

1. *With regard to the NO<sub>x</sub> SIP call, you mentioned a \$2000/ton EPA mandate. Could you please explain what this means, and how this applies? My understanding at this point is that states must decide on measures such that NO<sub>x</sub> emissions credits can be traded at \$2000/ton or less. If this is the extent of what you were expecting us to know, then a response is not necessary.*

When EPA promulgated its NO<sub>x</sub> SIP call in 1998, it required 22 states and D.C. to reduce their “significant contribution” to ozone NAAQS exceedances in downwind states. To select which upwind emissions were “significant”, EPA decided that NO<sub>x</sub> emissions were “significant” if they could be reduced cheaply – i.e., for less than \$2,000 per ton. See Percival at p. 639, and the subsequent discussion in *Michigan v. EPA* on p. 641.

2. *With respect to Professor Cook's presentation, what legal conclusions should we be expected to make as to climate change regulation? Here, I have taken away an understanding of the interaction between NSPS and PSD, with a focus on NSPS for coal-fired power plants. Please let me know which other areas of law I should pay attention to from his lecture and presentation.*

You’ve correctly identified that the interplay between NSPS and PSD will play a critical role for regulation of greenhouse gas emissions under the Clean Air Act. The rest of Prof. Cook’s presentation, however, includes other important observations about the formulation of ambient air quality standards and permit frameworks for large stationary sources under the PSD and non-attainment NSR programs.

3. *In class (11/18/13), during the discussion of Remedial Responses, you mentioned “Megasites” and provided an example of an entire River in NJ. Is “Megasite” a term of art with specific requirements? If so, how does a Megasite differ from a regular remediation site?*

A “mega-site” isn’t a statutorily defined term or legal concept, but EPA uses it to label particularly large and difficult CERCLA sites. They typically cover large geographic areas and will require more than \$50 million to remediate. As EPA finishes work on smaller and simpler sites, the mega-sites have begun to consume a greater portion of EPA’s resources and CERCLA funds. Some examples of CERCLA mega-sites include the Diamond Alkali Site in New Jersey (which now encompasses much of the Passaic River and a good portion of Newark Bay), the Hudson River Site in New York, the Fox River Site and the Palmer Mining Site in Missouri.

4. *Is bankruptcy a quasi-defense under CERCLA? I assume that injunctions are not affected by a PRP's status under bankruptcy, but what about cleanup orders or reimbursement?*

A debtor can discharge in bankruptcy its liabilities for arranging the treatment or disposal of its hazardous substances at a third-party site. The ability to discharge CERCLA liabilities for contaminated sites that the debtor still owns, however, is far more limited.

5. *Under CERCLA, who is eligible to enter into a de minimis settlement agreement? Is this something that the generator would work out with the EPA, or with the PRPs?*

Typically, a de minimis settlor is responsible for one percent or less of the volume or liabilities associated with a site. A de micromis settlor is even smaller, and typically accounts for .1 percent or less. Either EPA or private parties can discharge a party as a de minimis party, but CERCLA provides special settlement protection and (in some cases) exemptions from liability for de minimis and de micromis parties.

6. *What is the difference in process from Informal Rulemaking (ANPR, Proposed Rule, NoDA, Final Rule) and Formal Rule Making? i.e., what are the steps in formal rule making aside from Reviewing the Record, Final Rule, Action / Guidance)?*

Formal rulemaking typically involves a quasi-judicial proceeding with a formal hearing, third-party adjudicator and introduction of evidence or testimony. Because of the heavy burdens and resources limitations on the agency when it uses formal rulemaking, federal agencies almost always rely on informal notice-and-comment rulemaking to promulgate routine regulations.

7. *You mentioned in class that "NSPS has a trap door to apply to any regulated pollutant, the largest one being CO2." Why is this significant? Simply because this is the only way that CO2 is captured under legislation?*

“Trap door” might not have been the clearest term. I meant that parties often fight vigorously on whether a substance qualifies as an air “pollutant” or on NAAQS standards for other ambient pollutants, but then overlook that EPA has the ability to set NSPS standards that limit a broad array of contaminants that aren’t criteria air pollutants. This catch-all is particularly important for CO<sub>2</sub> (as we discussed in light of the NSPS for new coal-fired power plants), but keep in mind that it isn’t “the only way that CO<sub>2</sub> is captured under legislation” – EPA has now promulgated requirements to control CO<sub>2</sub> under the PSD program via the Tailoring Rule.

8. *Under the CAA, are we responsible for knowing the maximum emissions allowable and the triggering levels for what qualifies as a major source? i.e., do we need to bring the NAAQ table from the course syllabus?*

You should know generally some of the most important triggering levels for major source status, such as the threshold levels to determine major sources for ozone under Title I, hazardous air pollutants under Title III, and CO<sub>2</sub> under the Tailoring Rule. Just to be safe, I would bring in the NAAQS table.

9. *You said that a trucker who conveyed toxic hazardous materials would NOT be potentially liable if the customer selects the destination. It's my understanding according to my notes that which party makes the final decision does not determine liability, but rather if a transporter is engaged in the decision making process, he can still be exposed to liability. I'd like to confirm that either my notes are right and I misread the question or that my notes are incorrect.*

Generally, section 107(a)(4) of CERCLA will make a transporter of hazardous substances liable for response costs at a site “selected by such person.” Typically, a transporter will not incur

liability if its customer selected the site and the transporter simply conveyed the material. Some courts, however, have occasionally held transporters liable for acting in concert with their clients in picking out the site (usually by actively participating in the choice).

*10. One of the review questions said that the U.S. Supreme Court in Duke Energy did NOT decide that the CAA gave EPA the authority only to approve or deny a SIP based on its compliance with a NAAQS. Is this because they decided that in Virginia v. EPA? or is it because the EPA can dictate specific control measures that a state must include in its SIP?*

The review question centered on the holding in *Duke Energy*, which addressed the scope of EPA's power to define the term "modification" under the NSPS and PSD/NSR programs. The question of EPA's authority to reject proposed SIPs arose in a different case – *Virginia v. EPA*, as you noted.

*11. Did we cover the National Priorities List under CERCLA?*

Yes. The National Priorities List is the list of CERCLA sites that qualify for remedial action. While EPA can spend CERCLA funds on emergency removal actions at any site which poses an imminent and substantial endangerment, it cannot disburse CERCLA funds on long-term remedial actions at sites without first listing them on the NPL. See Percival at p. 412.

*12. I understand the standards and requirements for PSD and NSR/NA, but I am a little confused about how to understand NSR. In class I got the impression that PSD and NSR are two separate but similar programs. PSD permits are issued to new sources in attainment areas and focus on preventing significant deterioration. Similarly, NSR permits are issued in non-attainment areas. However, when I read the book and the horn book you recommended, I get the impression that New Source Review is a process that determines specific technology requirements for individual sources. The permit requirements differ depending on whether the source is in an attainment area (PSD) or Non-attainment area (NA).*

You're correct in that non-attainment NSR permits can impose different technology standards on major sources based on the size of the source and the degree of the area's non-attainment for the pollutant. For example, a major source for volatile organic compounds in a non-attainment area for ozone will have to use control technology that meet Lowest Achievable Emission Rate standards (which are very stringent). As a result, individual facilities may use their own unique control technologies suited for their operations while still meet the same general LAER technology standard.

*13. If a person buys a land that is contaminated with hazardous substances, and then sells it without having released any hazardous substance in it, can that person be considered a PRP as a past owner?*

Generally, a past owner is not a potentially responsible party under CERCLA unless disposal occurs at the facility during their period of ownership. The only grey area is whether "passive

migration” such as a spreading plume of contamination constitutes “disposal” that can trigger liability for past owners. Some courts had said yes (*Nurad*) and others have said no (*CDMG Realty*). See discussion at Percival p. 427 n.7.

*14. Suppose there are two corporations producing solid waste and each is properly diluting it to safe levels before flushing it into the sewers, but when the two mix with each other and the sewer water it creates an unsafe brine. Are both corporations now in violation of RCRA or the Clean Water Act?*

First, be very careful in assuming that a facility operator can escape RCRA regulation by diluting a characteristic hazardous waste (i.e., the solution to pollution is not dilution). EPA regulations limit, or even prohibit, the use of dilution as a method of treatment, and even decharacterized wastes must still satisfy land disposal treatment standards before they can be disposed onto land. That said, if two corporations decharacterize their hazardous wastewaters through proper treatment and then the combination of them in sewer causes a synergistic reaction which creates a new dangerous wastewater, keep in mind that: (i) if the creation of a characteristically hazardous wastewater occurs within an exempt wastewater treatment system, that wastewater treatment unit shouldn't lose its exemption from RCRA TSD permitting requirements; (ii) the newly created hazardous wastewater must still meet the NPDES or state wastewater permit limits before it can be discharged into waters of the United States, and (iii) most NPDES and state wastewater permits generally prohibit the indirect discharge of incompatible wastewaters into a wastewater treatment system.