CASES AND MATERIALS ON

ENVIRONMENTAL LAW

2019-20 Supplement

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A. RISK-BASED APPROACHES

Page 54, insert the following after Note 4:

5. At the beginning of the Trump Administration, EPA Administrator Scott Pruitt proposed a new cross-cutting “transparency in science” initiative that would restrict the data and models that EPA may rely upon in its rulemakings. The rule was formally proposed by EPA Administrator Andrew Wheeler in April 2018. See Strengthening Transparency in Regulatory Science (83 FR 18768, April 30, 2018). In March 2020, EPA released a supplemental notice on the 2018 proposal. See Supplemental Notice of Proposed Rulemaking—Strengthening Transparency in Regulatory Science (85 FR 15396, Mar. 18, 2020). The proposal is substantially similar to the legislative changes that would be enacted through the HONEST Act, a bill introduced many times in Congress but never enacted. See https://www.congress.gov/bill/115th-congress/house-bill/1430. According to EPA, the rule is permissible under the Agency’s general “housekeeping authority” because it is intended to govern “internal agency procedures.” Numerous scientists, scientific organizations, public health and environmental groups, and even some industry groups have argued that the rule would have far-reaching, substantive impacts across virtually all of EPA’s major regulatory programs. Among other things, the proposal would greatly restrict EPA’s ability to rely upon public health studies for which the underlying data and models are not “publicly available.” This could have the effect of precluding from consideration significant public health studies that are based on confidential medical information, including, for example, the famous Six Cities Study that documented the increased premature mortality associated with exposure to fine particulates (PM 2.5) that has been a driver of significant air pollution regulations over the last two decades. See Douglas Dockery et al., An Association between Air Pollution and Mortality in Six U.S. Cities, 329 New Eng. J. Med. 1753 (1993). Critics have also argued that the proposal would conflict with the APA as well as EPA’s substantive and procedural mandates under various environmental statutes, where those statutes require decisionmaking to be based on scientific criteria and based on evidence presented to the agency.
B. ECONOMIC APPROACHES

Page 87, insert the following after Note 3 (and relabel existing Note 4 as Note 5):

4. The Trump Administration and other conservative and industry critics have challenged EPA’s longstanding inclusion of co-benefits in various cost-benefit analyses, particularly in the context of air pollution regulations. As discussed in Chapter 6, infra, this has been a major issue in the Mercury and Air Toxics Standards (MATS) under the Clean Air Act, where the co-benefits from reduced PM2.5 pollution were significantly larger than the direct benefits of reducing mercury emissions from power plants. In May 2020, the EPA issued a final rule on the revisions to the MATS rule that precludes consideration of co-benefits in making the “appropriate and necessary” determination required under the statute. See National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review (85 FR 31286 May 22, 2020). In June 2018, the EPA issued an Advance Notice of Proposed Rulemaking, Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process (83 FR 27524, June 13, 2018), to solicit public input on potential approaches for conducting cost-benefit analysis in the rulemaking process. Based on the comments received, the EPA Administrator issued a memorandum to EPA’s Assistant Administrators in May 2020 announcing the intention to propose statute-specific rules outlining how consistency and transparency concepts will be implemented in future rulemakings. In June 2020, EPA proposed its first statute-specific rulemaking on cost-benefit analysis under the Clean Air Act. See Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process (85 FR 35612, June 11, 2020). The goal is to codify a set of best practices for preparing cost-benefit analyses for all future significant proposed and final regulations under the Clean Air Act. As proposed, the new rule calls for a reporting of total costs, benefits, and net benefits as well as a separate reporting of the public health and welfare benefits that are specific to the objective of the CAA provision under which the rule is promulgated.

C. EQUITY-BASED APPROACHES

2. THE LEGAL IMPLEMENTATION OF ENVIRONMENTAL JUSTICE

Page 111, insert the following before the heading:

The Black Lives Matter protests during the spring and summer of 2020 across the United States and around the world have focused attention on structural inequality and systemic racism, including the substantial environmental pollution and public health burdens that disproportionately
affect frontline communities. Black people in the United States continue to suffer from significantly higher exposure to air and water pollution, toxics, and hazardous waste, all of which has been further compounded by Covid-19, which is killing black people at much higher rates than white people. In the wake of the protests, several major U.S. environmental groups have signaled a new commitment to environmental justice, but for many frontline communities the proof will be in the actions that they take. For its part, the Trump EPA continues to dismantle previous commitments to environmental justice within the Agency, while also pursuing various efforts to roll back and weaken major pollution regulations that will disproportionately harm black communities and other communities of color.
CHAPTER 3

ENDANGERED SPECIES

B. LISTING: SECTION 4

1. LISTING ENDANGERED AND THREATENED SPECIES

Page 154. Insert at the end of Note 1:

In 2019, the Trump Administration issued new regulations on listing. The regulations address the time span that the agency must consider in determining a species’ status as endangered or threatened:

The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species’ lifehistory characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

§ 424.11(d), 85 Fed. Reg. 45052 (Aug. 27, 2019). This was a particularly controversial issue during the comment period. Do you read this language as changing the approach adopted in In re Polar Bear Listing?

Page 154. Delete the second paragraph of note 6 and replace it with the following:

A 2005 FWS regulation gave threatened species the same protections under § 9 as endangered species, unless otherwise noted in the listing decision. A 2019 regulation issued by the Trump Administration eliminated this default assumption. 84 Fed. Reg. 44754 (Aug. 27, 2019). Thus, the § 9 protections for threatened species will in the future be determined on a case-by-case basis as they are listed.

Page 162. Add the following before the heading:

The final version of the rule was somewhat modified. It replaces “probable” with the statutory term, “likely.” It also emphasizes that the agency will determine the foreseeable future “on a case-by-case basis, using the best available data and taking into account considerations such as the species’ lifehistory characteristics, threat-projection timeframes, and
environmental variability.” Finally, the final rule makes it clear that the Service does not need to designate a specific period of time as the foreseeable future: the question is whether it can conclude that a foreseeable threat will likely place the species in jeopardy.

2. CRITICAL HABITAT

Page 169. Add the following before the heading:

4. The final version of the rule provides that in addition to the possibility that designation of critical habitat could lead to human actions threatening the species, the following are grounds for declining to designate critical habitat:

   (ii) The present or threatened destruction, modification, or curtailment of a species’ habitat or range is not a threat to the species, or threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

   (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

   (iv) No areas meet the definition of critical habitat; or

   (v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.


Insert at the end of p. 171:

One particularly controversial area has been the designation of areas not currently occupied by the species as critical habitat. That issue is addressed in the following case.

**WEYERHAEUSER CO. v. U.S. FISH & WILDLIFE SERV.**

Supreme Court of the United States, 2018

— U.S. — , 139 S. Ct. 361, — L.Ed.2d —

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Endangered Species Act directs the Secretary of the Interior, upon listing a species as endangered, to also designate the “critical habitat” of the species. A group of landowners whose property was designated as critical habitat for an endangered frog challenged the designation. The landowners urge that their land cannot be critical habitat because it is not habitat, which they contend refers only to areas where the frog could
currently survive. The court below ruled that the Act imposed no such limitation on the scope of critical habitat.

The Act also authorizes the Secretary to exclude an area that would otherwise be included as critical habitat, if the benefits of exclusion outweigh the benefits of designation. The landowners challenged the decision of the Secretary not to exclude their property, but the court below held that the Secretary’s action was not subject to judicial review.

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The amphibian Rana sevosa is popularly known as the “dusky gopher frog”—“dusky” because of its dark coloring and “gopher” because it lives underground. The dusky gopher frog is about three inches long, with a large head, plump body, and short legs. Warts dot its back, and dark spots cover its entire body. It is noted for covering its eyes with its front legs when it feels threatened, peeking out periodically until danger passes. Less endearingly, it also secretes a bitter, milky substance to deter would-be diners.

The frog spends most of its time in burrows and stump holes located in upland longleaf pine forests. In such forests, frequent fires help maintain an open canopy, which in turn allows vegetation to grow on the forest floor. The vegetation supports the small insects that the frog eats and provides a place for the frog’s eggs to attach when it breeds. The frog breeds in “ephemeral” ponds that are dry for part of the year. Such ponds are safe for tadpoles because predatory fish cannot live in them.

The dusky gopher frog once lived throughout coastal Alabama, Louisiana, and Mississippi, in the longleaf pine forests that used to cover the southeast. But more than 98% of those forests have been removed to make way for urban development, agriculture, and timber plantations. The timber plantations consist of fast-growing loblolly pines planted as close together as possible, resulting in a closed-canopy forest inhospitable to the frog. The near eradication of the frog’s habitat sent the species into severe decline. By 2001, the known wild population of the dusky gopher frog had dwindled to a group of 100 at a single pond in southern Mississippi. That year, the Fish and Wildlife Service, which administers the Endangered Species Act of 1973 on behalf of the Secretary of the Interior, listed the dusky gopher frog as an endangered species. ***

A critical-habitat designation does not directly limit the rights of private landowners. It instead places conditions on the Federal Government’s authority to effect any physical changes to the designated area, whether through activities of its own or by facilitating private development. Section 7 of the ESA requires all federal agencies to consult with the Secretary to “[e]nsure that any action authorized, funded, or carried out by such agency” is not likely to adversely affect a listed species'
critical habitat. If the Secretary determines that an agency action, such as issuing a permit, would harm critical habitat, then the agency must terminate the action, implement an alternative proposed by the Secretary, or seek an exemption from the Cabinet-level Endangered Species Committee.

Due to resource constraints, the Service did not designate the frog’s critical habitat in 2001, when it listed the frog as endangered.*** In 2010, in response to litigation by the Center for Biological Diversity, the Service published a proposed critical-habitat designation. The Service proposed to designate as occupied critical habitat all four areas with existing dusky gopher frog populations. The Service found that each of those areas possessed the three features that the Service considered “essential to the conservation” of the frog and that required special protection: ephemeral ponds; upland open-canopy forest containing the holes and burrows in which the frog could live; and open-canopy forest connecting the two. But the Service also determined that designating only those four sites would not adequately ensure the frog’s conservation. Because the existing dusky gopher frog populations were all located in two adjacent counties on the Gulf Coast of Mississippi, local events such as extreme weather or an outbreak of an infectious disease could jeopardize the entire species.

To protect against that risk, the Service proposed to designate as unoccupied critical habitat a 1,544-acre site in St. Tammany Parish, Louisiana. The site, dubbed “Unit 1” by the Service, had been home to the last known population of dusky gopher frogs outside of Mississippi. The frog had not been seen in Unit 1 since 1965, and a closed-canopy timber plantation occupied much of the site. But the Service found that the site retained five ephemeral ponds “of remarkable quality,” and determined that an open-canopy forest could be restored on the surrounding uplands “with reasonable effort.” Although the uplands in Unit 1 lacked the open-canopy forests (and, of course, the frogs) necessary for designation as occupied critical habitat, the Service concluded that the site met the statutory definition of unoccupied critical habitat because its rare, high-quality breeding ponds and its distance from existing frog populations made it essential for the conservation of the species.

After issuing its proposal, the Service commissioned a report on the probable economic impact of designating each area, including Unit 1, as critical habitat for the dusky gopher frog. Petitioner Weyerhaeuser Company, a timber company, owns part of Unit 1 and leases the remainder from a group of family landowners. While the critical-habitat designation has no direct effect on the timber operations, St. Tammany Parish is a fast-growing part of the New Orleans metropolitan area, and the landowners have already invested in plans to more profitably develop the site. The report recognized that anyone developing the area may need to obtain
Clean Water Act permits from the Army Corps of Engineers before filling any wetlands on Unit 1. Because Unit 1 is designated as critical habitat, Section 7 of the ESA would require the Corps to consult with the Service before issuing any permits.

According to the report, that consultation process could result in one of three outcomes. First, it could turn out that the wetlands in Unit 1 are not subject to the Clean Water Act permitting requirements, in which case the landowners could proceed with their plans unimpeded. Second, the Service could ask the Corps not to issue permits to the landowners to fill some of the wetlands on the site, in effect prohibiting development on 60% of Unit 1. The report estimated that this would deprive the owners of $20.4 million in development value. Third, by asking the Corps to deny even more of the permit requests, the Service could bar all development of Unit 1, costing the owners $33.9 million. The Service concluded that those potential costs were not “disproportionate” to the conservation benefits of designation. “Consequently,” the Service announced, it would not “exercis[e][its] discretion to exclude” Unit 1 from the dusky gopher frog’s critical habitat. * * *

* * *

The Center for Biological Diversity contends that the statutory definition of critical habitat is complete in itself and does not require any independent inquiry into the meaning of the term “habitat,” which the statute leaves undefined. But the statutory definition of “critical habitat” tells us what makes habitat “critical,” not what makes it “habitat.” Under the statutory definition, critical habitat comprises areas occupied by the species “on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection,” as well as unoccupied areas that the Secretary determines to be “essential for the conservation of the species.” That is no baseline definition of habitat—it identifies only certain areas that are indispensable to the conservation of the endangered species. The definition allows the Secretary to identify the subset of habitat that is critical, but leaves the larger category of habitat undefined.

The Service does not now dispute that critical habitat must be habitat, although it made no such concession below. Instead, the Service argues that habitat includes areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species. Weyerhaeuser, for its part, urges that habitat cannot include areas where the species could not currently survive. (Habitat can, of course, include areas where the species does not currently live, given that the statute defines critical habitat to include unoccupied areas.) The Service in turn disputes Weyerhaeuser’s premise that the administrative record shows that the frog could not survive in Unit 1.
The Court of Appeals concluded that “critical habitat” designations under the statute were not limited to areas that qualified as habitat. The court therefore had no occasion to interpret the term “habitat” in Section 4(a)(3)(A)(i) or to assess the Service’s administrative findings regarding Unit 1. Accordingly, we vacate the judgment below and remand to the Court of Appeals to consider these questions in the first instance. [The Court also held that the Service’s refusal to exclude the lands in question from critical habitat under § 4(b)(2) was subject to judicial review, and remanded on that question as well. Section 4(b)(2) allows land to be excluded if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.”]

NOTES

1. Recall that the statute defines critical habitat to include “specific areas outside the geographical area occupied by the species at the time it was listed . . . , upon a determination by the Secretary that such areas are essential for the conservation of the species.” Does the requirement that land be “habitat” add anything? Note that, as the statute is written, the Secretary can include occupied areas only when they contain physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” Are these requirements for land to be considered habitat? Or do these go only to whether land is essential, and not to whether it is habitat?

2. The Trump Administration addressed the issue of unoccupied habitat in its 2019 revision of the ESA regulations. The new provision reads as follows:

The Secretary will designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species.

In addition to this requirement, the agency must make two additional findings in order to designate unoccupied habitat:

In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

§ 424.12(b)(2), 84 Fed. Reg. 85053 (Aug. 27, 2019). According to the Service, the two additional findings were added in response to Weyerhaeuser.
Does the Unit 1 land in the *Weyerhaeuser* case qualify as critical habitat under this definition?

C. CONSULTATION: SECTION 7

Page 172. Delete the final paragraph and replace it with the following:

The Trump Administration adopted changes in the regulations governing the consultation process. The new regulations encourage the use of consultation about programs rather than specific proposed actions, and limit the requirement of reconsultation when a new species is listed in an area covered by an existing land management plan. 84 Fed. Reg. 44976 (2019).

One concern about the amendments relates to the causation requirement. The prior regulation made it clear that the agency should consider the direct, indirect, and cumulative effects of its action on the endangered species. The new regulation eliminates these terms. Instead, it defines effects to include all “consequences,” and then defines consequences to be an event that “is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.” Commentators on the proposed change were concerned that the language narrowed the definition of effects and raised the burden of proof to show harm to the species. The agency insisted, however, that the changes were merely clarifications of existing language. Presumably, then, the agency did not intend to modify existing caselaw on the subject.

Page 177. Delete the top paragraph on the page, because the *Weyerhaeuser* case is now excerpted above.

Page 178. Insert at the end of note 5:

The 2019 regulation adopted by the Trump Administration appears to change the definition of when an action adversely modifies critical habitat. 84 Fed. Reg. 44976 (2019). The regulation provides that “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” § 402.02. This language may open the door to piecemeal destruction of critical habitat so long as no individual action qualifies as causing appreciable harm to the “habitat as a whole.” This could be a particular problem where the critical habitat is large. Would a single logging lease be enough to “appreciable harm” the entire area designed as critical for the Spotted Owl?
F. RECOVERY OF LISTED SPECIES: SECTION 4(F)

Page 200. Add at the end of note 3:

In a later round of the litigation, the Ninth Circuit again faulted the decision to delist the Yellowstone grizzly. In the court’s view, the FWS had not adequately taken into account the risk that the grizzlies might suffer from a lack of genetic diversity if cut off from the remnant populations outside of Yellowstone. As the court, explained, “because there are no concrete, enforceable mechanisms in place to ensure long-term genetic health of the Yellowstone grizzly, the district court correctly concluded that the 2017 Rule is arbitrary and capricious in that regard.” *Crow Indian Tribe v. United States*, — F.3d— , 2020 WL 3831636 (9th Cir. 2020).
NOTE ON OTHER CONSTITUTIONAL RESTRICTIONS ON STATES

Although less frequently invoked in environmental cases than the dormant commerce clause, there are two other constitutional restrictions that sometimes crop up. The first is known as implied foreign affairs preemption. The other restriction is based on the Compact Clause of the Constitution.

Foreign Affairs Preemption. Like the extraterritoriality doctrine, foreign affairs preemption is not based on any explicit constitutional prohibition on state laws. Also like extraterritoriality, it rests in part on the view that states are properly concerned only with matters within their borders. Rather than being concerned about a state intruding on the affairs of another state, however, foreign affairs preemption is based on a concern that the state may interfere with the federal government’s authority over relationships with foreign nations.

In the past two decades, the Supreme Court has issued several opinions dealing directly with implied restrictions on state regulatory authority affecting foreign affairs. The first case was Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000). Massachusetts passed a law requiring state and local governments to boycott companies that were themselves doing business with Burma (now Myanmar). The Court concluded that the state law interfered with a federal law that gave the President discretion over economic sanctions against Burma. Three years later, the Court returned to the preemption issue in American Insurance Ass’n v. Garamendi, 539 U.S. 396 (2003). California had passed legislation dealing with property confiscated by the Nazis or dishonored by insurers after World War II. Years later, the U.S. government entered into negotiations to try to resolve remaining disputes about the policies. The Court held that California unduly interfered with the President’s approach to negotiations. The import of these cases remains unclear. So far, courts have not found state climate legislation preempted by the federal government’s foreign affairs powers.
The Compact Clause. When states try to pursue their policy goals through cooperation with foreign governments, they may encounter additional constitutional problems. The Constitution forbids states from entering into treaties with foreign governments. In addition, the compact clause provides that no state can enter into an “Agreement or Compact with another State, or with a foreign Power” without the approval of Congress. The Supreme Court has made it clear, however, that the term Agreement does not include all cooperative arrangements. The Supreme Court cases involve alleged cooperation with other states rather than foreign governments. In general, the Court has upheld cooperative schemes when states are not legally bound to implement the scheme and where the scheme does not transfer regulatory authority to an interstate body.

For instance, in Northeast Bancorp, Inc. v. Bd. of Governors of the Federal Res. Sys., 472 U.S. 159 (1985), the Court found that no compact existed despite deliberately parallel state laws and informal agreements between state officers regarding acquisition of local banks by out-of-state banks. Although the parallel state laws were adopted by state governments in concert, the Court found other circumstances more important: that no joint regulatory body was established, the statutes were not conditional on each other, and states were not legally bound. The Court held that that the statutes did not “either enhance the political power of the New England States at the expense of other States or have an ‘impact on our federal structure.’ ”

Challenges to Cross-Border Emissions Trading. East Coast states have created a multi-state carbon trading system covering electricity generators. Does this system violate the Compact Clause? The answer seems to be no. The states are free to leave the trading system at any time, and this has actually occurred. They did not transfer any of their regulatory authority to an interstate body. Thus, the arrangement seems to comply with the Supreme Court’s guidelines.

California’s carbon trading scheme was originally intended to link with other western states. Due to political changes, that linkage has not taken place. In the meantime, however, California has linked its scheme with the Canadian province of Quebec. The Trump Administration filed a lawsuit challenging this linkage. The district court rejected the argument that the linkage violated the Compact Clause. The court found that all of the traditional features of a compact were missing: “1) provisions that required reciprocal action for the agreement’s effectiveness; (2) a regional limitation; (3) a joint organization or body for regulatory purposes; and (4) a prohibition on the agreement’s unilateral modification or termination.” United States v. California, No. 219CV02142WBSEFB, 2020 WL 1182663, at *10 (E.D. Cal. Mar. 12, 2020).

A July 17 opinion in the same case also rejected the federal government’s argument based on foreign affairs preemption. The court ruled that the linkage did not conflict with a 1987 appropriations bill funding some federal efforts to deal with climate change. Nor did it conflict with President Trump’s withdrawal from the Paris Agreement. Finally, there was no evidence that the
agreement interfered with President Trump’s efforts to obtain a better deal than the Paris Agreement — perhaps, though the court was too tactful to say so, because no such efforts existed. The court’s opinion on foreign affairs preemption can be found at:

D. STATUTORY PREEMPTION OF STATE LAW

Page 260. Insert at the end of note 5:

6. When faced with a threat of federal preemption of its carbon emission standards for new vehicles, California adopted a novel approach to reducing emissions. The state reached an agreement with the four major carmakers who wished to avoid the uncertainty of prolonged litigation:

The compromise between the California Air Resources Board and Ford, Honda, Volkswagen and BMW of North America came after weeks of secret negotiations and could shape future U.S. vehicle production, even as White House officials aim to relax gas-mileage standards for the nation’s cars, pickups and SUVs. ***

Under the new accord, the four companies, which represent about 30 percent of the U.S. auto market, have agreed to produce fleets averaging nearly 50 mpg by model year 2026. That is one year later than the target set under the Obama administration, which said that requiring vehicles to be more fuel-efficient would improve public health, combat climate change and save consumers money at the gas pump without compromising safety. ***

As part of the new deal, California pledged to certify vehicles from the four automakers and provide the companies additional flexibility in meeting each year’s emissions goal: They will improve their fleet’s average efficiency by 3.7 percent a year, as opposed to 4.7 percent dictated under the Obama-era rules.

Juliet Eilperin and Brady Dennis, “Major Automakers Strike Climate Deal with California, Rebuffing Trump on Proposed Mileage Freeze,” Wash. Post (July 25, 2019). The Trump Administration threatened an antitrust investigation into the agreement, which was later dropped.

E. REGULATION AND PROPERTY RIGHTS

2. THE PUBLIC TRUST DOCTRINE

Page 288. Insert before the final paragraph on the page:
A panel of the Ninth Circuit rejected the lawsuits on standing grounds. The majority expressed considerable sympathy, however, for the merits of the plaintiffs’ claims. In the majority’s view,

The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. We reluctantly conclude, however, that the plaintiffs’ case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

The dissenter would have ruled in favor the plaintiffs, citing the urgent threat posed by the climate crisis to Americans. *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).
CHAPTER 5

JUDICIAL REVIEW AND ADMINISTRATIVE PROCESS

B. STANDING

1. INJURY-IN-FACT

Page 325. Insert the following before Summers:

In Juliana v. United States, 947 F.3d 1159 (2020), a group of young people sued the federal government, arguing that the government had violated the public trust doctrine and their right to substantive due process by encouraging higher carbon emissions. The Ninth Circuit held that they had satisfied the first two elements of standing. In terms of injury-in-fact, the injuries were sufficiently particularized. One plaintiff, for instance, “alleged she was forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation.” The court also found that the plaintiffs had satisfied the causation element of standing:

The plaintiffs’ alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%. And, the plaintiffs’ evidence shows that federal subsidies and leases have increased those emissions. About 25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government.

Moreover, the plaintiffs were not challenging a few isolated government actions. Instead, they challenged “a host of federal policies, from subsidies to drilling permits, spanning ‘over 50 years,’ and direct actions by the government,” creating “a genuine factual dispute as to whether those policies were a ‘substantial factor’ in causing the plaintiffs’ injuries.” The plaintiffs had failed, however, to show that their injury was redressable by a court. Their effort to force a general overhaul of government policies, the court said, intruded too deeply on the prerogatives of Congress and the executive branch.
C. LEGAL BASES FOR CHALLENGING AGENCY ACTION

1. CONSTITUTIONAL CHALLENGES

Page 341. Add the following before the heading:

NOTE ON THE POSSIBLE REVIVAL OF THE NONDELEGATION DOCTRINE

A 2019 decision indicated that at least four Justices were considering adoption of a much more robust version of the non-delegation doctrine, which could have major consequences for environmental law. Gundy v. United States, 139 S. Ct. 2116 (2019), involved a fairly obscure statute regulating sex offenders, but some have seen it as a harbinger of the destruction of the modern administrative state. The statute establishes a national system for registering sex offenders. Congress was apparently unsure about whether to require registration for sex offenders who were convicted before the law was passed and left that decision to the Attorney General. The statute does not specify what standard the Attorney General should use in making that decision.

In a 4-1-3 split, the Court rejected his argument that the law gave the Attorney General too much discretion in deciding whether to require people like him to register. Justice Kavanaugh did not participate in the case. Four of the Justices joined in an opinion by Justice Elena Kagan upholding the statute under the intelligible principle test. The plurality opinion interpreted the law to require inclusion of pre-Act offenders to the extent feasible, and found this to be an intelligible principle, but the other four Justices expressed an interest in using a stricter constitutional standard.

Justice Alito voted to uphold the statute but said he was open to reconsidering the intelligible principle standard in a case if there was a majority on the Court for changing it. Writing for himself, Chief Justice Roberts, and Justice Thomas, Justice Neil Gorsuch called for a dramatic rethinking of the Court’s approach to regulatory statutes.

Justice Gorsuch began by noting that different Attorneys General had taken very different approaches to the statute. He viewed the statute as leaving the treatment of pre-enactment offenders completely at the will of the Attorney General. He decried the statute for investing the Attorney General with the power to make “unbounded policy choices” with “profound consequences for the people they affect.” Gorsuch characterized the “intelligible principle” standard as a New Deal-era innovation that opened the door to wide-open delegations. He called for a return to earlier legal doctrine.

Gorsuch identified several circumstances in which Congress can delegate authority to agencies. First, when Congress has “made the policy decisions,” it may leave it to an agency to “fill in the details.” Second, once Congress has made the policy decisions, it can delegate fact-finding to the executive branch. For instance, it could make a trade embargo contingent on a presidential
finding about whether a country had stopped interfering with American shipping. In another part of the opinion, he added that Congress has to set the criteria and facts that the agency could consider. Third, Congress can broadly delegate authority in areas where the President has his own inherent authority, such as foreign affairs or national security.

How would Justice Gorsuch’s test apply in other cases? Consider the national air quality standards that were upheld by Justice Scalia. On the one hand, the level of the air quality standards is a highly consequential decision, not easily described as a “detail.” Many other parts of the Clean Air Act regulating industry are keyed to achieving these air quality standards. Much of what EPA does could be considered fact-finding regarding public health risks, but there are also judgment calls about when a risk is too uncertain or too minor. The statute involves a policy decision about how ample the margin of safety should be. The statute does limit EPA to considering a single factor, health risks. And it does make what is probably the crucial policy judgment, that risks to public health must be avoided without regard to cost. On the other hand, the federal courts have found it possible to engage in meaningful judicial review, satisfying the concern that courts and the public be able to decide whether the boundaries of the law were crossed.

Apart from the merits of Gorsuch’s position, there’s the question of whether it will command a majority on the Supreme Court. Justice Kavanaugh did not participate in the sex offender case. In connection with a later case, he provided his own interpretation of Gorsuch’s approach. Kavanaugh pointed to a statutory interpretation rule called the major questions doctrine. As he explained, that doctrine involves the question of how to interpret agency regulations involving “a major policy question of great economic and political importance.” In that situation, the Supreme Court has said that Congress either has to explicitly decide the question itself or specifically give the agency the power to decide it. Otherwise, the law will not be interpreted to allow agency regulation on the subject. For example, when the FDA first decided to regulate cigarettes, the Court refused to defer to EPA’s interpretation of its statutory power to do so because of the importance of the issue. Kavanaugh read Gorsuch’s opinion as in effect eliminating the second option, so that Congress would have to “expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce.” That’s what eventually happened in the cigarette case after Congress amended the law to give the FDA power to act.

One problem with Kavanaugh’s formulation is that the Court has found it very difficult to agree in statutory interpretation cases on what constitutes a “major question.” But it’s not completely clear whether Kavanaugh was ready to make a major change in delegation doctrine anyway. In the end, he equivocated, saying only that Gorsuch’s scholarly and thoughtful opinion “raised important points that may warrant further consideration in future cases.” Kavanaugh made the statement in the context of the Court’s decision not to hear a case. Those decisions aren’t considered precedents, so Justices generally feel no need to speak. The fact that he took the occasion to discuss
Gorsuch’s opinion at all, when he could just as easily have remained silent, was widely interpreted as siding with Gorsuch’s approach. But perhaps that is reading too much into it. Only time will tell whether Gorsuch’s opinion will prove to be a relatively minor blip or a major threat to the current framework of federal environmental law.

2. STATUTE-BASED CHALLENGES

Page 348. Add at the end of note 5:

A recent decision on a non-environmental matter seems to strengthen the degree of judicial scrutiny under “arbitrary and capricious” review, or at least, emphasizes the duty of courts to exercise care in examining regulations. The case involved a decision by the Trump Administration to eliminate the DACA program for people who were brought to the United States by their parents in violation of immigration laws. In an opinion by Chief Justice Roberts, the Court reversed the Trump Administration’s action on two grounds. First, the agency had misunderstood the scope of its discretion and failed to realize that it had authority to retain part of the program. Second, it had failed to take into account the degree to which affected individuals had relied on the program. Although the agency was not required to protect that reliance interest, “it was required to assess the existence and strength of any reliance interests, and weigh them against competing policy concerns.” Its failure to do so was arbitrary and capricious. Dep’t of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020). States may well argue that they relied on some Obama-era environmental regulations in making other decisions and that they consequently would be injured by Trump Administration environmental rollbacks.

D. THE NATIONAL ENVIRONMENTAL POLICY ACT

1. THRESHOLD REQUIREMENTS

Page 363. Insert after note 2 and renumber note 3:

3. The 2020 amendments to the CEQ rules provide a different treatment of the “significance” requirement. Section 1501.3 states:

   (b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with § 1501.9(e)(1).

   (1) In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources, such as listed species and designated critical habitat under the Endangered Species Act. Significance varies with the setting of the proposed action. For
instance, in the case of a site-specific action, significance would usually depend only upon the effects in the local area.

(2) In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action:

   (i) Both short- and long-term effects.

   (ii) Both beneficial and adverse effects.

   (iii) Effects on public health and safety.

   (iv) Effects that would violate Federal, State, Tribal, or local law protecting the environment.

Note that the amended version omits any mention of the unique characteristics of the site, the uncertainty or uniqueness of risks, and the degree to which the action was controversial. Those factors were supported in prior caselaw, and it is unclear whether courts will be willing to retreat from those precedents in light of the new regulation.

2. SCOPE AND TIMING OF THE EIS

Page 375. Insert at the end of note 2:

The 2020 amendments to the CEQ regulation delete the portion of the scope rule after the first two sentences. Thus, the rule no longer contains any discussion of connected, cumulative, or similar actions. The Preamble to the new provisions states that the CEQ considered the consideration of cumulative effects to be time-consuming and distracting. It remains to be seen whether courts will agree. For instance, are the highway segmentation cases still good law? The answer seems to depend at least in part on whether the prior caselaw merely followed the 1978 CEQ regulations, or whether courts independently viewed these factors as relevant under the statute. The other major issue is how much deference the courts will give the new CEQ regulations, given that CEQ regulations are binding on agencies only due to an executive order rather than a statute.

Page 383. Insert after note 3:

4. The Trump Administration's 2020 revision of the CEQ guidelines defines “effects” as follows:

   (g) Effects or impacts means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives. **

   (2) A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically
remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

If the effect of a decision is to increase carbon emissions, is the subsequent effect on climate change covered under this definition? Or are climate impact excluded as “remote in time, geographically remote, or the product of a lengthy causal chain”? In response to commentators who said the language would preclude consideration of climate change, the Preamble to the 2020 amendments states:

The rule does not preclude consideration of the impacts of a proposed action on any particular aspect of the human environment. The analysis of the impacts on climate change will depend on the specific circumstances of the proposed action. As discussed above, under the final rule, agencies will consider predictable trends in the area in the baseline analysis of the affected environment.

This response leaves it unclear when climate change would be a required consideration.

3. CONTENT OF THE IMPACT STATEMENT

Page 385. Insert at the end of note 1:

The 2020 amendments to the CEQ regulations define reasonable alternatives to include “a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.”

4. NEPA’S PAST AND FUTURE

Insert on p. 395 before the final paragraph:

The CEQ adopted new NEPA regulations in 2020. In announcing the new regulations, President Trump said, “Today’s action is part of my administration’s fierce commitment to slashing the web of needless bureaucracy that is holding back our citizens. I’ve been wanting to do this from day one.” Trump stressed the need to speed up the approval process for infrastructure projects: “So we’re cutting the federal permitting timeline for a major project from up to 20 years or more — hard to believe — down to two years or less. . . . And our goal is one year.” Critics argue that this desire to streamline the process came at the expense of NEPA’s mandate for full consideration of environmental impacts.

In the litigation that is sure to come, one key question will be how much deference the courts give to CEQ’s interpretation of NEPA. CEQ does have a special role in the implementation of NEPA, but it does not have any statutory rulemaking power. Hence, the rules do not have the force of law. They simply represent the Executive Branch’s interpretation of
NEPA. Judges may find them persuasive to the extent that they reflect CEQ’s experience and expertise, but the statute itself remains the only governing source of law. To the extent that prior judicial precedents rested on a court’s independent interpretation of the statute, they will probably remain unaffected by the Trump CEQ’s amendments.

Putting aside the specifics of these recent amendments, is there a good argument that NEPA currently impedes infrastructure projects (including renewable energy) too much? If so, are there ways of speeding up the process without undue risk to the environment? These issues are sure to remain on the agenda regardless of the fate of these particular amendments.
CHAPTER 6

AIR POLLUTION

A. THE COMMON LAW

2. PUBLIC NUISANCE

On page 415, insert a new note 4 as follows:

A number of municipalities and one state, Rhode Island have filed a new round of nuisance lawsuits under state, rather than federal, nuisance laws. The defendants in the cases are oil companies like ExxonMobile and Shell and the governments are seeking compensatory and punitive damages for damage caused by climate change. The new cases may fare better than the cases that have been dismissed in federal court in part because some states have nuisance statutes rather than relying only on common law (California is an example, see Cal. Civ. Code §§3479-3486.5), state courts are more accustomed to deciding common law claims (federal common law is relatively unusual), and the American Electric Power decision applied only to federal common law in holding that the Clean Air Act displaces federal common law nuisance claims for greenhouse gases. The lawsuits rely, too, on relatively new information that at least some of the oil company defendants knew about the risks of climate change as early as the 1960s, changed their own internal operations as a result (by, for example, fortifying oil platforms that might be affected by storm surges and sea level rise), and nevertheless financed a campaign to create doubt among members of the public about whether climate change is occurring. For representative complaints see ClimateChangeLitigationDatabases: Common Law Claims, http://climatecasechart.com/case-category/common-law-claims/

Do you think nuisance cases are an appropriate way to address the problem of climate change? What obstacles do you think plaintiffs will face in attempting to prove their cases? Will courts find that the Clean Air Act also displaces state nuisance claims? The oil companies have filed numerous motions seeking to remove the state cases to federal court. To date, most district courts and three appellate courts that have heard the removal claims have rejected the oil company motions. See, e.g., Mayor of Baltimore v. BP, No. 19-1644, (March 6, 2020); http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200306_docket-19-1644_opinion.pdf City of Oakland v. BP, No. 18-16663 (May 26, 2020), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200526_docket-18-16663_opinion.pdf
On page 416, insert a new note 6

6. The nuisance cases against oil companies are not the only novel form of litigation designed to combat greenhouse gas emissions. A group of 21 children has sued the federal government arguing that the government has a constitutional obligation to provide for a stable climate system and a public trust obligation to protect the global atmosphere. Although the case withstood a motion to dismiss in the district court, the Ninth Circuit Court of Appeal dismissed the case on standing grounds. *Juliana v. United States*, 18-36082, (Jan 17, 2020). The plaintiffs have filed a petition seeking en banc review in the Ninth Circuit. https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf. See also Chapter 5 at 325 (update).

B. C. THE BASICS OF THE CLEAN AIR ACT

1. AIR QUALITY STANDARDS

On page 448, insert a new note 4

4. The EPA has an obligation under section 109(d) to review and, if necessary, revise the list of air pollutants every five years. The agency has been sued repeatedly by the American Lung Association for failing to do this. See, e.g., American Lung Association v. Browner, 884 F.Supp. 345 (D. Ariz. 1994). The prevailing view from the courts is that the agency does not have a non-discretionary duty to revise the NAAQS, but it must take some action regarding review and revision by the statutory deadline. See, e.g., Environmental Defense Fund v. Thomas, 870 F.2d 892 (2d Cir. 1989). In February, 2010, the EPA tightened the primary NAAQS for nitrous dioxide. See http://www.epa.gov/ttn/naaqs/standards/nox/fr/20100209.pdf. In 2015, it tightened the ozone standard after a lengthy court battle. See U.S. Environmental Protection Agency, Implementation of the 2015 National Ambient Air Quality Standard for Ozone: State Implementation Plan Requirements, https://www.epa.gov/ground-level-ozone-pollution/implementation-2015-national-ambient-air-quality-standards-naaqs-ozone. In March, 2020, EPA proposed leaving the current standard for PM 2.5 despite findings from its own staff that “the risk assessment estimates that the current PM 2.5 standards could allow a substantial number of PM2.5-associated deaths in the U.S.” U.S. Environmental Protection Agency, *Policy Assessment for the Review of the National Ambient Air Quality Standards for Particulate Matter*, (Jan 2020) at 3-106, https://www.epa.gov/sites/production/files/2020-01/documents/final_policy_assessment_for_the_review_of_the_pm_naaqs_01-2020.pdf
C. D. MAJOR PROVISIONS OF THE CAA

2. HAZARDOUS AIR POLLUTANTS

On page 483, replace notes 1 and 2 with the following:

1. Would it make a difference in EPA’s analysis if it considered cost before or after deciding to issue regulations? On April 25, 2016, EPA issued a supplemental finding holding that it is “appropriate and necessary” to regulate mercury from the electric power sector. See 81 FR 24420. 20 states and industry groups immediately appealed the finding. Murray Energy v. EPA, No. 16-1127 (D.C. Cir). The Trump Administration subsequently asked the court to suspend briefing in the case while it evaluated the rule. EPA has now rescinded the “appropriate and necessary” finding on the grounds that the Obama Administration inappropriately considered co-benefits from reducing particulate and other conventional pollutants in deciding whether to regulate. Instead, EPA’s new proposal considers only those benefits that come directly from regulating mercury and other hazardous pollutants at the “appropriate and necessary” stage. Because the quantified direct benefits (between $4 and $6 million) are so much lower than the costs to implement pollution controls (between $7 and $9 billion), EPA says there is a “gross imbalance” between the costs on industry of compliance versus the benefits to human health and environment. Although the agency rescinded the “appropriate and necessary” finding, it did not propose rescinding the rule. See U.S. EPA, Mercury and Air Toxics Standards, Final Revised Supplemental Finding and Results of the Residual Risk and Technology Review. https://www.epa.gov/mats/final-revised-supplemental-finding-and-results-residual-risk-and-technology-review For an analysis of the Trump Administration strategy, see Ann Carlson, The Curious Case of EPA’s Mercury Cost-Benefit Decision, LEGAL PLANET (Dec. 30, 2018), http://legal-planet.org/2018/12/30/the-curious-case-of-epas-mercury-cost-benefit-decision/. For a critique of the administration’s position on the mercury rule, see, Joseph Aldy, et al., Deep Flaws in a Mercury Regulatory Analysis, 368 SCIENCE 247 (2020), HTTPS://SCIENCE.SCIENCEMAG.ORG/CONTENT/368/6488/247. See also the discussion of costs and benefits in Chapter 2 at page 87 (update). Do you think the new proposal – considering only direct costs at the “appropriate and necessary” stage and finding no need to regulate – is a reasonable interpretation of the statute under Chevron? Notably, the utility industry has not requested reconsideration of the MAT standard, although the coal industry has done so.

2. Is the opinion in Michigan v. EPA consistent with the Chevron doctrine? Does the Court’s opinion signal that it will defer less frequently to agency interpretations of ambiguous statutory provisions? Should the Court have decided the case under Step 1 of Chevron rather than Step 2? For a sense of Justice Brett Kavanaugh’s view of the Chevron Doctrine, see Brett Kavanaugh, Fixing Statutory Interpretation, 129 HARV. L. REV. 2118 (2016). Justice Neil Gorsuch also criticized the doctrine when he served as a circuit court judge on the 10th Circuit. Guitierrez-Brezuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).
In two recent cases, several justices have indicated that they may revive a long-dormant doctrine known as the non-delegation doctrine, particularly for issues that raise “major questions.” Justice Gorsuch suggested in a dissent in a case involving criminal sex offender registries that current non-delegation doctrine may have strayed too far from constitutional limitations on delegated authority to executive actors. Gundy v. United States, ___U.S.__, 139 S. Ct. 2126, 2123 (2019). He was joined by Justices Roberts and Thomas. Justice Alito suggested he may be open to revisiting the doctrine as well. Justice Kavanaugh signaled in a separate explanation of a denial of certiorari that he may join his conservative colleagues in scaling back delegations of authority to executive agencies, possibly relying on the major questions in doing so. Paul v. United States, 140 S. Ct. 342 (Mem) (Nov. 25, 2019) (Kavanaugh, J., respecting the denial of certiorari). For further discussion see Note, Chapter 5 at 341 (update).

E. MOBILE SOURCE, SPILLOVERS AND OTHER SPECIAL PROVISIONS OF THE CLEAN AIR ACT

2. INTERSTATE AIR POLLUTION

On page 529, insert a new note 4:

4. Since EME Homer was decided, the D.C. Circuit Court of Appeal has twice heard challenges to technical aspects of the cross state air pollution rule. In EME Homer v. EPA (“EME Homer II”), 795 F.3d 118 (2025), the court upheld much of the rule against highly technical industry and state challenges but found, in as-applied challenges from various states, that EPA had “over controlled” some emissions and remanded the rule back to the agency for revision. It nevertheless kept the rule in place pending that revision. In Wisconsin v. EPA, https://www.cadc.uscourts.gov/internet/opinions.nsf/AB56D2429DBDBE3B8525B45400512A0D/$file/16-1406.pdf (2019) the court again upheld most of the rule against numerous technical challenges from industry, states, and environmental groups, noting that courts are “at [our] most deferential” when reviewing an agency’s predictions and scientific determinations.” (internal citations omitted.) The court did, however, rule in favor of one portion of the challenge brought by environmental and downwind states. The EPA rule set no deadline for upwind states and sources to meet their required emissions cuts. Downwind states were nevertheless still required to meet statutory attainment deadlines. The court found that this omission of a deadline violated the Clean Air Act, finding no ambiguity in the statutory deadlines for attainment. The court also dismissed as not ripe challenges to several state emissions budgets and left the current rule in place pending revision.

3. GREENHOUSE GAS EMISSIONS AND THE CLEAN AIR ACT

On page 543, insert a new note 1:
1. After a long and protracted battle, the EPA issued an endangerment finding in April, 2009 holding that greenhouse gas emissions in the atmosphere threaten the public health and welfare “of current and future generations.” U.S. Environmental Protection Agency, Overview of EPA’s Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under the Clean Air Act, (April 17, 2009). The Obama Administration then followed the endangerment finding with two sets of regulations to cut greenhouse gases from vehicles. The first set grew out of California’s efforts to regulate GHGs from passenger cars. The effort began when the state passed Assembly Bill 1493, authorizing the state’s Air Resources Board to establish standards for emissions of carbon dioxide (CO₂). See California Air Resources Board, Climate Change, http://www.arb.ca.gov/cc/cc.htm#Background, for more information about regulations implementing the law, which were to take effect in January 2006 for model years 2009 and thereafter. California could not implement its regulations without a waiver from the federal government. After a long and convoluted battle that included several federal lawsuits and an initial denial of the waiver by the Bush Administration, on June 30, 2009 the EPA finally granted the California waiver. California and the U.S. then issued harmonized greenhouse gas regulations for 2012-2016 model years, regulations that also harmonized fuel economy standards (known as CAFE standards) under the Energy Policy and Conservation Act. The standards set a fleet average of 35.5 miles per gallon by the 2016 year. The federal government and California together then issued a set of standards for the 2017-2025 model years, with a 2025 fleet average standard of 55.5 mph, increasing in the final years of the rule by 5% annually. See U.S. EPA, Regulations for Emissions from Vehicles and Engines, Final Rule for Model Year 2017 and Later Light Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards. The Trump Administration has since rolled back the second set of standards beginning for model year 2021, limiting the increases through 2025 to 1.5 percent per year. See The Safer Affordable Fuel Efficient (SAFE) Vehicles Final Rule for Model Years 2021-2026, https://www.epa.gov/regulations-emissions-vehicles-and-engines/safer-affordable-fuel-efficient-safe-vehicles-final-rule. As part of the so-called “SAFE” rule, the administration has also revoked the California waiver to issue greenhouse gas standards and for its Zero Emission Vehicle program. U.S. EPA, U.S. EPA and DOT Propose Fuel Economy Standards for MY 2021-2026 Vehicles. The Administration claims that the new standards would be uneconomical and cause an increase in traffic deaths, both claims that have been heavily criticized. See, e.g., Robinson Meyer, The Trump Administration Flunked Its Math Homework, THE ATLANTIC (Oct. 31, 2018), https://www.theatlantic.com/science/archive/2018/10/trumps-clean-car-rollback-is-riddled-with-math-errors-clouding-its-legal-future/574249/. For an explanation of how the proposal to revoke California’s waiver is part of a broader attack on California climate policy, see Ann Carlson, The Trump Administration’s Assault on California’s Global Climate Leadership, 112 AJIL UNBOUND 269 (2018), HTTPS://WWW.CAMBRIDGE.ORG/CORE/JOURNALS/AMERICAN-JOURNAL-OF-INTERNATIONAL-LAW/ARTICLE/TRUMP-ADMINISTRATIONS-ASSAULT-ON-

On page 558, insert new notes 5 and 6

5. In 2014, EPA, after a protracted legal and political battle, issued NSPS for both new and existing electric generating units (EGUs or, more conventionally, power plants) to limit greenhouse gas emissions. The rules for new power plants would have essentially banned the regulatory approval of coal-fired power plants by setting an emissions limit equivalent to efficient natural gas plants, one that existing technology for new coal plants couldn’t meet. The much larger regulatory program, however, would have regulated greenhouse gases from existing power plants. Section 111(d) of the CAA requires states to submit plans similar to SIPs that establish “standards of performance” for “an existing source of any air pollutant” that is not regulated as a criteria pollutant. 42 U.S.C. §7411(d). “Standard of performance” is defined as a standard “which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which ... the Administrator determines has been adequately demonstrated.” 42 U.S.C. §7411(a)(1). In issuing existing power plant regulations, (the Clean Power Plan), the Obama EPA treated the “best system of emission reduction” as the electric grid itself. It set targets for individual states to meet through their plans based not only on traditional controls on existing power plants but also by including reductions that could occur by going “beyond the fenceline” of the power plant to include reductions that could be achieved by switching to cleaner fuels (e.g., coal to natural gas) and to renewable fuels. When fully implemented, the CPP was expected to reduce GHGs from the electricity sector by 32 percent below 2005 levels. For a more detailed explanation of the CPP, see U.S. EPA Archived Documents, Overview of the Clean Power Plan, https://archive.epa.gov/epa/sites/production/files/2015-08/documents/fs-cpp-overview.pdf. The CPP was challenged immediately by a coalition of states and industry groups. State of West Virginia v. EPA, No. 15-1363 (D.C. Circuit Court of Appeals). In what many observers considered to be an extraordinary move, the U.S. Supreme Court stayed the implementation of the CPP pending resolution of its legality. See U.S. Supreme Court, Order in Pending Case, Chamber of Commerce v. EPA (2016), https://www.supremecourt.gov/orders/courtorders/020916sr3_hf5m.pdf. The Trump Administration has withdrawn the rule and issued a new rule in its place.

6. The new Trump Administration rule under Section 111(d) is called the “Affordable Clean Energy” (ACE) Rule. It sets the best system of emission
reduction based only on “inside the fenceline” reductions, in other words those reductions that can occur only from controlling emissions directly from individual power plants. See U.S. Environmental Protection Agency, Affordable Clean Energy Rule, https://www.epa.gov/stationary-sources-air-pollution/affordable-clean-energy-rule The proposed rule would result in far fewer emissions reductions than the CPP (indeed perhaps emissions increases) and may well cost industry as much as CPP compliance would, and its costs might exceed its benefits by almost a trillion dollars over 15 years. See Jean Chemnck and Niina H. Farah, Cost of ACE Could Eclipse Benefits by $980M, Climatewire (June 20, 2019). Can you anticipate the legal arguments opponents will make against the rule? See N.Y. v. EPA, https://oag.ca.gov/system/files/attachments/press-docs/2019%20petition%20for%20review.pdf (petition for review) (August 13, 2019).
D. ISSUES IN THE IMPLEMENTATION OF THE CWA

1. POINT SOURCES

On page 619, delete note 5 and insert the following:

COUNTY OF MAUI V. HAWAII WILDLIFE FUND
Supreme Court of the United States, 2020
140 S.Ct. 1462

Justice BREYER delivered the opinion of the Court.

The Clean Water Act forbids the “addition” of any pollutant from a “point source” to “navigable waters” without the appropriate permit from the Environmental Protection Agency (EPA). The question presented here is whether the Act “requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source,” here, “groundwater.” Suppose, for example, that a sewage treatment plant discharges polluted water into the ground where it mixes with groundwater, which, in turn, flows into a navigable river, or perhaps the ocean. Must the plant’s owner seek an EPA permit before emitting the pollutant? We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.

Congress’ purpose as reflected in the language of the Clean Water Act is to “‘restore and maintain the ... integrity of the Nation’s waters.’” Prior to the Act, Federal and State Governments regulated water pollution in large part by setting water quality standards. The Act restructures federal regulation by insisting that a person wishing to discharge any pollution into navigable waters first obtain EPA’s permission to do so.

The Act’s provisions use specific definitional language to achieve this result. First, the Act defines “pollutant” broadly, including in its definition, for example, any solid waste, incinerator residue, “‘heat,’” “‘discarded equipment,’” or sand (among many other things). Second, the Act defines a “point source” as “‘any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged,’” including, for example, any “‘container,’” “‘pipe, ditch, channel, tunnel, conduit,’” or “‘well.’” Third, it
defines the term “discharge of a pollutant” as “‘any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source.’”

The Act then sets forth a statutory provision that, using these terms, broadly states that (with certain exceptions) “[the discharge of any pollutant by any person]” without an appropriate permit “[shall be unlawful].” The question here, as we have said, is whether, or how, this statutory language applies to a pollutant that reaches navigable waters only after it leaves a “point source” and then travels through groundwater before reaching navigable waters. In such an instance, has there been a “discharge of a pollutant,” that is, has there been “any addition of any pollutant to navigable waters from any point source?”

The petitioner, the County of Maui, operates a wastewater reclamation facility on the island of Maui, Hawaii. The facility collects sewage from the surrounding area, partially treats it, and pumps the treated water through four wells hundreds of feet underground. This effluent, amounting to about 4 million gallons each day, then travels a further half mile or so, through groundwater, to the ocean.

In 2012, several environmental groups, the respondents here, brought this citizens’ Clean Water Act lawsuit against Maui. They claimed that Maui was “discharg[ing]” a “pollutant” to “navigable waters,” namely, the Pacific Ocean, without the permit required by the Clean Water Act. The District Court, relying in part upon a detailed study of the discharges, found that a considerable amount of effluent from the wells ended up in the ocean (a navigable water). It wrote that, because the “path to the ocean is clearly ascertainable,” the discharge from Maui’s wells into the nearby groundwater was “functionally one into navigable water.” And it granted summary judgment in favor of the environmental groups.

The Ninth Circuit affirmed the District Court, but it described the relevant statutory standard somewhat differently. The appeals court wrote that a permit is required when “the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.” The court left “for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability.”

Maui petitioned for certiorari. In light of the differences in the standards adopted by the different Courts of Appeals, we granted the petition.

The linguistic question here concerns the statutory word “from.” Is pollution that reaches navigable waters only through groundwater pollution that is “from” a point source, as the statute uses the word? The word “from” is broad in scope, but context often imposes limitations. “Finland,” for example, is often not the right kind of answer to the question, “Where have you come from?” even if long ago you were born there.

The parties here disagree dramatically about the scope of the word “from” in the present context. The environmental groups, the respondents, basically
adopt the Ninth Circuit’s view—that the permitting requirement applies so long as the pollutant is “fairly traceable” to a point source even if it traveled long and far (through groundwater) before it reached navigable waters. They add that the release from the point source must be “a proximate cause of the addition of pollutants to navigable waters.”

Maui, on the other hand, argues that the statute creates a “bright-line test.” A point source or series of point sources must be “the means of delivering pollutants to navigable waters.” They add that, if “at least one nonpoint source (e.g., unconfined rainwater runoff or groundwater)” lies “between the point source and the navigable water,” then the permit requirement “does not apply.” A pollutant is “from” a point source only if a point source is the last “conveyance” that conducted the pollutant to navigable waters.

The Solicitor General, as amicus curiae, supports Maui, at least in respect to groundwater. Reiterating the position taken in a recent EPA “Interpretive Statement,” he argues that, given the Act’s structure and history, “a release of pollutants to groundwater is not subject to” the Act’s permitting requirement “even if the pollutants subsequently migrate to jurisdictional surface waters,” such as the ocean.

We agree that statutory context limits the reach of the statutory phrase “from any point source” to a range of circumstances narrower than that which the Ninth Circuit’s interpretation suggests. At the same time, it is significantly broader than the total exclusion of all discharges through groundwater described by Maui and the Solicitor General.

Virtually all water, polluted or not, eventually makes its way to navigable water. This is just as true for groundwater. Given the power of modern science, the Ninth Circuit’s limitation, “fairly traceable,” may well allow EPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release (say, from a well or pipe or compost heap) and in highly diluted forms.

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Our view is that Congress did not intend the point source-permitting requirement to provide EPA with such broad authority as the Ninth Circuit’s narrow focus on traceability would allow. First, to interpret the word “from” in this literal way would require a permit in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird’s feathers, or, to mention more mundane instances, the 100-year migration of pollutants through 250 miles of groundwater to a river.

Second, and perhaps most important, the structure of the statute indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States. Much water pollution does not come from a readily identifiable source. Rainwater, for example, can carry pollutants (say, as might otherwise collect on a roadway); it can pollute groundwater, and pollution collected by unchanneled rainwater runoff is not ordinarily considered point source pollution. Over many decades, and with federal encouragement, the States
have developed methods of regulating nonpoint source pollution through water quality standards, and otherwise.

The Act envisions EPA’s role in managing nonpoint source pollution and groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants. Although the Act grants EPA specific authority to regulate certain point source pollution (it can also delegate some of this authority to the States acting under EPA supervision), these permitting provisions refer to “point sources” and “navigable waters,” and say nothing at all about nonpoint source regulation or groundwater regulation. We must doubt that Congress intended to give EPA the authority to apply the word “from” in a way that could interfere as seriously with States’ traditional regulatory authority—authority the Act preserves and promotes—as the Ninth Circuit’s “fairly traceable” test would.

Third, those who look to legislative history to help interpret a statute will find that this Act’s history strongly supports our conclusion that the permitting provision does not extend so far. * * * The upshot is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.

Finally, longstanding regulatory practice undermines the Ninth Circuit’s broad interpretation of the statute. EPA itself for many years has applied the permitting provision to pollution discharges from point sources that reached navigable waters only after traveling through groundwater. But, in doing so, EPA followed a narrower interpretation than that of the Ninth Circuit. EPA has opposed applying the Act’s permitting requirements to discharges that reach groundwater only after lengthy periods. Indeed, in this very case (prior to its recent Interpretive Statement), EPA asked the Ninth Circuit to apply a more limited “direct hydrological connection” test. The Ninth Circuit did not accept this suggestion.

We do not defer here to EPA’s interpretation of the statute embodied in this practice. Indeed, EPA itself has changed its mind about the meaning of the statutory provision. But this history, by showing that a comparatively narrow view of the statute is administratively workable, offers some additional support for the view that Congress did not intend as broad a delegation of regulatory authority as the Ninth Circuit test would allow.

As we have said, the specific meaning of the word “from” necessarily draws its meaning from context. The apparent breadth of the Ninth Circuit’s “fairly traceable” approach is inconsistent with the context we have just described.

Maui and the Solicitor General argue that the statute’s permitting requirement does not apply if a pollutant, having emerged from a “point source,” must travel through any amount of groundwater before reaching
navigable waters. That interpretation is too narrow, for it would risk serious interference with EPA’s ability to regulate ordinary point source discharges.

Consider a pipe that spews pollution directly into coastal waters. There is an “addition of” a “pollutant to navigable waters from [a] point source.” Hence, a permit is required. But Maui and the Government read the permitting requirement not to apply if there is any amount of groundwater between the end of the pipe and the edge of the navigable water. If that is the correct interpretation of the statute, then why could not the pipe’s owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea? We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act.

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Over the years, courts and EPA have tried to find general language that will reflect a middle ground between these extremes. The statute’s words reflect Congress’ basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States’ longstanding regulatory authority over land and groundwater. We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be “from any point source” when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

Time and distance are obviously important. Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.

The object in a given scenario will be to advance, in a manner consistent with the statute’s language, the statutory purposes that Congress sought to achieve. As we have said (repeatedly), the word “from” seeks a “point source” origin, and context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater. That context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution. Whether pollutants that arrive at navigable waters after traveling through groundwater are “from” a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.

The difficulty with this approach, we recognize, is that it does not, on its own, clearly explain how to deal with middle instances. But there are too many
potentially relevant factors applicable to factually different cases for this Court now to use more specific language. Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

At the same time, courts can provide guidance through decisions in individual cases. The Circuits have tried to do so, often using general language somewhat similar to the language we have used. And the traditional common-law method, making decisions that provide examples that in turn lead to ever more refined principles, is sometimes useful, even in an era of statutes.

The underlying statutory objectives also provide guidance. Decisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives.

EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules. Indeed, over the years, EPA and the States have often considered the Act's application to discharges through groundwater.

Both Maui and the Government object that to subject discharges to navigable waters through groundwater to the statute's permitting requirements, as our interpretation will sometimes do, would vastly expand the scope of the statute, perhaps requiring permits for each of the 650,000 wells like petitioner's or for each of the over 20 million septic systems used in many Americans' homes.

But EPA has applied the permitting provision to some (but not to all) discharges through groundwater for over 30 years. In that time we have seen no evidence of unmanageable expansion. EPA and the States also have tools to mitigate those harms, should they arise, by (for example) developing general permits for recurring situations or by issuing permits based on best practices where appropriate. Judges, too, can mitigate any hardship or injustice when they apply the statute's penalty provision. That provision vests courts with broad discretion to set a penalty that takes account of many factors, including “any good-faith efforts to comply” with the Act, the “seriousness of the violation,” the “economic impact of the penalty on the violator,” and “such other matters as justice may require.” We expect that district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act's
penalties when, for example, a party could reasonably have thought that a permit was not required.

In sum, we recognize that a more absolute position, such as the means-of-delivery test or that of the Government or that of the Ninth Circuit, may be easier to administer. But, as we have said, those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute’s language, structure, and purposes. We consequently understand the permitting requirement, § 301, as applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters.

Because the Ninth Circuit applied a different standard, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH joins, dissenting.

The Clean Water Act (CWA) requires a federal permit for “the discharge of any pollutant by any person.” The CWA defines a “discharge” as “any addition of any pollutant to navigable waters from any point source.” Based on the statutory text and structure, I would hold that a permit is required only when a point source discharges pollutants directly into navigable waters. The Court adopts this interpretation in part, concluding that a permit is required for “a direct discharge.” But the Court then departs from the statutory text by requiring a permit for “the functional equivalent of a direct discharge,” which it defines through an open-ended inquiry into congressional intent and practical considerations. Because I would adhere to the text, I respectfully dissent.

* * *

The best reading of the statute is that a “discharge” is the release of pollutants directly from a point source to navigable waters. The application of this interpretation to the undisputed facts of this case makes a remand unnecessary. Petitioner operates a wastewater treatment facility and injects treated wastewater into four underground injection control wells. All parties agree that the wastewater enters groundwater from the wells and does not directly enter navigable waters. Based on these undisputed facts, there is no “discharge,” so I would reverse the judgment of the Ninth Circuit. I respectfully dissent.

Justice ALITO, dissenting.

If the Court is going to devise its own legal rules, instead of interpreting those enacted by Congress, it might at least adopt rules that can be applied
with a modicum of consistency. Here, however, the Court makes up a rule that
provides no clear guidance and invites arbitrary and inconsistent application.

The text of the Clean Water Act generally requires a permit when a
discharge “from” a “point source” (such as a pipe) “add[s]” a pollutant “to”
navigable waters (such as the Pacific Ocean). There are two ways to read this
text. A pollutant that reaches the ocean could be understood to have been
added “from” a pipe if the pipe originally discharged the pollutant and the
pollutant eventually made its way to the ocean by flowing over or under the
surface of the ground. Or a pollutant that reaches the ocean could be
understood to have come “from” a pipe if the pollutant is discharged from the
pipe directly into the ocean.

There is no comprehensible alternative to these two interpretations, but
the Court refuses to accept either. Both alternatives, it believes, lead to
unacceptable results, and it therefore tries to find a middle way. It holds that
a permit is required “when there is a direct discharge from a point source into
navigable waters or when there is the functional equivalent of a direct
discharge.” This is not a plausible interpretation of the statutory text and, to
make matters worse, the Court’s test has no clear meaning.

Just what is the “functional equivalent” of a “direct discharge”? The Court
provides no real answer. All it will say is that the distance a pollutant travels
and the time this trip entails are the most important factors, but at least five
other factors may have a bearing on the question, and even this list is not
exhaustive. Entities like water treatment authorities that need to know
whether they must get a permit are left to guess how this nebulous standard
will be applied. Regulators are given the discretion, at least in the first
instance, to make of this standard what they will. And the lower courts? The
Court’s advice, in essence, is: “That’s your problem. Muddle through as best
you can.”

* * *

The term “functional equivalent” may have a quasi-technical ring, but
what does it mean? “Equivalent” means “equal” in some respect, and
“functional” signifies a relationship to a function. The function of a direct
discharge from a point source into navigable waters is to convey the entirety of
the discharge into navigable waters without any delay. Therefore, the
“functional equivalent” of a direct discharge of a pollutant into navigable
waters would seem to be a discharge that is equal to a direct discharge in these
respects.

If that is what the Court meant by “the functional equivalent of a direct
discharge,” the test would apply at best to only a small set of situations not
involving a direct discharge. The Court’s example of a pipe that emits
pollutants a few feet from the ocean would presumably qualify on de minimis
grounds, but if the pipe were moved back any significant distance, the
discharge would not be exactly equal to a direct discharge. There would be
some lag from the time of the discharge to the time when the pollutant reaches
navigable waters; some of the pollutant might not reach that destination; and
the pollutant might have changed somewhat in composition by the time it reached the navigable waters.

For these reasons, the Court’s reference to “the functional equivalent of a direct discharge,” if taken literally, would be of little importance, but the Court’s understanding of this concept is very different from the literal meaning of the phrase. As used by the Court, “the functional equivalent of a direct discharge” means a discharge that is sufficiently similar to a direct discharge to warrant a permit in light of the Clean Water Act’s “language, structure, and purposes.” But what, in concrete terms, does this mean? How similar is sufficiently similar?

The Court provides this guidance. It explains that time and distance are the most important factors but it does not set any time or distance limits except to observe that a permit is needed where the discharge is a few feet away from navigable waters and that a permit is not required where the discharge is far away and it takes “many years” for the pollutants to complete the journey. Beyond this, the Court provides a list (and a non-exhaustive one at that!) of five other factors that may be relevant: “the nature of the material through which the pollutant travels,” “the extent to which the pollutant is diluted or chemically changed as it travels,” “the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,” “the manner by or area in which the pollutant enters the navigable waters,” and “the degree to which the pollution (at that point) has maintained its specific identity.”

The Court admits that its rule “does not, on its own, clearly explain how to deal with middle instances,” but that admission does not go far enough. How the rule applies to “middle instances” is anybody’s guess. Except in extreme cases, dischargers will be able to argue that the Court’s multifactor test does not require a permit. Opponents will be able to make the opposite argument. Regulators will be able to justify whatever result they prefer in a particular case. And judges will be left at sea.

Instead of concocting our own rule, I would interpret the words of the statute, and in my view, the better of the two possible interpretations is that a permit is required when a pollutant is discharged directly from a point source to navigable waters. This interpretation is consistent with the statutory language and better fits the overall scheme of the Clean Water Act. And properly understood, it does not have the sort of extreme consequences that the Court finds unacceptable.

* * *

The Court adopts a nebulous standard, enumerates a non-exhaustive list of potentially relevant factors, and washes its hands of the problem. We should not require regulated parties to “feel their way on a case-by-case basis” where the costs of uncertainty are so great. The Court’s decision invites “arbitrary and inconsistent decisionmaking.” And “[t]hat is not what the Clean [Water] Act contemplates.”
I would reverse the judgment below and instruct the lower courts to apply the test set out above. I therefore respectfully dissent.

2. DEVELOPMENT RESTRICTIONS ON PRIVATE WETLANDS

On page 704, replace note 3 with the following:

3. In 2015, the Obama Administration issued a new rule – after extensive public comment, to clarify the federal government’s jurisdiction over wetlands. Known as the “Waters of the United States” rule, or “WOTUS,” the rule specifies waters that are categorically included in the definition (including traditional navigable waters, interstate waters, tributaries as long as they have a bed, bank, and high water mark, and adjacent waters). It also essentially codifies the “substantial nexus” test from Rapanos and delineates five categories of waters that should be subject to a case-by-case analysis to see if a substantial nexus exists between the water body and a “water of the United States.” These five categories include Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands.

The Trump Administration made clear as soon as President Trump was elected that it would move to repeal the WOTUS rule. It began proceedings to do so in June of 2018 and temporarily replaced the WOTUS rule with pre-existing guidance documents. In April, 2020, EPA finally issued a replacement rule it calls the “Navigable Waters Protection Rule.” The replacement rule is much closer to Justice Scalia’s dissent than to Justice Kennedy’s substantial nexus test. It includes four categories of waters that are subject to federal jurisdiction: 1) the territorial seas and traditional navigable waters; perennial and intermittent tributaries to those waters; certain lakes, ponds and impoundments, and wetlands adjacent to jurisdictional waters. Importantly, it excludes jurisdiction over “ephemeral waters” that flow after rainfall and several other categories of water bodies. The U.S. Geological Survey estimates that the new rule would eliminate jurisdiction over 51 percent of wetlands and almost 20 percent of streams that lack a permanent connection to surface waters. The rule has already faced critique, not only because of the significant contraction of federal jurisdiction over wetlands, but because the rule is not – even according to a science advisory board appointed by the Trump Administration – based in sound science. A letter from EPA’s Science Advisory Board concluded about the rule when it was still in proposed form: “the proposed WOTUS rule does not incorporate best available science and as such we find that a scientific basis for the proposed Rule, and its consistency with the objectives of the Clean Water Act, is lacking.” A number of lawsuits have already been filed challenging the new rule as inconsistent with the Clean Water Act and with sound science, including by a coalition of
states.  https://oag.ca.gov/system/files/attachments/press-docs/WOTUS%20Complaint%20Filed_05012020.pdf. Some industry groups have challenged the rule as too environmentally protective. https://www.epa.gov/sites/production/files/2019-10/documents/2019-10-22_n.m._cattle_growers_assn_v._epa_d.n.m._-_complaint.pdf The retirement of Justice Kennedy makes it hard to predict how a Supreme Court will react to the new rule if it reaches the high Court.

While the Trump Administration defends the rule in court, different parts of the country may be subject to different jurisdictional requirements. In Nat’l Assn of Manufacturers v. Dept of Defense, 583 U.S. __, 138 S.C.t 617 (2018), the Supreme Court held that challenges to the Obama WOTUS rule must be filed in federal district court, not in the federal courts of appeal. As a result, different challenges to the new Trump rule in different parts of the country could lead to differential outcomes about what rule is in effect pending the final outcome of the litigation. A motion to stay the effective date of the new Trump rule filed by the states in California v. EPA failed. http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200619_docket-320-cv-03005_order.pdf. A similar motion filed in Colorado district court succeeded, meaning the Obama rule remains in place for the state of Colorado, though the judge refused to extend the injunction nationwide. https://www.eenews.net/assets/2020/06/23/document_gw_06.pdf
CHAPTER 8

HAZARDOUS WASTE

■ ■ ■

B. CLEAN UP OF CONTAMINATED SITES: CERCLA

2. LIABILITY

g. Settlement

Page 813 Insert the before the sub-heading:

Once EPA has developed a cleanup plan as part of a settlement with one or more PRPs, can local landowners affected by the pollution from the contaminated site seek relief under state law for additional clean-up and restoration? That question was addressed in the following case involving the massive Superfund site in Butte, Montana.

ATLANTIC RICHFIELD COMPANY V. CHRISTIAN
Supreme Court of the United States, 2020
140 S.Ct. 1335

Chief Justice ROBERTS delivered the opinion of the Court.

For nearly a century, the Anaconda Copper Smelter in Butte, Montana contaminated an area of over 300 square miles with arsenic and lead. Over the past 35 years, the Environmental Protection Agency has worked with the current owner of the smelter, Atlantic Richfield Company, to implement a cleanup plan under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. EPA projects that the cleanup will continue through 2025.

A group of 98 landowners sued Atlantic Richfield in Montana state court for common law nuisance, trespass, and strict liability. Among other remedies, the landowners sought restoration damages, which under Montana law must be spent on rehabilitation of the property. The landowners’ proposed restoration plan includes measures beyond those the agency found necessary to protect human health and the environment.

We consider whether the Act strips the Montana courts of jurisdiction over the landowners’ claim for restoration damages and, if not, whether the
Act requires the landowners to seek EPA approval for their restoration plan.

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, also known as the Superfund statute, to address “the serious environmental and health risks posed by industrial pollution.” The Act seeks “to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination.”

The Act directs EPA to compile and annually revise a prioritized list of contaminated sites for cleanup, commonly known as Superfund sites. EPA may clean those sites itself or compel responsible parties to perform the cleanup. If the Government performs the cleanup, it may recover its costs from responsible parties. Responsible parties are jointly and severally liable for the full cost of the cleanup, but may seek contribution from other responsible parties.

Prior to selecting a cleanup plan, EPA conducts (or orders a private party to conduct) a remedial investigation and feasibility study to assess the contamination and evaluate cleanup options. Section 122(e)(6) of the Act provides that, once the study begins, “no potentially responsible party may undertake any remedial action” at the site without EPA approval.

The Act prescribes extensive public consultation while a cleanup plan is being developed. It requires an opportunity for public notice and comment on proposed cleanup plans. It requires “substantial and meaningful involvement by each State in initiation, development, and selection” of cleanup actions in that State. And, in most instances, it requires that remedial action comply with “legally applicable or relevant and appropriate” requirements of state environmental law.

But once a plan is selected, the time for debate ends and the time for action begins. To insulate cleanup plans from collateral attack, § 113(b) of the Act provides federal district courts with “exclusive original jurisdiction over all controversies arising under” the Act, and § 113(h) then strips such courts of jurisdiction “to review any challenges to removal or remedial action,” except in five limited circumstances.

* * *

Between 1884 and 1902, the Anaconda Copper Mining Company built three copper smelters 26 miles west of the mining town of Butte, Montana. The largest one, the Washoe Smelter, featured a 585-foot smoke stack, taller than the Washington Monument. The structure still towers over the area today, as part of the Anaconda Smoke Stack State Park. Together, the three smelters refined tens of millions of pounds of copper ore mined in Butte, the “Richest Hill on Earth,” to feed burgeoning demand for telephone wires and power lines. “It was hot. It was dirty. It was dangerous.
But it was a job for thousands.” From 1912 to 1973, Anaconda Company payrolls totaled over $2.5 billion, compensating around three-quarters of Montana’s work force.

Bust followed boom. By the 1970s, the falling price of copper, an ongoing energy crisis, and the nationalization of Anaconda’s copper mines in Chile and Mexico squeezed Anaconda. But what others saw as an ailing relic, Atlantic Richfield saw as a turnaround opportunity, purchasing the Anaconda Company for the discount price of $700 million. Unfortunately, Atlantic Richfield was unable to revive Anaconda’s fortunes. By 1980 Atlantic Richfield had closed the facility for good, and by 1984 Fortune had dubbed the purchase one of the “Decade’s Worst Mergers.”

Atlantic Richfield’s troubles were just beginning. After Congress passed the Superfund statute in 1980, Atlantic Richfield faced strict and retroactive liability for the many tons of arsenic and lead that Anaconda had spewed across the area over the previous century. In 1983, EPA designated an area of more than 300 square miles around the smelters as one of the inaugural Superfund sites. In the 35 years since, EPA has managed an extensive cleanup at the site, working with Atlantic Richfield to remediate more than 800 residential and commercial properties; remove 10 million cubic yards of tailings, mine waste, and contaminated soil; cap in place 500 million cubic yards of waste over 5,000 acres; and reclaim 12,500 acres of land. To date, Atlantic Richfield estimates that it has spent roughly $450 million implementing EPA’s orders.

More work remains. As of 2015, EPA’s plan anticipated cleanup of more than 1,000 additional residential yards, revegetation of 7,000 acres of uplands, removal of several waste areas, and closure of contaminated stream banks and railroad beds. EPA projects that remedial work will continue through 2025.

In 2008, a group of 98 owners of property within the Superfund site filed this lawsuit against Atlantic Richfield in Montana state court, asserting trespass, nuisance, and strict liability claims under state common law. The landowners sought restoration damages, among other forms of relief.

To collect restoration damages, a plaintiff must demonstrate that he has “reasons personal” for restoring the property and that his injury is temporary and abatable, meaning “[t]he ability to repair [the] injury must be more than a theoretical possibility.” The injured party must “establish that the award actually will be used for restoration.”

The landowners here propose a restoration plan that goes beyond EPA’s own cleanup plan, which the agency had found “protective of human health and the environment.” For example, the landowners propose a
maximum soil contamination level of 15 parts per million of arsenic, rather than the 250 parts per million level set by EPA. And the landowners seek to excavate offending soil within residential yards to a depth of two feet rather than EPA’s chosen depth of one. The landowners also seek to capture and treat shallow groundwater through an 8,000-foot long, 15-foot deep, and 3-foot wide underground permeable barrier, a plan the agency rejected as costly and unnecessary to secure safe drinking water.

The landowners estimate that their cleanup would cost Atlantic Richfield $50 to $58 million. Atlantic Richfield would place that amount in a trust and the trustee would release funds only for restoration work.

In the trial court, Atlantic Richfield and the landowners filed competing motions for summary judgment on whether the Act precluded the landowners’ claim for restoration damages. The court granted judgment for the landowners on that issue and allowed the lawsuit to continue. After granting a writ of supervisory control, the Montana Supreme Court affirmed.

The Montana Supreme Court rejected Atlantic Richfield’s argument that § 113 stripped the Montana courts of jurisdiction over the landowners’ claim for restoration damages. The court recognized that § 113 strips federal courts (and, it was willing to assume, state courts) of jurisdiction to review challenges to EPA cleanup plans. But the Montana Supreme Court reasoned that the landowners’ plan was not such a challenge because it would not “stop, delay, or change the work EPA is doing.” The landowners were “simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan.”

The Montana Supreme Court also rejected Atlantic Richfield’s argument that the landowners were potentially responsible parties (sometimes called PRPs) prohibited from taking remedial action without EPA approval under § 122(e)(6) of the Act. The Court observed that the landowners had “never been treated as PRPs for any purpose—by either EPA or [Atlantic Richfield]—during the entire thirty-plus years” since the designation of the Superfund site, and that the statute of limitations for a claim against the landowners had run. “Put simply, the PRP horse left the barn decades ago.”

We granted certiorari.

* * *

We begin with two threshold questions: whether this Court has jurisdiction to review the decision of the Montana Supreme Court and, if so, whether the Montana courts have jurisdiction over the landowners’ claim for restoration damages.
[The Court found that it did have jurisdiction to review the decision of the Montana Supreme Court and that CERCLA does not strip the Montana courts of jurisdiction over the landowners claims for restoration damages] * * *

Although the Montana Supreme Court answered the jurisdictional question correctly, the Court erred by holding that the landowners were not potentially responsible parties under the Act and therefore did not need EPA approval to take remedial action. Section 122(e)(6), titled “Inconsistent response action,” provides that “[w]hen either the President, or a potentially responsible party ... has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.” Both parties agree that this provision would require the landowners to obtain EPA approval for their restoration plan if the landowners qualify as potentially responsible parties.

To determine who is a potentially responsible party, we look to the list of “covered persons” in § 107, the liability section of the Act. “Section 107(a) lists four classes of potentially responsible persons (PRPs) and provides that they ‘shall be liable’ for, among other things, ‘all costs of removal or remedial action incurred by the United States Government.’ ” The first category under § 107(a) includes any “owner” of “a facility.” “Facility” is defined to include “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” Arsenic and lead are hazardous substances. Because those pollutants have “come to be located” on the landowners’ properties, the landowners are potentially responsible parties.

The landowners and Justice GORSUCH argue that even if the landowners were once potentially responsible parties, they are no longer because the Act’s six-year limitations period for recovery of remedial costs has run, and thus they could not be held liable in a hypothetical lawsuit.

This argument collapses status as a potentially responsible party with liability for the payment of response costs. A property owner can be a potentially responsible party even if he is no longer subject to suit in court. As we have said, “[E]ven parties not responsible for contamination may fall within the broad definitions of PRPs in §§ 107(a)(1)—(4).” That includes “‘innocent’ ... landowner[s] whose land has been contaminated by another,” who would be shielded from liability by the Act’s so-called “innocent landowner” or “third party” defense in § 107(b)(3). The same principle holds true for parties that face no liability because of the Act’s limitations period.

Interpreting “potentially responsible parties” to include owners of polluted property reflects the Act’s objective to develop, as its name suggests, a “Comprehensive Environmental Response” to hazardous waste
pollution. Section 122(e)(6) is one of several tools in the Act that ensure the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones.

Yet under the landowners’ interpretation, property owners would be free to dig up arsenic-infected soil and build trenches to redirect lead-contaminated groundwater without even notifying EPA, so long as they have not been sued within six years of commencement of the cleanup. We doubt Congress provided such a fragile remedy for such a serious problem. And we suspect most other landowners would not be too pleased if Congress required EPA to sue each and every one of them just to ensure an orderly cleanup of toxic waste in their neighborhood. A straightforward reading of the text avoids such anomalies.

* * *

Turning from text to consequences, the landowners warn that our interpretation of § 122(e)(6) creates a permanent easement on their land, forever requiring them “to get permission from EPA in Washington if they want to dig out part of their backyard to put in a sandbox for their grandchildren.” The grandchildren of Montana can rest easy: The Act does nothing of the sort.

Section 122(e)(6) refers only to “remedial action,” a defined term in the Act encompassing technical actions like “storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials,” and so forth. While broad, the Act’s definition of remedial action does not reach so far as to cover planting a garden, installing a lawn sprinkler, or digging a sandbox. In addition, § 122(e)(6) applies only to sites on the Superfund list. The Act requires EPA to annually review and reissue that list. EPA delists Superfund sites once responsible parties have taken all appropriate remedial action and the pollutant no longer poses a significant threat to public health or the environment.

The landowners and Justice GORSUCH alternatively argue that the landowners are not potentially responsible parties because they did not receive the notice of settlement negotiations required by § 122(e)(1). Under a policy dating back to 1991, EPA does not seek to recover costs from residential landowners who are not responsible for contamination and do not interfere with the agency’s remedy. EPA views this policy as an exercise of its “enforcement discretion in pursuing potentially responsible parties.” Because EPA has a policy of not suing innocent homeowners for pollution they did not cause, it did not include the landowners in settlement negotiations.

But EPA’s nonenforcement policy does not alter the landowners’ status as potentially responsible parties. Section 107(a) unambiguously defines potentially responsible parties and EPA does not have authority to alter
that definition. Section 122(e)(1) requires notification of settlement negotiations to all potentially responsible parties. To say that provision determines who is a potentially responsible party in the first instance would render the Act circular. Even the Government does not claim that its decisions whether to send notices of settlement negotiations carry such authority.

In short, even if EPA ran afoul of § 122(e)(1) by not providing the landowners notice of settlement negotiations, that does not change the landowners' status as potentially responsible parties.

The landowners relatedly argue that the limitation in § 122(e)(6) on remedial action by potentially responsible parties cannot carry the weight we assign to it because it is located in the Act’s section on settlement negotiations. Congress, we are reminded, does not “hide elephants in mouseholes.”

We take no issue with characterizing § 122(e)(6) as an elephant. It is, after all, one of the Act’s crucial tools for ensuring an orderly cleanup of toxic waste. But § 122 of the Act is, at the risk of the tired metaphor spinning out of control, less a mousehole and more a watering hole—exactly the sort of place we would expect to find this elephant.

Settlements are the heart of the Superfund statute. EPA’s efforts to negotiate settlement agreements and issue orders for cleanups account for approximately 69% of all cleanup work currently underway. The Act commands EPA to proceed by settlement “[w]henever practicable and in the public interest ... in order to expedite effective remedial actions and minimize litigation.” EPA, for its part, “prefers to reach an agreement with a potentially responsible party (PRP) to clean up a Superfund site instead of issuing an order or paying for it and recovering the cleanup costs later.”

* * *

What is more, Atlantic Richfield remains potentially liable under state law for compensatory damages, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort. The damages issue before the Court is whether Atlantic Richfield is also liable for the landowners’ own remediation beyond that required under the Act. Even then, the answer is yes—so long as the landowners first obtain EPA approval for the remedial work they seek to carry out.

* * *

As a last ditch effort, the landowners contend that, even if § 107(a) defines potentially responsible parties, they qualify as contiguous property owners under § 107(q), which would pull them outside the scope of § 107(a). The landowners are correct that contiguous property owners are not potentially responsible parties. Section 107(q)(1)(A) provides that “[a]
person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered an owner of a facility under § 107(a). The problem for the landowners is that there are eight further requirements to qualify as a contiguous property owner. Each landowner individually must “establish by a preponderance of the evidence” that he satisfies the criteria.

The landowners cannot clear this high bar. One of the eight requirements is that, at the time the person acquired the property, the person “did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances.” All of the landowners here purchased their property after the Anaconda Company built the Washington Monument sized smelter. Indeed “evidence of public knowledge” of contamination was “almost overwhelming.” In the early 1900s, the Anaconda Company actually obtained smoke and tailing easements authorizing the disposition of smelter waste onto many properties now owned by the landowners. The landowners had reason to know their property “could be contaminated by a release or threatened release” of a hazardous substance.

At any rate, contiguous landowners must provide “full cooperation, assistance, and access” to EPA and those carrying out Superfund cleanups in order to maintain that status. But the Government has represented that the landowners’ restoration plan, if implemented, would interfere with its cleanup by, for example, digging up contaminated soil that has been deliberately capped in place. If that is true, the landowners’ plan would soon trigger a lack of cooperation between EPA and the landowners. At that point, the landowners would no longer qualify as contiguous landowners and we would be back to square one.

The Montana Supreme Court erred in holding that the landowners were not potentially responsible parties under § 122(e)(6) and therefore did not need to seek EPA approval. Montana law requires that “an award of restoration damages actually ... be used to repair the damaged property.” But such action cannot be taken in the absence of EPA approval. That approval process, if pursued, could ameliorate any conflict between the landowners’ restoration plan and EPA’s Superfund cleanup, just as Congress envisioned. In the absence of EPA approval of the current restoration plan, we have no occasion to entertain Atlantic Richfield’s claim that the Act otherwise preempts the plan.

The judgment of the Montana Supreme Court is affirmed in part and vacated in part. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.
Justice GORSUCH, with whom Justice THOMAS joins, concurring in part and dissenting in part.

For nearly a century, Atlantic Richfield’s predecessor operated a smelter near the town of Opportunity, Montana. At one time, the smelter produced much of the Nation’s copper supply and served as the State’s largest employer. Eventually, though, it became apparent the smelter was producing more than just copper and jobs. Studies showed that the plant emitted up to 62 tons of arsenic and 10 tons of lead each day. Thanks to what was once the world’s tallest brick smokestack, these heavy metals blanketed the town and the whole of the Deer Lodge Valley—contaminating hundreds of square miles. Today, the smokestack is all that is left of the once massive operation. It stands alone in a state park, much of which remains dangerously contaminated and closed to the public. Visitors may view the stack, but only from a distance, through fences and between huge slag piles.

This case involves nearly 100 nearby residents. Some have lived in their homes for decades, some long before the environmental consequences of the smelter were fully appreciated. They say they have thought about moving, but for many their property values aren’t what they once were. Besides, as one homeowner put it, “I couldn’t find a kitchen door that’s got all my kids’ heights on it.”

The federal government has tried to help in its own way. In 1983, the government designated the 300-square-mile area surrounding the smelter a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). After years of study and negotiation, the government ordered Atlantic Richfield to remove up to 18 inches of soil in residential yards with arsenic levels exceeding 250 parts per million (ppm). For so-called “pasture land”—that is, nearly everything else—the government set the threshold for soil removal at 1,000 ppm. By way of reference, even 100 ppm is sometimes considered too toxic for local landfills, and the federal government itself has elsewhere set a threshold of 25 ppm. Some States set residential cleanup levels as low as 0.04 ppm.

The cleanup work that followed left much to be desired. By 2016, Atlantic Richfield claimed that it had virtually finished work on the landowners’ properties. Yet, only 24 of their 77 properties had been remediated, and only about 5 percent of the total acreage had been touched. Soil near Tammy Peters’s daycare playground, for example, still shows an arsenic level of 292 ppm. But because the “weighted average” for her yard is below 250 ppm, Atlantic Richfield performed no cleanup of the playground at all.
So the landowners here proceeded as landowners historically have: They sought remedies for the pollution on their lands in state court under state law. *** The Montana Supreme Court has held that the landowners’ case states a viable claim for relief and warrants trial.

Now, however, Atlantic Richfield wants us to call a halt to the proceedings. The company insists that CERCLA preempts and prohibits common law tort suits like this one. On Atlantic Richfield’s telling, CERCLA even prevents private landowners from voluntarily remediating their own properties at their own expense. No one may do anything in 300 square miles of Montana, the company insists, without first securing the federal government’s permission.

But what in the law commands that result? Everything in CERCLA suggests that it seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land.

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So how does Atlantic Richfield seek to transform CERCLA from a tool to aid cleanups into a ban on them? *** Atlantic Richfield directs our attention to § 122(e)(6). It’s a provision buried in a section captioned “Settlements.” The section outlines the process private parties must follow to negotiate a settlement and release of CERCLA liability with the federal government. Subsection (e)(6) bears the title “Inconsistent response action” and states that, “[w]hen either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.” So even read for all its worth, this provision only bars those “potentially responsible” to the federal government from initiating cleanup efforts without prior approval. To get where it needs to go, Atlantic Richfield must find some way to label the innocent landowners here “potentially responsible part[ies]” on the hook for cleanup duties with the federal government.

They are hardly that. When interpreting a statute, this Court applies the law’s ordinary public meaning at the time of the statute’s adoption, here 1980. To be “potentially responsible” for something meant then, as it does today, that a person could possibly be held accountable for it; the outcome is capable of happening. And there is simply no way the landowners here are potentially, possibly, or capable of being held liable by the federal government for anything. In the first place, the federal government never notified the landowners that they might be responsible parties, as it must under § 122(e)(1). Additionally, everyone admits that the period allowed for bringing a CERCLA claim against them has long since passed under § 113(g)(2)(B). On any reasonable account, the
landowners are potentially responsible to the government for exactly nothing.

Statutory context is of a piece with the narrow text. Nothing in § 122 affects the rights of strangers to the federal government’s settlement process. Everything in the section speaks to the details of that process. * * * It says nothing about the rights and duties of individuals who, like the landowners here, have nothing to settle because they face no potential liability.

Atlantic Richfield’s replies do nothing to address these problems. Instead of making some helpful textual or contextual rejoinder about § 122, the company asks us look somewhere else entirely. Now, Atlantic Richfield says, we should direct our attention to § 107, a provision that lists four classes of “[c]overed persons” the federal government is authorized to sue under CERCLA. One of these classes encompasses any person who owns a “facility” where hazardous waste has “come to be located.” Because the landowners’ properties qualify as “facilit[ies]” where Atlantic Richfield’s waste has come to be located, everyone admits the landowners themselves are “[c]overed persons.” And, according to Atlantic Richfield, this necessarily means they are also “potentially responsible part[ies]” subject to § 122(e)(6)’s requirement that they seek federal permission before proceeding with any cleanup.

But notice the linguistic contortion and logical leap. Linguistically, § 107 identifies the “[c]overed persons” the government is authorized to sue. Section 122 requires a “potentially responsible party” seeking settlement with and discharge of liability from the federal government to obtain its permission before engaging in a cleanup. The terms use different language, appear in different statutory sections, and address different matters.

Under the plain and ordinary meaning of the statutory terms before us, these landowners are not potentially responsible parties and CERCLA doesn’t require them to seek permission from federal officials before cleaning their own lands. If Congress had wished to extend its ask-before-cleaning rule to every covered person—including those the government chooses not to pursue for potential liability—all it had to do was say so. Congress displayed no trouble using the term “[c]overed persons” elsewhere in the statute. Conspicuously, it made a different choice here.

In the end, the company’s case cannot help but be seen for what it really is: an appeal to policy. On its view, things would be so much more orderly if the federal government ran everything. And, let’s be honest, the implication here is that property owners cannot be trusted to clean up their
lands without causing trouble (especially for Atlantic Richfield). Nor, we are told, should Montanans worry so much: The restrictions Atlantic Richfield proposes aren’t really that draconian because homeowners would still be free to do things like build sandboxes for their grandchildren (provided, of course, they don’t scoop out too much arsenic in the process).

But, as in so many cases that come before this Court, the policy arguments here cut both ways. Maybe paternalistic central planning cannot tolerate parallel state law efforts to restore state lands. But maybe, too, good government and environmental protection would be better served if state law remedies proceeded alongside federal efforts. State and federal law enforcement usually work in just this way, complementing rather than displacing one another. And, anyway, how long would Atlantic Richfield have us enforce what amounts to a federal easement requiring landowners to house toxic waste on their lands? The government has been on site since 1983; work supposedly finished around the landowners’ homes in 2016; the completion of “primary” cleanup efforts is “estimated” to happen by 2025. So, yes, once a Superfund site is “delisted,” the restrictions on potentially responsible parties fade away. But this project is well on its way to the half-century mark and still only a “preliminary” deadline lies on the horizon. No one before us will even hazard a guess when the work will finish and a “delisting” might come. On Atlantic Richfield’s view, generations have come and gone and more may follow before the plaintiffs can clean their land.

The real problem, of course, is that Congress, not this Court, is supposed to make judgments between competing policy arguments like these. And, as we’ve seen, Congress has offered its judgment repeatedly and clearly. CERCLA sought to add to, not detract from, state law remedial efforts. It endorsed a federalized, not a centralized, approach to environmental protection. What if private or state cleanup efforts really do somehow interfere with federal interests? Congress didn’t neglect the possibility. But instead of requiring state officials and local landowners to beg Washington for permission, Congress authorized the federal government to seek injunctive relief in court. Atlantic Richfield would have us turn this system upside down, recasting the statute’s presumption in favor of cooperative federalism into a presumption of federal absolutism.

While I agree with the Court’s assessment in Parts I and II of its opinion that we have jurisdiction to hear this case, I cannot agree with its ruling on the merits in Part III. Departing from CERCLA’s terms in this way transforms it from a law that supplements state environmental restoration efforts into one that prohibits them. Along the way, it strips away ancient common law rights from innocent landowners and forces them to suffer toxic waste in their backyards, playgrounds, and farms. Respectfully, that is not what the law was written to do; that is what it was written to prevent.
CHAPTER 9

REGULATION OF TOXIC SUBSTANCES AND GENETICALLY MODIFIED ORGANISMS

A. REGULATING PESTICIDES

3. ESTABLISHING TOLERANCES FOR PESTICIDE RESIDUES ON FOOD

Page 851, insert the following at the end of Note 4:

In April 2019, in response to a request for rehearing en banc, the 9th Circuit ordered EPA to issue a “full and final decision” on chlorpyrifos within 90 days. See LULAC v. Wheeler, 922 F.3d 443 (9th Cir. 2019). In July 2019, EPA issued its decision, refusing to revoke the tolerances and cancel the registrations for chlorpyrifos on the grounds that the claims regarding neurodevelopmental toxicity were not supported by valid, complete, and reliable evidence. See Chlorpyrifos; Final Order Denying Objections to March 2017 Petition Denial Order (84 FR 35555, July 24, 2019). In response, several states, including California, have banned chlorpyrifos. And in February 2020, the leading manufacturer of chlorpyrifos, Corteva Agriscience (a 2019 spinoff of the crop protection business of DowDuPont) announced that it would stop producing the pesticide by the end of 2020.

B. Regulating Industrial Chemicals

3. TSCA 2.0: KEY PROVISIONS OF THE REVISED STATUTE

Page 868, insert the following after Note 3:

SAFER CHEMICALS, HEALTHY FAMILIES V. U.S. ENVIRONMENTAL PROTECTION AGENCY


943 F.3d 397

MICHELLE T. FRIEDLAND, CIRCUIT JUDGE:

Petitioners, a variety of environmental groups and other organizations, seek review of a rule promulgated by the United States Environmental
Protection Agency (“EPA” or “the Agency”) establishing a process to evaluate the health and environmental risks of chemical substances. EPA promulgated the “Risk Evaluation Rule” under its authority granted by 15 U.S.C. § 2605(b)(4)(B), a provision added in 2016 to the Toxic Substances Control Act (“TSCA”). Petitioners argue that provisions in the Risk Evaluation Rule relating to the Agency’s evaluation of the risks from a substance’s “conditions of use” violate several of TSCA’s requirements. Specifically, Petitioners argue: (1) that TSCA requires EPA to evaluate risks associated with a chemical’s uses collectively before determining that the chemical is safe; (2) that EPA must consider all of a chemical’s conditions of use in that evaluation; and (3) that, when considering conditions of use, EPA must evaluate past disposals of all chemicals, as well as the use and subsequent disposal of chemicals not currently or prospectively manufactured or distributed in commerce for that use. Petitioners argue that various provisions of the Risk Evaluation Rule demonstrate that EPA will not do any of these three things.

We hold that we lack jurisdiction to review Petitioners’ first challenge, and that their second fails on the merits. But we grant in part the Petition for Review with respect to Petitioners’ third challenge.

I.

A.

Congress enacted TSCA in 1976 “to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances.” TSCA was “designed to fill a number of regulatory gaps” in premarket review, regulation of chemicals themselves (rather than regulation of discharges, emissions, ambient air, or consumer products), and information-gathering responsibility. TSCA required EPA to regulate chemical substances that the Agency found to “present an unreasonable risk of injury to health or the environment.” As originally enacted, however, TSCA did not provide a specific process or timeline by which EPA was required to evaluate a substance’s risks.

In the decades following TSCA’s passage, Congress found that “effective implementation of TSCA by [EPA] ha[d] been challenged by shortcomings in the statute itself, and by several key decisions of Federal Courts and the Agency’s interpretation of those decisions.” There had “been persistent concerns about the pace of EPA’s work under TSCA, the ability of the Agency to use its existing authority, and whether the statute prevent[ed] certain regulatory efforts.” Congress accordingly amended TSCA in 2016. See Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (codified at 15 U.S.C. § 2601 et seq.).

The 2016 amendments “restructur[ed] the way ... chemicals are evaluated and regulated,” but Congress’s policy goals reflected in the 1976 Act remained “intact.” Congress intended through the amendments “to provide broad protection of human health and the environment,” and “to improve availability of information about chemicals.”
The 2016 amendments create, among other things, “a separate risk evaluation process for determining whether a chemical substance presents or will present an unreasonable risk of injury,” and prescribe statutory deadlines by which EPA is required to complete such evaluations. The amendments also direct EPA’s Administrator to prioritize evaluations of the risks of chemicals considered to be the most dangerous. And once EPA determines that a particular chemical substance is associated with an unreasonable risk, the Agency is required to regulate that substance.

With respect to prioritizing risk evaluations, TSCA requires that the Administrator “designate as a high-priority substance a chemical substance that the Administrator concludes ... may present an unreasonable risk of injury to health or the environment ... under the conditions of use.” The Administrator must designate a substance as “low-priority” if “such substance does not meet the standard” to be high-priority.

For chemical substances that EPA designates as high-priority, the Agency must initiate and complete a risk evaluation of the chemical within three years, with a possible six-month extension. EPA must also conduct some risk evaluations at the request of chemical manufacturers (“manufacturer-requested risk evaluations”).

TSCA’s risk evaluation provision requires EPA to evaluate chemical substances under their “conditions of use.” Specifically, TSCA states:

The Administrator shall conduct risk evaluations pursuant to this paragraph to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.

The term “conditions of use” is defined to mean “the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.” In the early stages of the risk evaluation process, TSCA requires EPA to list in a published scope document the conditions of use it “expects to consider” for the chemical substance being evaluated.

Once a risk evaluation is completed, if the Administrator determines based on that evaluation “that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents an unreasonable risk of injury to health or the environment, the Administrator shall” promulgate rules regulating that chemical substance so that it “no longer presents such [an unreasonable] risk.”

In order to effectuate TSCA’s statutory requirements, Congress instructed EPA to “establish, by rule, a risk-based screening process, including criteria
for designating chemical substances as” either high-priority or low-priority for risk evaluation. EPA was also required to establish by rule “a process to conduct risk evaluations.”

C.

In accordance with TSCA, EPA issued rules for prioritization and risk evaluation in July 2017. The Risk Evaluation Rule states, generally, that EPA will evaluate chemical substances under their conditions of use:

As part of the risk evaluation, EPA will determine whether the chemical substance presents an unreasonable risk of injury to health or the environment under each condition of uses [sic] within the scope of the risk evaluation, either in a single decision document or in multiple decision documents.

The Risk Evaluation Rule similarly explains that “[t]he scope of the risk evaluation will include,” among other things, “[t]he condition(s) of use, as determined by the Administrator, that the EPA plans to consider in the risk evaluation.” “Conditions of use” is defined in the Risk Evaluation Rule as “the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of”—the same definition as in TSCA itself.

In the preamble to the Risk Evaluation Rule, EPA states that three categories of uses and activities are excluded from the definition of conditions of use. Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act. These are: (1) “circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing, or distribution,” which the Agency calls “legacy uses”; (2) “disposals from such uses,” which the Agency calls “associated disposal”; and (3) “disposals that have already occurred,” which the Agency calls “legacy disposal.” In this litigation, EPA refers to these uses and activities collectively as “legacy activities.”

II.

A.

Petitioners first challenge provisions of the Risk Evaluation Rule relating to the process by which EPA will conduct risk determinations. Petitioners argue that several provisions in the Rule assert that EPA has authority to determine whether individual conditions of use, in isolation, pose unreasonable risks, rather than to evaluate the risks posed by a chemical substance holistically.

We conclude that Petitioners’ challenge regarding use-by-use risk evaluations is not justiciable because it is not clear, due to the ambiguous text
of the Risk Evaluation Rule, whether the Agency will actually conduct risk
evaluations in the manner Petitioners fear.

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Because Petitioners’ theory of injury is dependent upon harm caused by a
failure to assess all conditions of use together, and because it is very uncertain
whether EPA ever plans to do what Petitioners fear, Petitioners’ alleged injury
is too speculative at this time to establish Article III jurisdiction. If EPA does,
in the future, fail to consider all conditions of use together in completing a risk
evaluation, and if Petitioners are harmed by that failure, then Petitioners may,
under TSCA, seek review of EPA’s “no unreasonable risk” determination.
Petitioners would at that time have standing to sue, and such a claim would
be ripe for review. And EPA has insisted—both at oral argument and in its
briefing here—that Petitioners would be able to challenge an allegedly
improper risk determination.

B.

Petitioners next argue that the Risk Evaluation Rule contravenes TSCA’s
requirement that EPA consider all of a chemical’s conditions of use when
conducting a risk evaluation—which Petitioners assert is required whether or
not Petitioners are correct in their argument, discussed above, that the risk
analysis should look at uses collectively.

***

Petitioners’ challenge to the Rule’s scope provisions, however, fails on the
merits. The problem with Petitioners’ theory is that the meaning they attribute
to these provisions is inconsistent with the provisions themselves. The phrase
“the conditions of use within the scope of” an evaluation simply refers to the
conditions of use that are applicable to any particular substance—and that
therefore are included in the scope of that substance’s evaluation—without
excluding any conditions of use in forming that list. Likewise, the phrase that
refers to the conditions of use “that the EPA plans to consider” simply refers to
the Agency’s role in determining what the conditions of use are for a particular
substance. Petitioners effectively acknowledge as much in arguing that the
similar language of TSCA itself referring to the conditions of use that the
Administrator “expects to consider” does not grant EPA discretion to exclude
conditions of use. We see no reason why “plans to consider” should be read
differently than “expects to consider.”

C.

Finally, we turn to Petitioners’ challenge to EPA’s categorical exclusion of
legacy activities from the definition of “conditions of use.”

TSCA defines the term “conditions of use” to mean: “the circumstances, as
determined by the Administrator, under which a chemical substance is
intended, known, or reasonably foreseen to be manufactured, processed,
distributed in commerce, used, or disposed of.” The definition in the Risk
Evaluation Rule parrots the statute. In the preamble to the Risk Evaluation
Rule, EPA elaborated on this definition, however, and stated that it does not consider what it now calls “legacy activities”—consisting of “legacy uses,” “associated disposals,” and “legacy disposals”—to be conditions of use.

EPA defines the term “legacy uses” in the preamble as “the circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing, or distribution.” For example, although asbestos is now infrequently used in making new insulation, it remains in place in previously installed insulation. According to EPA’s interpretation, the use of asbestos in insulation is a “legacy use” of that chemical. “Associated disposal[s]” refers to future disposals from legacy uses, id., such as the removal of asbestos-containing insulation to a landfill during a building’s renovation. Finally, “legacy disposal[s]” are defined as “disposals that have already occurred,” regardless of whether the substance disposed of is still manufactured for its pre-disposal use. For example, this could refer to the previous placement of asbestos insulation into a landfill or the previous disposal of a chemical substance in a flame retardant that is still used for that purpose. Petitioners argue that EPA’s exclusion of these legacy activities from the definition of “conditions of use” contradicts TSCA’s clear statutory definition of the term.

Petitioners argue that their members are exposed to—and injured by—the use of chemical substances through legacy activities. For example, Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union has members who, through their work, are exposed to the known carcinogen asbestos in the form of legacy uses when “equipment or structures are demolished, repaired[,] or refurbished.” Petitioners also argue that their members are at risk of exposure to asbestos through its associated disposal. Petitioners similarly claim that their members suffer harmful lead exposures resulting from the “legacy use” of lead paint and water pipes.

Petitioners have standing to challenge this exclusion, and their challenge is ripe. As Petitioners point out, EPA’s interpretation here is “definitional,” and generally “requir[es] EPA to ignore ongoing exposures from ‘legacy activities’ in every risk evaluation.” Petitioners claim that excluding these ongoing exposures from consideration will understate a chemical’s health risks, violating Petitioners’ right to risk evaluations that comply with TSCA. They argue that this threatens their concrete interest in the health protections provided by TSCA. EPA’s exclusion of legacy activities from the definition of “conditions of use” has the clear, immediate effect of excluding broad categories of activities from EPA’s consideration in chemical risk evaluations, and Petitioners’ alleged resulting injury is sufficiently clear and concretely tied to
the challenged preamble to satisfy the requirements of both standing and ripeness

2.

In reviewing an agency’s interpretation of a statute, we apply the standard articulated by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under Chevron step one, we ask “whether Congress has directly spoken to the precise question at issue.” At that point, “[i]f the intent of Congress is clear, that is the end of the matter;...[w]e must give effect to the unambiguously expressed intent of Congress.” But if “the statute is silent or ambiguous with respect to the specific issue, we must ask” at Chevron step two “whether the regulations promulgated by the agency are based on a permissible construction of the statute.” If they are, we “must defer to the agency.” We need not defer to agency regulations, however, “if they construe a statute in a way that is contrary to congressional intent or that frustrates congressional policy.”

* * *

TSCA defines “conditions of use” as “the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.” Interpreting this statutory text in the preamble to the Rule, EPA relied on what it understood to be TSCA’s “focus on uses for which manufacturing, processing, or distribution in commerce is intended, known to be occurring, or reasonably foreseen to occur (i.e., is prospective or on-going), rather than reaching back to evaluate the risks associated with legacy uses, associated disposal, and legacy disposal.” As evidence, EPA pointed to the “to be” phrasing in TSCA’s definition of “conditions of use.” EPA also noted that TSCA’s legislative history focuses on the regulation of chemicals “in commerce.” Finally, the Agency stated that TSCA does not authorize it to regulate uses of chemicals except by regulating chemicals’ manufacture, processing, or distribution. For example, although EPA could regulate the production of a flame retardant for use in home furniture, the Agency contends in its briefing here that it could not prevent individuals who already own furniture treated with that flame retardant from continuing to use that furniture. Together, such considerations led EPA to give TSCA a “prospective interpretation” that excludes legacy activities.

In defending its interpretation here, EPA draws on these explanations given in the preamble. EPA further argues that the terms “intended” and “reasonably foreseen” as used in TSCA’s definition of “conditions of use” “are plainly forward looking”; that “known,” when combined with “to be,” is a “present tense verb”; and that “intended,” “known,” and “reasonably foreseen” are all “broad, general terms that plainly require EPA to exercise its judgment.” This language, EPA contends, demonstrates that Congress intended EPA to focus on activities for which the manufacturing, processing, or distribution in commerce of a chemical is intended, known, or reasonably foreseen. EPA also argues that it would make little sense to interpret
conditions of use to include activities that EPA has little time to evaluate or ability to regulate, and that TSCA should be interpreted to allow the Agency to focus on quickly regulating the worst risks, which it contends do not arise from legacy activities.

Petitioners argue that EPA’s interpretation is contradicted by the plain text of TSCA’s statutory definition of “conditions of use,” and is not saved by any grant of unfettered discretion to the Agency. Petitioners argue that EPA’s interpretation, which only includes the use and subsequent disposal of chemicals that also continue to be manufactured, processed, or distributed in commerce for that same use, fails to give independent meaning to “use” and “disposal” in the statutory definition’s disjunctive list (“manufactured, processed, distributed in commerce, used, or disposed of”). For instance, Petitioners note, “lead pipes are ‘known to be used’ in water distribution systems,” and “[t]his is true regardless of whether lead pipes continue to be manufactured or distributed.” Petitioners also argue that an interpretation that “would result in inconsistent treatment of identical activities based solely on whether manufacture or distribution is ongoing,” as EPA’s would, does not square with TSCA itself. Petitioners dispute EPA’s claim that, when a substance is no longer manufactured or distributed for a particular use, it is unable to evaluate or regulate that use and associated disposal, and argue that even if EPA’s assertions to that effect were correct, that would not necessitate a finding that EPA could therefore exclude consideration of such use and disposal from risk evaluations. They further argue that because previously disposed substances continue to be present at disposal sites, their disposal is ongoing, and captured by TSCA’s definition. Finally, Petitioners generally contend that EPA’s exclusion of legacy activities “undermine[s] TSCA’s core aim to prevent unreasonable risks to health and the environment from toxic chemicals.”

EPA’s contention that TSCA can reasonably be read to refer to the future use of a product, and disposals associated with such use, only when the product will also be manufactured in the future for that use—and not when the product is no longer manufactured for the relevant use—is without merit. TSCA’s “conditions of use” definition plainly addresses conditions of use of chemical substances that will be used or disposed of in the future, regardless of whether the substances are still manufactured for the particular use.

Although we agree with EPA that the phrase “to be” in the statutory definition denotes the present or future tense, when “to be” is combined with “used” and “disposed of,” two plain meanings result: future uses and future disposals. And these are precisely the things that EPA has purported to exclude by defining conditions of use to exclude legacy uses and associated disposals: activities (i.e., uses), “that do not reflect ongoing or prospective manufacturing, processing, or distribution,” and “disposals from such uses,” such as “the future disposal of insulation that contains a chemical substance that is no longer manufactured, processed, or distributed for use in insulation.”
The example used by EPA in the Risk Evaluation Rule’s preamble—the disposal of insulation previously installed in a building—in fact serves as a useful example for why the Agency’s interpretation cannot be upheld: The future disposal of asbestos insulation is clearly an example of a chemical substance being “disposed of.” To the extent it is “intended” that such a substance be disposed of, or “known” that it will be, or if such disposal is “reasonably foreseen,” that circumstance unambiguously falls within TSCA’s definition of “conditions of use.” Similarly, as Petitioners point out, if lead pipes exist in water distribution systems, they are “known to be used” in those systems. This is so without any regard to whether these substances are also intended, known, or reasonably foreseen to be prospectively manufactured (or processed, or distributed in commerce) for those uses.

EPA resists this conclusion, arguing that the Agency has broad discretion, granted to it by TSCA, to determine what constitutes a condition of use. We agree that the statute grants EPA discretion to determine the conditions of use for each chemical substance, but that discretion may only be exercised within the bounds of the statutory definition itself. Where Congress has explicitly provided a definition for a term, and that definition is clear, an agency must follow it. And here, as we have explained, TSCA’s definition of “conditions of use” clearly includes uses and future disposals of chemicals even if those chemicals were only historically manufactured for those uses. EPA’s exclusion of legacy uses and associated disposals from the definition of “conditions of use” is therefore unlawful.

We draw a distinction, however, between “legacy uses” and “associated disposals,” on the one hand, and “legacy disposals,” on the other. EPA uses the term “legacy disposals” to refer to “disposals that have already occurred (e.g., a chemical substance currently in a landfill or in groundwater).” As to this issue, EPA’s present tense argument has more force, and we hold that its interpretation is permissible under TSCA.

In our view, TSCA unambiguously does not require past disposals to be considered conditions of use. The statutory definition, once again, covers the circumstances “under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.” A substance that has already been disposed of will not ordinarily be intended, known, or reasonably foreseen to be prospectively manufactured, processed, distributed in commerce, used, or (again) disposed of. Of course, there may be some substances that already have been disposed of yet are also “known ... to be ... distributed in commerce” or used. And TSCA’s definition does, as discussed above, clearly cover those substances and those prospective uses. But TSCA does not address a substance that has already been disposed of and remains so.

Petitioners argue that “disposal” in this context “is not a one-time occurrence when the substance ... is buried or placed in a landfill or other waste facility,” but rather that disposal “remains ongoing after the initial act of discard.” By way of example, Petitioners note that although TSCA itself does
not define the term “disposal,” EPA has previously defined the term in the context of regulating chemicals known as PCBs, under the pre-2016 TSCA. In that context, EPA defines “disposal” to mean “intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items,” and specifically notes that “[d]isposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items.” EPA takes issue with Petitioners’ reliance on this definition, but acknowledges in its briefing here that the term “disposed of” could refer to “the act of putting something in a landfill or other resting place, or it could conceivably refer to the movement of chemicals by natural forces after the initial act of disposal.”

We need not wade into any debate over the precise meaning of “disposal.” Even accepting Petitioners’ asserted definition, we see no reason why “spills, leaks, and other uncontrolled discharges”—or even “actions related to containing ... or confining” substances as also referenced in 40 C.F.R. § 761.3—would not be considered independent disposals. They would thus qualify as “disposals” (and therefore conditions of use) for substances that are currently manufactured for their pre-disposal use, or “associated disposals” for substances that are no longer manufactured for their pre-disposal use. If, under the applicable definition of “disposal,” something is in fact again disposed of—even if it was disposed of previously—or when a disposal is in fact ongoing, we see no reason why that use is not captured as a prospective disposal. But that does not mean that legacy disposals—as used to refer simply to “disposals that have already occurred”—should fall under the statutory definition of “conditions of use.”

Because TSCA’s statutory definition of “conditions of use” unambiguously does not reach legacy disposals, we hold that the Agency did not err in excluding such disposals from consideration as “conditions of use.”

III.

For the reasons discussed, the Petition for Review is DISMISSED in part, GRANTED in part, and DENIED in part. The Petition is dismissed with respect to Petitioners’ challenge regarding use-by-use determinations. The Petition is granted with respect to Petitioners’ challenge to EPA’s exclusion of “legacy uses” and “associated disposals” from the definition of “conditions of use,” and those portions of the Risk Evaluation Rule’s preamble are vacated. The Petition is denied with respect to the alleged exclusion of conditions of use from the scope of risk evaluation and with respect to EPA’s exclusion of “legacy disposals” from “conditions of use.” The parties shall bear their own costs on appeal.