

ENVIRONMENTAL AND NATURAL RESOURCES LAW

Fourth Edition

2014 Supplement

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2014 Supplement

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PREFACE

The fourth and most recent edition of this casebook was published in 2012. In the two years that have passed since that time, federal environmental and natural resources legislation has remained largely unchanged. The chief reason for this period of quiet is political. Before 2010, President Barack Obama enjoyed the support of a Democrat-controlled Senate and a Democrat-controlled House of Representatives. Much could be done (which explains, for example, the enactment of the President's signature legislation, the Affordable Care Act, on a partisan basis). The 2010 elections, however, changed all of that by reassigning control of the House to the Republican Party. With that, prospects for new legislation effectively ended. Indeed, the move from Pelosi to Boehner spelled an almost wholesale demise of legislative product from the Congress. Environmental and Natural Resources Law, like virtually all other areas of law, has been stuck in the quagmire.

There has been more activity in the regulatory arena, particularly with respect to the Clean Air Act (see Chapter 9 of the casebook). Most importantly, EPA added carbon dioxide to the list of pollutants subject to stationary source regulation. This incorporation was a truly major development. Beyond that, the agency also promulgated new primary and secondary national ambient air quality standards for small particulate matter ("PM 2.5"). And the agency has plans to do more: for example, it is currently reviewing its NAAQSs for lead, its MACT for petroleum refineries, and is working on reducing amounts of sulfur in gasoline to bring federal standards in line with California's Low Vehicle Emissions Program.

On the water side, EPA proposed a new definition of "waters of the United States", an initiative prompted by the Supreme Court's *Rapanos* decision (set forth at page 561 *et seq.* in the casebook). It issued as well a new rule under the Endangered Species Act to specify how economic impact analyses should be undertaken in conjunction with critical habitat designations. Of course, this is not an exhaustive list of regulatory repositioning and tinkering — EPA and its companion agencies have undertaken initiatives in addition to these. But, for reasons of brevity and mindful of the survey nature of these materials, only the most significant of these adjustments has found a place in this supplement.

The most significant judicial development in Environmental and Natural Resources Law since 2012 was the United States Supreme Court's decision in the *Utility Air Regulatory Group* case, in which the Court cleared the path for EPA to move forward with its plans to regulate carbon dioxide emissions from stationary sources. The decision, set forth in edited form in this supplement, is good for class coverage because of its recitation of the history of climate change regulation over the past couple of years, its recency (June, 2014), and its significance for the future of air quality regulation.

On an independent basis, *UARG* is notable for its condemnation of executive rewrites of legislative enactments. EPA plainly had rewritten the Clean Air Act in its so-called “Tailoring Rule”, and for a laudable reason: the statute’s new source review provisions — as EPA understood them — were entirely dysfunctional as applied to carbon dioxide emissions. Hence, to avoid an “absurd” result, EPA simply rewrote the statute in its regulation. Justice Scalia disputed EPA’s right to do such a thing simply because the statute as enacted was unworkable in this particular application. (As mentioned above, he did find another way to allow EPA to go forward). His firm commentary in this regard will be seen again, and *UARG* surely will be cited, when the Supreme Court rules on the constitutionality of recent Presidential executive orders in areas such as immigration and health care.

As with the casebook, I welcome comments from readers of this online supplement.

Chapter 2

COMMON LAW CONSIDERATIONS

C. Tort Law: The Law of Nuisance

Page 38. Add at end of Note 4:

How does one determine when the statute of limitations *begins* to run? There are two theories. Under the first theory, the statute begins to run when the last pollution-causing action takes place. The second theory looks not to the cessation of pollution-causing activities but to the presence or lack of pollution migration. Under this second theory, if the tortious conduct of the defendant is at an end, but the pollution nonetheless continues to visit additional harms to the plaintiff, the statute does not run. These theories provide a methodology to discern between permanent and continuing nuisances: if pollution is ongoing and abatable, the nuisance ought to be viewed as continuing, and the statute of limitations should be tolled. *See, e.g., Burley v. Burlington N. & Santa Fe Ry. Co.* 364 Mont. 77 (2012). *Accord, Oglethorpe Power Corp. v. Forrister*, 71 S.E. 2d 641 (Ga. 2011).

Chapter 3

CONSTITUTIONAL CONSIDERATIONS

C. Considerations of Federalism

2. Preemption

Page 78. Insert new Note 5 and renumber existing Note 5 as Note 6:

5. *Statutes of Limitations and Repose:* In a recent case involving the Comprehensive Environmental Response, Compensation and Recovery Act (“CERCLA”), the Supreme Court ruled that CERCLA preempted North Carolina’s statutes of limitations but not its statute of repose. *CTS Corp. v. Waldburger*, 2104 U.S. LEXIS 3992 (June 9, 2014).

A statute of limitations establishes a period of time after which no cause of action may be brought. Often, statutes of limitations are coupled with a “discovery rule,” which stipulates the limitations period does not begin to run until a plaintiff knew or should have known that a defendant’s action allegedly caused an injury. A statute of repose, on the other hand, establishes a “cutoff” beyond which a cause of action may not be brought. (In North Carolina, the statute of repose stipulates that common law tort cases may not be brought later than ten years after a defendant’s last “culpable act.” *N.C. Gen. Stat. Ann. § 1-52(16)*.) A repose period can end before a plaintiff has even discovered an injury, thereby terminating a cause of action before it even accrues.

Page 78. Add new Note 7:

7. *Preemption and the Affirmative Commerce Clause:* Justice Thomas recently offered some perspective worthy of emphasis:

“The Supremacy Clause provides the constitutional basis for the pre-emption of state laws. *Art. VI, cl. 2* (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land”). Because the Constitution and federal laws are supreme, conflicting state laws are without legal effect. *See Crosby v. National Foreign Trade Council*, 530 U. S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). However, the constitutional text leaves no doubt that only federal laws made “in Pursuance of the Constitution are supreme. *See Gregory v. Ashcroft*, 501 U. S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States” (emphasis added)); *Wyeth v. Levine*, 555 U. S. 555, 583-587, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (Thomas, J., concurring in judgment).

Given this limitation, Congress cannot pre-empt a state law merely by promulgating a conflicting statute — the pre-empting statute must also be constitutional, both on its face and as applied. As relevant here, if Congress lacks authority to enact a law regulating a particular intrastate activity, it follows that Congress also lacks authority to pre-empt state laws regulating that activity. *See U. S. Const., Amdt. 10* (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people).

American Trucking Ass’n v. City of Los Angeles, ___ U.S. ___, 33 S.Ct. 2096 (2013)(Thomas, J., concurring).

3. Dormant Commerce Clause

Page 89. Add at end of large paragraph in middle of page:

See also, American Trucking Ass’n v. City of Los Angeles, ___ U.S. ___, 33 S. Ct. 2096, 2103 (2013) (asserting that if a governmental entity’s contract for services in real terms “functions as part and parcel of a government program wielding coercive power over private parties . . .”, the governmental entity is acting in a governmental, not in a proprietary capacity. It is function, not the intentions of the governmental entity, that matters).

Chapter 4

THE NATIONAL ENVIRONMENTAL POLICY ACT

D. Environmental Impact Statements

1. The Role of EISs in Decisionmaking

Page 173. *Add at end of first full paragraph (at the middle of the page):*

(The Plan EJ 2014 Progress Report was issued in February, 2013. In it, then-EPA Administrator Lisa P. Jackson asserted that things were going well: “We have made significant progress in areas critical to advancing environmental justice, including rulemaking, permitting, compliance and enforcement, community-based programs and our work with other federal agencies. In addition, we have enhanced the critical legal, scientific and information tools that help us meet the needs of communities in our decision making.”

<http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-progress-report-2013.pdf> (page i).

Chapter 6 THE PUBLIC TRUST DOCTRINE

B. *Illinois Central*

Page 268. Add new Note 2 and renumber notes accordingly:

2. *Abdication of Trust Responsibilities.* *Illinois Central* proclaims that an abdication of trust responsibilities occurs if a sale of a public interest property impairs the public interest. *See, supra*. Determining whether a sale impairs public interest requires consideration of a number of factors, including if the property continues to serve the public and the degree to which public use would diminish upon sale. Recently, a court in Illinois identified a perhaps less intuitive factor for consideration in these circumstances: “. . . under the public trust doctrine the planned use of funds from the sale of park land is relevant to the determination of whether the sale would be for the public interest” *In re Park District of La Grange*, 2013 Ill. App. LEXIS 725, 998 N.E. 2d 659, ¶ 83 (October, 2013). Accordingly, if proceeds of sale were earmarked for construction of a public park, it may be a sale of land is appropriate under the public trust doctrine. It might be a different story if proceeds would go to the general treasury.

C. The Public Trust Doctrine in State Law

Page 269. Add after citation to Lazarus article:

One state court recently clarified, however, that the trust does not secure property rights in running waters to states or individuals. *Public Lands Access Ass’n v. Board of County Commissioners of Madison County*, 373 Mont. 277, 299-302, 321 P.3d 38, 51-53 (2014). (For more on water rights, see Chapter 8, *infra*.)

Page 277. Add to Note 1:

Courts in California continue to view *Audubon* as providing the State with considerable discretionary authority over privately held water rights. *See, e.g. Light v. State Water Resources Control Board*, ___ Cal. Rptr. 3d ___, 2014 Cal. App. LEXIS 523 (June 16, 2014) (holding that “in regulating the unreasonable use of water, the [State] can weigh the use of water for certain public purposes, notably the protection of wildlife habitat, against the commercial use of water by riparian users and early appropriators.” *Id.* at [3]. In *Light*, salmon were killed when vineyard operators diverted water to spray on grapes to prevent frost).

Chapter 7

ENDANGERED SPECIES ACT

B. Section 4

2. Designation of Critical Habitat

Page 314. Add new Note 1 and renumber existing notes accordingly:

1. *Baseline Approach:* *New Mexico Cattle Growers Association* rejected the baseline approach because “. . . Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes.” *See, supra*. For a contrary view, see *Ariz. Cattle Growers Ass’n v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010):

The baseline approach is, if anything, more logical than the co-extensive approach. The very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made. Moreover, the practical relevance of the economic analysis under the ESA is to determine the benefits of excluding or including an area in the critical habitat designation: if there is no net benefit (such as a reduction in economic impacts) to excluding the area, the agency must designate it. (citation omitted). The baseline approach, in contrast to the co-extensive approach, reflects this purpose.

Congress has directed the FWS to list species, and thus impose a regulatory burden, without consideration of the costs of doing so. (citations omitted). It would be strange to conclude that Congress intended the FWS to consider costs at the critical habitat phase that the agency was barred from considering at the listing phase where, as a result, the analysis would bear little relationship to reality. It would also be strange to conclude that Congress intended to use the critical habitat designation to require the agency to consider the previously irrelevant costs of listing the species, particularly given that the decision to exclude an area from critical habitat for economic reasons is discretionary. (citations omitted). The simpler explanation is that the economic analysis of the critical habitat designation is exactly what it sounds like and is not intended to incorporate the burdens imposed by listing the species.

This inter-circuit wrangling prompted the FWS and the NMFS to promulgate a new rule to resolve the dispute. The rule adopted the baseline approach. *50 C.F.R. § 424.19 (October, 2013)*. The rule does not specify how economic impacts should be measured.

Chapter 8

WATER RIGHTS

D. Federal Water Rights

1. Federal Legislation and Water Projects

Page 383. *Add new Note 1 and renumber existing notes accordingly:*

1. *National Grid*: The FPA does not preempt all of state law. For example, determinations of assessments and apportionments of costs to beneficiaries of hydroelectric projects may be undertaken under state law without interference of the FPA. *Niagara Mohawk Power Corp. (“National Grid”) v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 96 (2d Cir. 2012): “. . . [t]he FPA make[s] clear that to the extent the statute preempts state law, it preempts only those laws that affect the federal regulation of hydroelectric projects.”

CHAPTER 9 THE CLEAN AIR ACT

B. THE 1970 ACT

1. Regulation of Criteria Pollutants

a. National Ambient Air Quality Standards

Page 400. *Replace the last sentence in the caption under the graph with the following:*

The 1997 standards for ozone remained in place pending administrative reconsideration and, ultimately, judicial review. Upon review, the 2008 8-hour primary standard for ozone was upheld but the secondary standard was remanded due to EPA's failure to properly explain its reasoning. *Mississippi v. EPA*, 723 F.3d 246 (D.C. Cir. 2013).

In 2013, EPA lowered the primary and secondary standards for PM_{2.5} to 12 $\mu\text{g}/\text{m}^3$. The D.C. Circuit Court of Appeals affirmed. *National Association of Manufacturers v. EPA*, 750 F.3d 921 (D.C. Cir. 2014).

b. Emissions Limitations

Page 408. *Add after first full paragraph:*

In a recent judicial decision dealing with transboundary air pollution, the United States Supreme Court upheld EPA's Cross-State Air Pollution Rule ("Transport Rule"). Promulgated in August, 2011, the Transport Rule obligates 27 upwind states to curtail emissions of Nox and SO₂ for the benefit of downwind states. The issue before the Court was whether EPA had interpreted § 110(a)(2)(D)(i) properly. That section, as mentioned above, allows EPA to prohibit in-state sources from "emitting any air pollutant in amounts that will . . . contribute significantly" to downwind states' "nonattainment . . . , or interfere with maintenance . . ." of an NAAQS. EPA created a formula to calculate emission reductions requirements for the upwind States. The formula allowed for consideration of costs, as well as other factors, in determining each State's emissions "budget" for these purposes. The D.C. Circuit Court of Appeals had vacated the Transport Rule on the theory that the formula should have disregarded costs. In the D.C. Circuit's view, EPA should have fashioned emissions reductions by sole reference to each upwind State's proportionate responsibility for each downwind State's air quality problems. In *EPA v. EME Homer City Generation, L.P.*, (slip opinion, April 29, 2014), however, the Supreme Court reversed. Relying on *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), (see Note on Administrative Law #2, *supra*), the Court found EPA's interpretation of the Good Neighbor Provision to be "permissible, workable, and equitable . . ." (*EME*, slip op. at 32): "[T]he Agency has chosen, sensibly in our view, to reduce the amount [of emissions] easier, *i.e.* less

costly, to eradicate, and nothing in the text of the Good Neighbor Provision precludes that choice.” (*EME*, slip op. at 26).

Page 444. Add new Note 5:

5. Continuing Violations. The Third and Seventh Circuit Courts of Appeals have ruled that NSR violations are one-time violations, rather than continuing, *i.e.* a “fresh” violation occurring each day. Therefore, enforcement actions must be brought within five years. *United States v. EME Homer City Generation, LP*, 727 F.3d 274 (3d Cir. 2014); *United States v. Midwest Generation*, 720 F.3d 644 (7th Cir. 2013). These decisions align with earlier cases from the 8th and 11th Circuits. *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010); *Nat’l Parks & Conservation Ass’n, Inc. v. TVA*, 502 F.3d 1316 (11th Cir. 2007). EPA prefers NSR violations to be viewed as continuing in nature, to allow for potentially enormous increases in penalties.

Page 462. Omit the third paragraph and all of page 463. Insert:

Since then, much has transpired.

**UTILITY AIR REGULATORY GROUP v.
ENVIRONMENTAL PROTECTION AGENCY**
2014 U.S. LEXIS 4377 (2014)

SCALIA, J., announced the judgment of the Court and delivered an opinion, Parts I and II of which were for the Court. ROBERTS, C. J., and KENNEDY, J., joined that opinion in full; THOMAS and ALITO, JJ., joined as to Parts I, II-A, and II-B-1; and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined as to Part II-B-2. BREYER J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined.

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II.

Acting pursuant to the Clean Air Act, 69 Stat. 322, as amended, 42 U.S.C. §§ 7401-7671q, the Environmental Protection Agency recently set standards for emissions of “greenhouse gases” (substances it believes contribute to “global climate change”) from new motor vehicles. We must decide whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases.

I. Background

A. Stationary-Source Permitting (omitted)

B. EPA's Greenhouse-Gas Regulations

In 2007, the Court held that Title II of the Act “authorize[d] EPA to regulate greenhouse gas emissions from new motor vehicles” if the Agency “form[ed] a ‘judgment’ that such emissions contribute to climate change.” *Massachusetts v. EPA*, 549 U.S. 497, 528, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (quoting § 7521(a)(1)). In response to that decision, EPA embarked on a course of regulation resulting in “the single largest expansion in the scope of the [Act] in its history.” Clean Air Act Handbook, at xxi. EPA first asked the public, in a notice of proposed rulemaking, to comment on how the Agency should respond to *Massachusetts*. In doing so, it explained that regulating greenhouse-gas emissions from motor vehicles could have far-reaching consequences for stationary sources. Under EPA’s view, once greenhouse gases became regulated under any part of the Act, the PSD and Title V permitting requirements would apply to all stationary sources with the potential to emit greenhouse gases in excess of the statutory thresholds: 100 tons per year under Title V, and 100 or 250 tons per year under the PSD program depending on the type of source. 73 Fed. Reg. 44420, 44498, 44511 (2008). Because greenhouse-gas emissions tend to be “orders of magnitude greater” than emissions of conventional pollutants, EPA projected that numerous small sources not previously regulated under the Act would be swept into the PSD program and Title V, including “smaller industrial sources,” “large office and residential buildings, hotels, large retail establishments, and similar facilities.” *Id.*, at 44498-44499. The Agency warned that this would constitute an “unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land,” yet still be “relatively ineffective at reducing greenhouse gas concentrations.” *Id.*, at 44355.

In 2009, EPA announced its determination regarding the danger posed by motor-vehicle greenhouse-gas emissions. EPA found that greenhouse-gas emissions from new motor vehicles contribute to elevated atmospheric concentrations of greenhouse gases, which endanger public health and welfare by fostering global “climate change.” 74 Fed. Reg. 66523, 66537 (hereinafter Endangerment Finding). It denominated a “single air pollutant” the “combined mix” of six greenhouse gases that it identified as “the root cause of human-induced climate change”: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.*, at 66526, 66537. A source’s greenhouse-gas emissions would be measured in “carbon dioxide equivalent units” (CO₂e), which would be calculated based on each gas’s “global warming potential.” *Id.*, at 66499, n.4.

Next, EPA issued its “final decision” regarding the prospect that motor-vehicle greenhouse-gas standards would trigger stationary-source permitting requirements. 75 Fed. Reg. 17004 (2010) (hereinafter Triggering Rule). EPA announced that beginning on the effective date of its greenhouse-gas standards for motor vehicles, stationary sources would be subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases. As expected, EPA in short order promulgated greenhouse-gas emission standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles to take effect on January 2, 2011. 75 Fed. Reg. 25324 (hereinafter Tailpipe Rule).

EPA then announced steps it was taking to “tailor” the PSD program and Title V to greenhouse gases. 75 Fed. Reg. 31514 (hereinafter Tailoring Rule). Those steps were necessary, it said, because the PSD program and Title V were designed to regulate “a relatively small number of large industrial sources,” and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both unadministrable and “unrecognizable to the Congress that designed” them. *Id.*, at 31555, 31562. EPA nonetheless rejected calls to exclude greenhouse gases entirely from those programs, asserting that the Act is not “ambiguous with respect to the need to cover [greenhouse-gas] sources under either the PSD or title V program.” *Id.*, at 31548, n. 31. Instead, EPA adopted a “phase-in approach” that it said would “appl[y] PSD and title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point.” *Id.*, at 31523.

The phase-in, EPA said, would consist of at least three steps. During Step 1, from January 2 through June 30, 2011, no source would become newly subject to the PSD program or Title V solely on the basis of its greenhouse-gas emissions; however, sources required to obtain permits anyway because of their emission of conventional pollutants (so-called “anyway” sources) would need to comply with BACT for greenhouse gases if they emitted those gases in significant amounts, defined as at least 75,000 tons per year CO₂e. *Ibid.* During Step 2, from July 1, 2011, through June 30, 2012, sources with the potential to emit at least 100,000 tons per year CO₂e of greenhouse gases would be subject to PSD and Title V permitting for their construction and operation and to PSD permitting for modifications that would increase their greenhouse-gas emissions by at least 75,000 tons per year CO₂e. *Id.*, at 31523-31524. At Step 3, beginning on July 1, 2013, EPA said it might (or might not) further reduce the permitting thresholds (though not below 50,000 tons per year CO₂e), and it might (or might not) establish permanent exemptions for some sources. *Id.*, at 31524. Beyond Step 3, EPA promised to complete another round of rulemaking by April 30, 2016, in which it would “take further action to address small sources,” which might (or might not) include establishing permanent exemptions. *Id.*, at 31525.

EPA codified Steps 1 and 2 at 40 CFR §§ 51.166(b)(48) and 52.21(b)(49) for PSD and at §§ 70.2 and 71.2 for Title V, and it codified its commitments regarding Step 3 and beyond at §§ 52.22, 70.12, and 71.13. See Tailoring Rule 31606-31608. After the decision below, EPA issued its final Step 3 rule, in which it decided not to lower the thresholds it had established at Step 2 until at least 2016. 77 Fed. Reg. 41051 (2012).

C. Decision Below

....

We granted six petitions for certiorari but agreed to decide only one question: “Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.” 571 U.S. ____, 134 S. Ct. 418, 187 L. Ed. 2d 278 (2013).

II. Analysis

This litigation presents two distinct challenges to EPA’s stance on greenhouse-gas permitting for stationary sources. First, we must decide whether EPA permissibly determined that a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source’s potential to emit greenhouse gases. Second, we must decide whether EPA permissibly determined that a source already subject to the PSD program because of its emission of conventional pollutants (an “anyway” source) may be required to limit its greenhouse-gas emissions by employing the “best available control technology” for greenhouse gases. The Solicitor General joins issue on both points but evidently regards the second as more important; he informs us that “anyway” sources account for roughly 83% of American stationary-source greenhouse-gas emissions, compared to just 3% for the additional, non-“anyway” sources EPA sought to regulate at Steps 2 and 3 of the Tailoring Rule. Tr. of Oral Arg. 52.

We review EPA’s interpretations of the Clean Air Act using the standard set forth in *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). . . .

A. The PSD and Title V Triggers

We first decide whether EPA permissibly interpreted the statute to provide that a source may be required to obtain a PSD or Title V permit on the sole basis of its potential greenhouse-gas emissions.

1

EPA thought its conclusion that a source’s greenhouse-gas emissions may necessitate a PSD or Title V permit followed from the Act’s unambiguous language.

The Court of Appeals agreed and held that the statute “compelled” EPA’s interpretation. 684 F. 3d, at 134. We disagree. The statute compelled EPA’s greenhouse-gas-inclusive interpretation with respect to neither the PSD program nor Title V.

The Court of Appeals reasoned by way of a flawed syllogism: Under *Massachusetts*, the general, Act-wide definition of “air pollutant” includes greenhouse gases; the Act requires permits for major emitters of “any air pollutant”; therefore, the Act requires permits for major emitters of greenhouse gases. The conclusion follows from the premises only if the air pollutants referred to in the permit-requiring provisions (the minor premise) are the same air pollutants encompassed by the Act-wide definition as interpreted in *Massachusetts* (the major premise). Yet no one — least of all EPA — endorses that proposition, and it is obviously untenable.

The Act-wide definition says that an air pollutant is “any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” § 7602(g). In *Massachusetts*, the Court held that the Act-wide definition includes greenhouse gases because it is all-encompassing; it “embraces all airborne compounds of whatever stripe.” 549 U.S., at 529, 127 S.Ct. 1438, 167 L. Ed. 2d 248. But where the term “air pollutant” appears in the Act’s operative provisions, EPA has routinely given it a narrower, context-appropriate meaning.

That is certainly true of the provisions that require PSD and Title V permitting for major emitters of “any air pollutant.” Since 1978, EPA’s regulations have interpreted “air pollutant” in the PSD permitting trigger as limited to *regulated* air pollutants, 43 Fed. Reg. 26403, codified, as amended, 40 CFR § 52.21(b)(1)-(2), (50)—a class much narrower than *Massachusetts*’ “all airborne compounds of whatever stripe,” 549 U.S., at 529, 127 S. Ct. 1438, 167 L. Ed. 2d 248. And since 1993 EPA has informally taken the same position with regard to the Title V permitting trigger, a position the Agency ultimately incorporated into some of the regulations at issue here. See Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Air Division Director, Regions I-X, pp. 4-5 (Apr. 26, 1993); Tailoring Rule 31607-31608 (amending 40 CFR §§ 70.2, 71.2). Those interpretations were appropriate: It is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances. It takes some cheek for EPA to insist that it cannot possibly give “air pollutant” a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.

Nor are those the only places in the Act where EPA has inferred from statutory context that a generic reference to air pollutants does not encompass every substance falling within the Act-wide definition. Other examples abound:

- The Act authorizes EPA to enforce new source performance standards (NSPS) against a pre-existing source if, after promulgation of the standards, the source undergoes a physical or operational change that increases its emission of “any air pollutant.” §7411(a)(2), (4), (b)(1)(B). EPA interprets that provision as limited to air pollutants for which EPA has promulgated new source performance standards. 36 Fed. Reg. 24877 (1971), codified, as amended, 40 CFR § 60.2; 40 Fed. Reg. 58419 (1975), codified, as amended, 40 CFR §60.14(a).
- The Act requires a permit for the construction or operation in a nonattainment area of a source with the potential to emit 100 tons per year of “any air pollutant.” §§7502(c)(5), 7602(j). EPA interprets that provision as limited to pollutants for which the area is designated nonattainment. 45 Fed. Reg. 52745 (1980), promulgating 40 CFR §51.18(j)(2), as amended, §51.165(a)(2).
- The Act directs EPA to require “enhanced monitoring and submission of compliance certifications” for any source with the potential to emit 100 tons per year of “any air pollutant.” §§ 7414(a)(3), 7602(j). EPA interprets that provision as limited to *regulated* pollutants. 62 Fed. Reg. 54941 (1997), codified at 40 CFR §§ 64.1, 64.2.
- The Act requires certain sources of air pollutants that interfere with visibility to undergo retrofitting if they have the potential to emit 250 tons per year of “any pollutant.” § 7491(b)(2)(A), (g)(7). EPA interprets that provision as limited to *visibility-impairing* air pollutants. 70 Fed. Reg. 39160 (2005), codified at 40 CFR pt. 51, App. Y, § II.A.3.

Although these limitations are nowhere to be found in the Act-wide definition, in each instance EPA has concluded — as it has in the PSD and Title V context — that the statute is not using “air pollutant” in *Massachusetts*’ broad sense to mean any airborne substance whatsoever.

Massachusetts did not invalidate all these longstanding constructions. That case did not hold that EPA must always regulate greenhouse gases as an “air pollutant” everywhere that term appears in the statute, but only that EPA must “ground its reasons for action *or* inaction in the statute,” 549 U.S., at 535, 127 S. Ct. 1438, 167 L. Ed. 2d 24 (emphasis added), rather than on “reasoning divorced from the statutory text,” *id.*, at 532, 127 S. Ct. 1438, 167 L. Ed. 2d 24. EPA’s inaction with regard to Title II was not sufficiently grounded in the statute, the Court said, in part because nothing in the Act suggested that regulating greenhouse gases under that Title would conflict with the statutory design. Title II would not compel EPA to regulate in any way that would be “extreme,” “counterintuitive,” or contrary to “common sense.” *Id.*, at 531, 127 S. Ct. 1438, 167 L. Ed. 2d 24. At most, it would

require EPA to take the modest step of adding greenhouse-gas standards to the roster of new-motor-vehicle emission regulations. *Ibid.*

Massachusetts does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme. The Act-wide definition to which the Court gave a “sweeping” and capacious” interpretation, *id.*, at 528, 532, 127 S. Ct. 1438, 167 L. Ed. 2d 24, is not a command to regulate, but a description of the universe of substances EPA may *consider* regulating under the Act’s operative provisions. *Massachusetts* does not foreclose the Agency’s use of statutory context to infer that certain of the Act’s provisions use “air pollutant” to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program. As certain *amici* felicitously put it, while *Massachusetts* “rejected EPA’s categorical contention that greenhouse gases *could not* be ‘air pollutants’ for any purposes of the Act,” it did not “embrace EPA’s current, equally categorical position that greenhouse gases *must* be air pollutants for all purposes” regardless of the statutory context. Brief for Administrative Law Professors et al. as *Amici Curiae* 17.

To be sure, Congress’s profligate use of “air pollutant” where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity. One ordinarily assumes “that identical words used in different parts of the same act are intended to have the same meaning.” *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574, 127 S. Ct. 1423, 167 L. Ed. 2d 295 (2007). In this respect (as in countless others), the Act is far from a *chef d’oeuvre* of legislative draftsmanship. But we, and EPA, must do our best, bearing in mind the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). As we reiterated the same day we decided *Massachusetts*, the presumption of consistent usage “readily yields” to context, and a statutory term — even one defined in the statute — “may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.” *Duke Energy, supra*, at 574, 127 S. Ct. 1423, 167 L. Ed. 2d 295.

We need not, and do not, pass on the validity of all the limiting constructions EPA has given the term “air pollutant” throughout the Act. We merely observe that taken together, they belie EPA’s rigid insistence that when interpreting the PSD and Title V permitting requirements it is bound by the Act-wide definition’s inclusion of greenhouse gases, no matter how incompatible that inclusion is with those programs’ regulatory structure.

In sum, there is no insuperable textual barrier to EPA’s interpreting “any air pollutant” in the permitting triggers of PSD and Title V to encompass only

pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.

2

Having determined that EPA was mistaken in thinking the Act *compelled* a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers, we next consider the Agency's alternative position that its interpretation was justified as an exercise of its "discretion" to adopt "a reasonable construction of the statute." Tailoring Rule 31517. We conclude that EPA's interpretation is not permissible.

Even under *Chevron's* deferential framework, agencies must operate "within the bounds of reasonable interpretation." *Arlington*, 569 U.S., at ___, 133 S. Ct. 1863, 185 L. Ed. 2d 941, 951. And reasonable statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988). Thus, an agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole," *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. ___, ___, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013), does not merit deference.

EPA itself has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with — in fact, would overthrow — the Act's structure and design. In the Tailoring Rule, EPA described the calamitous consequences of interpreting the Act in that way. Under the PSD program, annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide. Tailoring Rule 31557. The picture under Title V was equally bleak: The number of sources required to have permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from \$62 million to \$21 billion; and collectively the newly covered sources would face permitting costs of \$147 billion. *Id.*, at 31562-31563. Moreover, "the great majority of additional sources brought into the PSD and title V programs would be small sources that Congress did not expect would need to undergo permitting." *Id.*, at 31533. EPA stated that these results would be so "contrary to congressional intent," and would so "severely undermine what Congress sought to accomplish," that they necessitated as much as a

1,000-fold increase in the permitting thresholds set forth in the statute. *Id.*, at 31554, 31562.

Like EPA, we think it beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gases at the 100- and 250-tons-per-year levels set forth in the statute would be “incompatible” with “the substance of Congress’ regulatory scheme.” *Brown & Williamson*, 529 U.S., at 156, 120 S. Ct. 1291, 146 L. Ed. 2d 121. A brief review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens. . . .

The fact that EPA’s greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” *Brown & Williamson*, 529 U.S., at 159, 120 S. Ct. 1291, 146 L. Ed. 2d 121, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.” *Id.*, at 160, 120 S. Ct. 1291, 146 L. Ed. 2d 121; (*additional citations omitted*). The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text. Moreover, in EPA’s assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute “unrecognizable to the Congress that designed” it. Tailoring Rule 31555. Since, as we hold above, the statute does not compel EPA’s interpretation, it would be patently unreasonable — not to say outrageous — for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.

3

EPA thought that despite the foregoing problems, it could make its interpretation reasonable by adjusting the levels at which a source’s greenhouse-gas emissions would oblige it to undergo PSD and Title V permitting. Although the Act, in no uncertain terms, requires permits for sources with the potential to emit more than 100 or 250 tons per year of a relevant pollutant, EPA in its Tailoring Rule wrote a new threshold of *100,000* tons per year for greenhouse gases. Since the Court of Appeals thought the statute unambiguously made greenhouse gases

capable of triggering PSD and Title V, it held that petitioners lacked Article III standing to challenge the Tailoring Rule because that rule did not injure petitioners but merely relaxed the pre-existing statutory requirements. Because we, however, hold that EPA’s greenhouse-gas-inclusive interpretation of the triggers was *not* compelled, and because EPA has essentially admitted that its interpretation would be unreasonable without “tailoring,” we consider the validity of the Tailoring Rule.

We conclude that EPA’s rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency’s interpretation of the triggering provisions. An agency has no power to “tailor” legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always “give effect to the unambiguously expressed intent of Congress.” *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) (quoting *Chevron*, 467 U.S., at 843, 104 S.Ct. 2778, 81 L. Ed. 2d 694). It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD and Title V permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the “bounds of its statutory authority.” *Arlington*, 569 U.S., at ___, 133 S. Ct. 1863, 185 L. Ed. 2d 941, 951 (emphasis deleted).

The Solicitor General does not, and cannot, defend the Tailoring Rule as an exercise of EPA’s enforcement discretion. The Tailoring Rule is not just an announcement of EPA’s refusal to enforce the statutory permitting requirements; it purports to *alter* those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act. This alteration of the statutory requirements was crucial to EPA’s “tailoring” efforts. Without it, small entities with the potential to emit greenhouse gases in amounts exceeding the statutory thresholds would have remained subject to citizen suits — authorized by the Act — to enjoin their construction, modification, or operation and to impose civil penalties of up to \$37,500 per day of violation. §§ 7413(b), 7604(a), (f)(4); 40 CFR § 19.4. EPA itself has recently affirmed that the “independent enforcement authority” furnished by the citizen-suit provision cannot be displaced by a permitting authority’s decision not to pursue enforcement. 78 Fed. Reg. 12477, 12486-12487 (2013). The Solicitor General is therefore quite right to acknowledge that the availability of citizen suits made it necessary for EPA, in seeking to mitigate the unreasonableness of its greenhouse-gas-inclusive interpretation, to go beyond merely exercising its enforcement discretion. See Tr. of Oral Arg. 87-88.

For similar reasons, *Morton v. Ruiz*, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974) — to which the Solicitor General points as the best case supporting the Tailoring Rule, see Tr. of Oral Arg. 71, 80-81 — is irrelevant. In *Ruiz*, Congress had appropriated funds for the Bureau of Indian Affairs to spend on providing assistance to “Indians throughout the United States” and had not “impose[d] any

geographical limitation on the availability of general assistance benefits.” *Id.*, at 206-207, 94 S. Ct. 1055, 39 L. Ed. 2d 270, and n. 7. Although we held the Bureau could not deny benefits to off-reservation Indians because it had not published its eligibility criteria, we stated in dictum that the Bureau could, if it followed proper administrative procedures, “create reasonable classifications and eligibility requirements in order to allocate the limited funds available.” *Id.*, at 230-231, 94 S. Ct. 1055, 39 L. Ed. 2d 270. That dictum stands only for the unremarkable proposition that an agency may adopt policies to prioritize its expenditures *within the bounds established by Congress*. See also *Lincoln v. Vigil*, 508 U.S. 182, 192-193, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993). Nothing in *Ruiz* remotely authorizes an agency to modify unambiguous requirements imposed by a federal statute. An agency confronting resource constraints may change its own conduct, but it cannot change the law.

Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution’s separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, “faithfully execute[s]” them. U. S. Const., Art. II, § 3; see *Medellan v. Texas*, 552 U.S. 491, 526-527, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008). The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice. See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (agency lacked authority “to develop new guidelines or to assign liability in a manner inconsistent with” an “unambiguous statute”).

In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. EPA therefore lacked authority to “tailor” the Act’s unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. Instead, the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn. Agencies are not free to “adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.” App. 175, 2012 U.S. App. LEXIS 25997, 2012 WL 6621785, *16 (Kavanaugh, J., dissenting from denial of rehearing en banc). Because the Tailoring Rule cannot save EPA’s interpretation of the triggers, that interpretation was impermissible under *Chevron*.

B. BACT for “Anyway” Sources

For the reasons we have given, EPA overstepped its statutory authority when it decided that a source could become subject to PSD or Title V permitting by reason of its greenhouse-gas emissions. But what about “anyway” sources, those that would need permits based on their emissions of more conventional pollutants (such as particulate matter)? We now consider whether EPA reasonably interpreted the Act to require those sources to comply with “best available control technology” emission standards for greenhouse gases. . . .

2

The question before us is whether EPA’s decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review is, as a general matter, a permissible interpretation of the statute under *Chevron*. We conclude that it is. The text of the BACT provision is far less open-ended than the text of the PSD and Title V permitting triggers. It states that BACT is required “for each pollutant subject to regulation under this chapter” (*i.e.*, the entire Act), § 7475(a)(4), a phrase that — as the D. C. Circuit wrote 35 years ago — “would not seem readily susceptible [of] misinterpretation.” *Alabama Power Co. v. Costle*, 636 F. 2d 323, 404, 204 U.S. App. D.C. 51 (1979). Whereas the dubious breadth of “any air pollutant” in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the BACT provision suggests that the necessary judgment has already been made by Congress. The wider statutory context likewise does not suggest that the BACT provision can bear a narrowing construction: There is no indication that the Act elsewhere uses, or that EPA has interpreted, “each pollutant subject to regulation under this chapter” to mean anything other than what it says.

Even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to convince us that EPA’s interpretation is unreasonable. We are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands EPA (or a state permitting authority) can make of entities already subject to its regulation. And it is not yet clear that EPA’s demands will be of a significantly different character from those traditionally associated with PSD review. In short, the record before us does not establish that the BACT provision as written is incapable of being sensibly applied to greenhouse gases.

We acknowledge the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA’s current approach, nor as a free rein for any future regulatory application of BACT in this distinct context. Our

narrow holding is that nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by “anyway” sources.

However, EPA may require an “anyway” source to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse gases. As noted above, the Tailoring Rule applies BACT only if a source emits greenhouse gases in excess of 75,000 tons per year CO₂e, but the Rule makes clear that EPA did not arrive at that number by identifying the *de minimis* level. See nn. 1, 3, *supra*. EPA may establish an appropriate *de minimis* threshold below which BACT is not required for a source’s greenhouse-gas emissions. We do not hold that 75,000 tons per year CO₂e necessarily exceeds a true *de minimis* level, only that EPA must justify its selection on proper grounds. *Cf. Alabama Power, supra*, at 405.

* * *

To sum up: We hold that EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions. Specifically, the Agency may not treat greenhouse gases as a pollutant for purposes of defining a “major emitting facility” (or a “modification” thereof) in the PSD context or a “major source” in the Title V context. To the extent its regulations purport to do so, they are invalid. EPA may, however, continue to treat greenhouse gases as a “pollutant subject to regulation under this chapter” for purposes of requiring BACT for “anyway” sources.

The judgment of the Court of Appeals is affirmed in part and reversed in part.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and dissenting in part.

[Justice Breyer agreed that the phrase “any air pollutant” need not be read to include greenhouse gases, but offered a more “sensible” way to resolve the practical difficulties the broad reading created for EPA. Instead of what might be termed a pollutant-specific exception, he argued for a source-specific exception. This would mean that EPA could exempt from regulation any source with greenhouse gas emissions sufficiently small that regulation would be absurd or impractical. If the thresholds did not make sense, EPA could ignore them. Justice Breyer did agree that “anyway” sources could be required to meet BACT standards for greenhouse gas emissions.]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

[Justice Alito argued that *Massachusetts v. EPA* was wrongly decided and greenhouse gases categorically are not regulable to Clean Air Act regulation. Beyond that, “. . . trying to fit greenhouse gases into the BACT analysis badly distorts the scheme that Congress adopted.”]

NOTE

RGGI: In 2005, seven states formed the Regional Greenhouse Gas Initiative. (Three additional states joined later, and then New Jersey, by order of Governor Chris Christie, withdrew, bringing current membership to nine: (Connecticut, Delaware, Maine, Massachusetts, Maryland, New Hampshire, New York, Rhode Island, and Vermont). Member states are implementing a cap and trade system which authorizes power plants to buy and sell carbon dioxide allowances through an auction process. Effective in 2014, the nine states agreed to lower the total carbon dioxide cap from 165 million tons to 91 million tons, with annual decreases of 2.5% in succeeding years.

Page 470. Replace Note 1 with the following:

1. **Federal Common Law after AEP.** In Part IV, A, of the opinion, *AEP* makes clear that there remains a federal common law of environmental protection. In that regard, see *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855-56 (9th Cir. 2013):

Post-*Erie*, federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution. *AEP*, 131 S. Ct. at 2535; see also *Illinois v. City of Milwaukee ("Milwaukee I")*, 406 U.S. 91, 103, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law.") (footnote omitted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987) ("[T]he control of interstate pollution is primarily a matter of federal law.").

Thus, federal common law can apply to transboundary pollution suits. Most often, as in this case, those suits are founded on a theory of public nuisance. Under federal common law, a public nuisance is defined as an "unreasonable interference with a right common to the general public." *Restatement (Second) of Torts* 821B(1) (1979). A successful public nuisance claim generally requires proof that a defendant's activity unreasonably interfered with the use or enjoyment of a public right and thereby caused the public-at-large substantial and widespread harm. See *Missouri v. Illinois*, 200 U.S. 496, 521,

26 S. Ct. 268, 50 L. Ed. 572 (1906) (stating that public nuisance actions "should be of serious magnitude, clearly and fully proved"); *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 357 (2d Cir. 2009), rev'd 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011) ("The touchstone of a common law public nuisance action is that the harm is widespread, unreasonably interfering with a right common to the general public.").

Kivalena went on to comment that federal common law can serve as the basis of a claim only when federal statutes provide no answer to the issue at bar: "The salient question is 'whether Congress has provided a sufficient legislative solution to the particular [issue] to warrant a conclusion that [the] legislation has occupied the field to the exclusion of federal common law.'" (Citation omitted). *Id.* at 856.

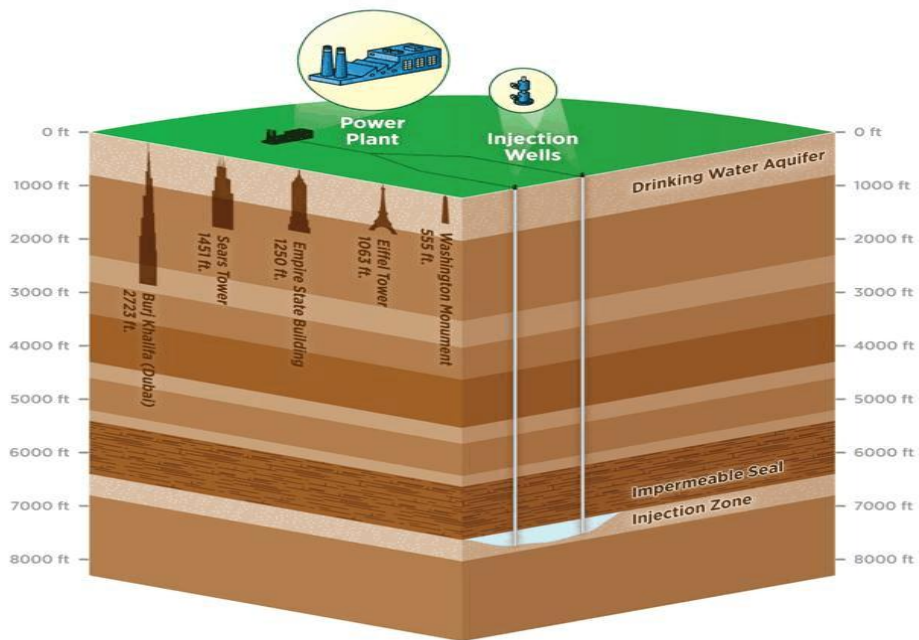
See also, *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d. Cir. 2013).

Page 470. Add at end of Note 3:

The increased availability of natural gas as a combustion fuel, however, has dimmed market prospects for carbon capture technology.

Carbon capture and sequestration involves deep injection into the earth.

Scale:
represent
Source:



5,280 feet
one mile.
U.S.

Environmental Protection Agency

Chapter 10

THE CLEAN WATER ACT

B. Issues of Applicability

Page 483. Replace the first sentence of Note 1 with the following:

It is clear that there can be no “discharge” of a pollutant if the flow of water is left untouched and undisturbed. *See, e.g. Los Angeles County Flood Control Dist. v. NRDC, Inc.*, 133 S. Ct. 710, 713 (U.S. 2013):

“ . . . no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another. We hold, therefore, that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA. . . .

The more difficult question, and the one posed and left unresolved in both *Miccosukee* and *Los Angeles County*, is how to treat not mere movement of water, but removal and return of water. In that circumstance, the issue is often whether the location of return is the same “water of the United States” as the location of removal. Lower courts have largely rejected EPA’s view on this matter.

Page 495. Add to Note 2:

Also exempt from CWA § 402 regulation are most stormwater discharges, including agricultural stormwater discharges. § 402(p), 33 U.S.C. § 1342(p). Those associated with “industrial activity”, however, remain regulated, as do discharges from municipal storm sewers that serve populations of 100,000 or more. §§ 402(p)(2)(B)-(D), 33 U.S.C. §§ 1342(p)(2)(B)-(D). The most common pollutants carried by municipal stormwater are sediments, pathogens, nutrients, and metals.

What constitutes “industrial activity” is undefined in the CWA, but EPA defined the term in its “Industrial Stormwater Rule” to include discharges resulting from “manufacturing, processing or raw material storage at an industrial plant . . .” 40 CFR § 122.26(b)(14) (2006). Recently, the question arose whether discharges from roads used in logging operations also qualify as “industrial.” EPA amended its Industrial Stormwater Rule to answer the question in the affirmative, but only if the logging activity involved “rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities . . .” 77 Fed. Reg. 72974, pt. 122, subpt. B (2012). *See, e.g. Decker v. Northwest Environmental Defense Center*, 568 U.S. ___, 133 S.Ct 1326 (U.S. 2013).

Note that even industrial and municipal stormwater discharges are free from § 402 regulation if they never take the form of a “discernable, defined and discrete conveyance” so to qualify as a point source. Stormwater discharges can often be regulated as nonpoint discharges. *See, infra*.

C. Point Source Regulation

4. The National Pollutant Discharge Elimination System

Page 546. Add new Note 1 and renumber existing notes accordingly:

1. ***Circuit Split:*** The Eleventh Circuit has disagreed with *Atlantic States* that state law-based conditions in NPDES permit are unenforceable in CWA § 505 citizen suit actions. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004). A District Court in the Fourth Circuit also rejected *Atlantic States* in this regard, on the theory that EPA regulations incorporate state standards into NPDES permits. *Ohio Valley Env'tl. Coalition, Inc. v. Fola Coal Co.*, 2013 U. S. District LEXIS 178319 (S.D. W. Va. 2013); 40 C.F.R. 122.4(d).

Page 551. Add new heading and new Note 1 and designate as number 2 the existing Note on Water Quality Trading:

NOTES

1. ***Continuing Planning Process.*** As noted above, nonpoint source regulation is largely left for states to accomplish through use of a CWA § 303(e) “continuing planning process” (“CPP”). CPPs include TMDLs for pollutants, effluent limitations and standards, revision procedures, and adequate implementation measures including schedules for compliance. *Id.* at § 303(e)(3), 33 U.S.C. § 1313(e)(3).

While EPA can step in to establish water quality standards and TMDLs, *see* § 303(c) and (d), 33 U.S.C. § § 1313(c) and (d), it may not step in to establish a CPP for a state. That, rather, is exclusively for states to do. In the main, therefore, EPA’s role in implementation is limited to its authorities over point sources under § 402, and otherwise by encouraging states to clean up nonpoint pollution by providing or withholding grant monies. Does this make sense? According to one court, among others, it does: “It is logical for states to retain control over implementation of non-point pollution regulation because non-point pollution control measures often involve local land use and zoning decisions, activities which are generally within the well-protected province of state and local government.” *American Farm Bureau Federation v. EPA*, 2013 U.S. Dist. LEXIS 131075, [64] (M.D. Pa. 2013).

E. Section 404

Page 572. Add at end of existing Note (which begins on page 571):

In June, 2014, the agencies proposed a new rule to define “waters of the United States.” 79 FR 22188 (proposed amendment to 33 C.F.R. § 328.3). The new rule, which would endeavor to facilitate categorical rather than case-by-case determinations of “jurisdictional waters,” relies on the significant nexus approach. As the preamble explains, “The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw.” *Id.* at 22189. In addition to defining “waters of the United States,” the rule would expressly declare that water treatment systems, prior converted cropland, certain ditches, groundwater and other such physical phenomena are *not* “waters of the United States.” The text of the proposed rule may be found at 79 FR 22262 *et seq.*

Page 576. Add at end of Note 4:

What constitutes “bringing an area of the navigable waters into a use to which it was not previously subject”? Additional logging of a previously logged area of land can qualify as a new use and, therefore, be recaptured. In *United States v. Huseby*, 862 F. Supp. 2d 951 (D.C. Minn., 2012), a logger clear-cut land and prepared it for replanting with red pine trees, a species of tree not previously in place on the property. The court held that “[T]ransforming the site into a red pine plantation . . . would be bringing the site into a new use. . . . Red pine is a non-wetland tree species and is absent from the hardwood swamps, conifer swamps, and alder thickets that were found on the wetlands of the site . . .” prior to the logging activities. *Id.* at 964.

Chapter 12

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

B. Personal Liability

2. Defenses

Page 663. Add after first line of type at top of page:

In May, 2014, the Second Circuit Court of Appeals affirmed a District Court's holding that the September 11, 2001, attacks on the World Trade Center were acts of war:

“ . . . CERCLA was not intended to create liability for the dispersal of debris and wreckage from a catastrophe that was indistinguishable from military attack in purpose, scale, means, and effect. Both the President and Congress responded to the September 11 attacks by labeling them acts of war, and this classification warrants notice, and perhaps some deference, in the CERCLA context. The decisive point is that the attacks directly and immediately caused the release, and were the "sole cause" of the release because the attacks "overwhelm[ed] and swamp[ed] the contributions of the defendant[s]." (quoting *In re September 11 Litigation*, 931 F. Supp. 2d 496, 512 (S.D.N.Y. 2013) (in turn quoting William H. Rodgers, Jr., *Environmental Law: Hazardous Wastes and Substances* § 8.13 (1992)).

Cedar and Washington Associates, LLC v. Port Authority of New York and New Jersey et al., 2014 U.S. App. LEXIS 8293 (2d Cir. 2014).

C. Issues of Liability and Damages

Page 673. Add new Note 4:

4. Consent Decrees. As noted above, a contribution action is available to a PRP who “has resolved its liability to the United States or a State for some or all of a response action . . .” § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B). What does this mean when a person is conducting a clean-up pursuant to a consent decree with the federal government? By one account, resolution of liability occurs only upon release from the decree. *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2012). Other courts consider liability to be resolved upon entering into the settlement agreement (which is EPA's view). See, e.g., *Niagara Mohawk Power Corp. v. Chevron, U.S.A., Inc.*, 596 F.3d 112 (2d Cir 2010).

Another issue has arisen with respect to consent decrees issued by states. As § 113(f)(3)(B) expressly provides, resolution of liability *with a State* can operate to

allow a plaintiff to bring a contribution action. But the language of the section stipulates that resolutions of liability must be “for some or all of a response action . . .” On the theory that response actions are CERCLA actions, some courts require a state consent decree to remove CERCLA liability, not just liability under state law, to allow the contribution action. *See, e.g. W.R. Grace & CO.-Conn. v. Zotos, Int’l, Inc.*, 559 F.3d 85 (2d Cir. 2009). Others disagree. *See, e.g., Trinity Industries, Inc. v. Chicago Bridge and Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) (“ . . . § 113(f)(3)(B) does not require resolution of CERCLA liability in particular. The statutory language of § 113(f)(3)(B) requires only the existence of a settlement resolving liability to the United States or a state “for some or all of a response action.” Section 113(f)(3)(B) does not state that the “response action” in question must have been initiated pursuant to CERCLA — a requirement that might easily have been written into the provision.”)

Page 685. Add new Note 9.

9. Update: As of September 30, 2013, over the history of the program, EPA had spent \$22.4 billion for clean-ups of NPL sites. PRPs have spent about \$32.2 billion. Federal appropriations for remedial actions have declined from about \$605 million for FY 2011 to about \$465 million for FY 2014. As a result, there were no federally funded construction starts in 2012 and only a small number in 2013. There have been more than 1700 proposed, final, and deleted NPL sites, of which about two-thirds have all construction completed. In the last ten years, the number of sites added to the NPL has averaged about 17 annually.

The average duration of RD/RA (remedial design and remedial action) negotiations from 2004-2009 was 449 days, up from 197 in the early nineties.

Source: EPA

EPA also has implemented a “Superfund Alternative Approach” (“SAA”). If a NPL-quality site has not been listed on the NPL and needs remedial action, and at least one eligible PRP signs an agreement with EPA, an administrative order can issue for the investigatory phase and a judicial consent decree for the clean-up. The PRP then undertakes the remediation in accordance with the decree. While there are about 50 such SAA agreements in place, very few new ones have been initiated in the last 5 years. *See, e.g., www2.epa.gov/oecaerth/cleanup/superfund/saa.html.*