Thanks for all of your emailed review questions for the Environmental Law final exam. As promised, I've collected your questions and provided answers below. You can also find these questions and answers posted to our class website as well. Please let me know if you need anything else or have any remaining concerns.

Best wishes for a happy holiday break, and good luck!

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1. *If you have some pollutants that are NAAQs, and some HAPS. Do you take the emissions from the HAPS into account when deciding whether you meet the thresholds for NSPS, or do you keep those separate?*

The federal Clean Air Act statutorily bars the listing of any NAAQS criteria air pollutant as a hazardous air pollutant, except in rare circumstances that have not yet been met. For now, just assume that the Clean Air Act keeps the two programs completely separate, and an air pollutant regulated under PSD or NSR will not also be subjected to MACT as a hazardous air pollutant.

2. *When we are discussing portions of a statute, for example NSPS in the Clean Air Act, should we cite to the statutory section or is identifying the program sufficient?*

I don't expect you to include specific statutory citations in your answer unless the question specifically calls for it, which virtually never happens. Simply referring to the program (PSD, NSR, Title IV Acid Rain, etc.) is usually just fine. If you add a specific statutory reference based on our class discussions (e.g., Section 111d for existing source performance standards on greenhouse gas emitters), that's good for some extra credit, but it's not a huge difference.

3. *I have a question about the CAA. So the two main questions for a Title I analysis are (1) is it an existing facility or new and (2) is it in an attainment area or non-attainment area. If it's a new facility then it's subject to NSPS and if it's existing then it follows the SIP. Then if it's in an attainment area then it's subject to PSD standards and if not then it follows NSR standards. But do PSDs and NSRs only apply to new facilities or do existing facilities have to follow them too?*

An excellent question. In general, an existing major source does not have to meet a new PSD or non-attainment NSR standard unless it undergoes a modification that causes a significant net increase in its emissions. Such sources are considered "grandfathered," which is a concept that goes back to the original version of the federal Clean Air Act in 1970.

There are only a few limited exceptions to this principle, such as if EPA passes a rule to impose Existing Source Performance Standards (as it has under section 111d for greenhouse gas emissions from fossil-fueled power plants) or if an existing source is in a non-attainment area (in which case those sources may have to meet Reasonable Available Control Technology standards, the weakest control standard in the Clean Air Act).

4. *I have in my notes that PSD has a threshold of 250 and NNSR has a threshold of 100, but I was under the impression it was the other way around. Which way is the more correct way?*

It's a bit more complicated. First, for PSD, the threshold is 100 tons per year (tpy) if the source falls within EPA's list of 28 industrial categories. If the source isn't on EPA's lists, then EPA will apply a default threshold of 250 tpy.

For non-attainment NSR to apply, you have to look at the particular pollutant involved. For most criteria pollutants, the default non-attainment NSR threshold is 100 tpy. For a few pollutants, such as carbon monoxide, ozone precursors (volatile organic compounds and nitrogen oxides) and fine particulate matter, the threshold varies depending on how badly the area is out of attainment. For example, an area in extreme non-attainment for ozone will have a threshold of only 10 tpy of volatile organic compounds for a major source classification.

5. *I just wanted to check with you the difference between apportioning and allocation.*

   Apportioning refers to the process in which you are able to divide the liability among the PRPs when there is a reasonable basis for determining the contribution of each cause to a single harm. Allocation is a process employed whenever you can't divide it up: you employ the Gore Factors and BNSF factors. Do I have that right or is it backwards?

You have it right. Apportionment essentially attacks whether a harm is indivisible – without indivisible harm, you can't have joint and several liability. Allocation assumes everyone is jointly and severally liable as a starting point, and works on ways for the liable parties to fairly share their costs among each other. Remember that equity and fairness only apply to allocation; apportionment is a strictly factual finding.

Also, if you have a PRP whose shares were purchased by another company, does the liability transfer? I know we talked about acquiring a company, in which yes, the liability merges, but what happens when you just own the shares?

Purchasing the shares of a corporation is typically not enough, by itself, to transfer liability. If you buy all of the shares, you have a wholly-owned subsidiary – which

can still take advantage of the corporate veil between parents and subsidiaries. The corporate veil disappears if the parent officially merges with its newly-bought subsidiary, or if the parent ignores the corporate form to effectively disregard the subsidiary's separate existence.

Beyond these general corporate law principles, you should remember that *Best Foods* also established that CERCLA did not change general veil piercing standards. The decision also held that a parent corporation can become directly liable under CERCLA by participating in the operation of the facility in a way that conflicts with its limited role as a parent (i.e., Justice Souter's two-hats test).

5. *Under RCRA, we said the EPA has "exempted" oil from its definition of hazardous waste by deciding not to list it. I've noticed there is an exclusion from the definition of solid waste for "waste from the exploration and production of oil and gas." Do these exemptions cover two different types of waste? The way I've interpreted those two is that oil is not a hazardous waste but could be a solid waste, while waste from E&P is not a solid waste (and thus can never be a hazardous waste).*

Close, but a bit more clarification. You're absolutely correct that EPA's RCRA regulations exempt wastes from the exploration and production of oil and gas, and this exemption can include spilled petroleum and oily wastes at drilling sites. Separately, CERCLA excludes petroleum itself from the definition of hazardous substances regardless of its location, which means that CERCLA liability typically cannot attach to spilled oil and oily wastes at drilling sites as well.

But these two exclusions cover differing things, and they overlap in odd ways. For example, RCRA's exploration and production exclusion only applies to early steps in the oil collection and production process, but would not apply to the same oils and oily wastes generated downstream (e.g., waste bottoms from midstream transfer tanks, or sludges from refinery operations). CERCLA's petroleum exclusion would apply to spill petroleum at the drilling site, but not other drilling wastes at the same site which that do not contain petroleum (e.g., used solvents, spent filters, or scrubbing chemicals, which RCRA would exclude).