is in order and not beyond judicial competence. And we have recognized that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances.

We need not address the parties' dispute in this regard. For it is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.

"[W]hen Congress addresses a question previously governed by a decision rested on federal common law," the Court has explained, "the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee II*. Legislative displacement of federal common law does not require the "same sort of

evidence of a clear and manifest [congressional] purpose" demanded for preemption of state law. "'[D]ue regard for the presuppositions of our embracing federal system ... as a promoter of democracy,'" does not enter the calculus, for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest. The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute "speak[s] directly to [the] question" at issue.

We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants.

Section 111 of the Act directs the EPA Administrator to list "categories of stationary sources" that "in [her] judgment ... caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 411(b)(1)(A). Once EPA lists a category, the agency must establish standards of performance for emission of pollutants from new or modified sources within that category. §7411(b)(1)(B); see also §7411(a)(2). And, most relevant here, §7411(d) then requires regulation of existing sources within the same category. For existing sources, EPA issues emissions guidelines, see 40 C.F.R. § 0.22, .23 (2009); in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, §7411(d)(1).

The Act provides multiple avenues for enforcement. EPA may delegate implementation and enforcement authority to the States, §7411(c)(1), (d)(1), but the agency retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court. §§7411(c)(2), (d)(2), 7413, 7414. In specified circumstances, the Act imposes criminal penalties on any person who knowingly violates emissions standards issued under §7411. See §7413(c). And the Act provides for private enforcement. If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits "any person" to bring a civil enforcement action in federal court. §7604(a).

If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter,

and EPA's response will be reviewable in federal court. See §7607(b)(1). As earlier noted, EPA is currently engaged in a §7411 rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired power plants. To settle litigation brought under §7607(b) by a group that included the majority of the plaintiffs in this very case, the agency agreed to complete that rulemaking by May 2012. The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.

The plaintiffs argue, as the Second Circuit held, that federal common law is not displaced until EPA actually exercises its regulatory authority, *i.e.,* until it sets standards governing emissions from the defendants' plants. We disagree.

The sewage discharges at issue in *Milwaukee II,* we do not overlook, were subject to effluent limits set by EPA; under the displacing statute, "[e]very point source discharge" of water pollution was "prohibited unless covered by a permit." As *Milwaukee II* made clear, however, the relevant question for purposes of displacement is "whether the field has been occupied, not whether it has been occupied in a particular manner." Of necessity, Congress selects different regulatory regimes to address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing.

The Clean Air Act is no less an exercise of the legislature's "considered judgment" concerning the regulation of air pollution because it permits emissions *until* EPA acts. The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing §7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination.

EPA's judgment, we hasten to add, would not escape judicial review. Federal courts, we earlier observed, can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted. As we have noted, the Clean Air Act directs EPA to establish emissions standards for categories of stationary sources that, "in [the Administrator's] judgment," "caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." "[T]he use of the word 'judgment,' " we explained in *Massachusetts,* "is not a roving license to ignore the statutory text."

"It is but a direction to exercise discretion within defined statutory limits." EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal to act would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in this Court.

Indeed, this prescribed order of decision making—the first decider under the Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance. . . .

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court. . . .

For the reasons stated, we reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion.

Insert on p. 345 in Notes and Questions, replacing Note 1:

1. In the *American Electric Power* case, the plaintiffs also sought relief under the nuisance laws of each state where the defendants operate power plants. Because it held that federal common law governed, the Second Circuit did not reach the state law claims. The Supreme Court noted this and explained that "[i]n

light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act. None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter [of the availability of state common law nuisance claims] open for consideration on remand."

In an earlier federal district court case in California, *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. 2007), the plaintiff also raised both federal and state common law public nuisance claims. The state of California alleged that carbon dioxide emissions from cars and trucks manufactured by defendants constituted a nuisance and entitled the state to recover the costs incurred to deal with global warming. The court held that the complaint raised non-justiciable political questions regarding plaintiff's federal common law nuisance claim and should be dismissed. Because the federal claim was dismissed, the court did not have supplemental jurisdiction over that plaintiff's state law nuisance claim and dismissed it without prejudice to refiling in state court.