I've listed below all of the questions that you asked me via email for our class. My responses are attached to each question. Please let me know if you have any remaining questions or concerns, and I'll be glad to help if I can.

Thanks again for a great semester, and I hope that we'll have more chance to work together again soon!

Best wishes,

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1. *In regards to TSCA and multi-state air quality issues, what generally do we need to know? I know that you mentioned we do not need to know in great detail these issues since they were covered by guest lecturers but some specifics would be great.*

In general, you need to be able to identify a TSCA or multistate air quality issue as part of a larger compliance issue. For example, I do not expect you to tackle a full analysis on TSCA Significant New Use requirements or testing protocols, but you should know enough to spot whether a user might need to check on whether a new chemical is listed on the master inventory of chemicals.

2. *What do we need to know for choice of law as it relates to nuisance law?*

Without discussing exactly what is on the final, I would expect you to know when federal or state law would apply (if relevant), and which state's law would apply under the *Oulette* decision. I do not expect you to conduct a full-blown choice of law analysis – that's grist for a different class entirely.

3. *What is the significance of the NRDC v. Costle case as it relates to the CWA?*

This decision requires EPA to honor the Clean Water Act's command to issue permits for all point sources of pollutants into waters of the United States. EPA cannot simply decline to regulate large classes of discharges simply because they're too difficult or minor to regulate (unless the statute allows that exemption). Needless to say, this decision has some importance under the Trump Administration's attempts to suspend or revoke numerous regulatory initiatives from the Obama Administration.

NRDC v. Costle also provides a useful overview of the types of tools that EPA can use to handle large classes of sources in an efficient manner, including general permits or alternative permit conditions.

4. *What is the significance of the Aceto Agricultural Corporation decision?*

The discussion on p. 438 provides a good summary. But in essence, this decision expands the sphere of arranger liability to include "tolling arrangements" where a customer sends its raw materials to an off-site formulator who mixes them into a final product. When this arrangement inherently includes

arrangements to dispose of portions of the raw materials or their byproducts from the formulation, *Aceto* allows imposition of arranger liability on the customer.

5. *With regards to pretreatment orders, I have that municipal ordinances effectively replace the PTO that would normally exist between private upstream producers and private wastewater treatment facilities. Is this correct?*

They can, but not always. Municipal ordinances control discharges to the municipal sewer system, so their coverage depends on their specific statutory terms. For example, a municipal ordinance may bar discharges of certain categories of wastewaters into the sewer. In those circumstances, a facility may end up discharging some of its wastewater into a municipal sewer pursuant to ordinance and other wastewaters into a wastewater treatment plant pursuant to a PTO.

6. *For setting TMDLs, I understand that the EPA has a duty to set a TMDL for impaired waterways when the state fails to do so, but do they have a similar duty to designate impaired water bodies when the state will not? Do they also have the power to set waste load allocations if the state will not?*

Yes, and yes. The Clean Water Act requires imposition of TMDLs and waste load allocations for impaired water bodies. If the state refuses to do either, the federal government has a non-discretionary duty to step in. This requirement has led to a decades-long boom in TMDL litigation against both states and EPA.

7. *Does section 404 apply only to the dredging and filling of wetlands, or the dredging and filling of any WOTUS? Is a permit required for dredging even if there is nothing being added to the water?*

Section 404 requires a permit for dredging and filling of any water of the United States (remember the lake in *Coeur Alaska v. Alaska Southeast Conservation Council*). In theory, you can require a permit for operations that solely dredge from U.S. waters, but in practice virtually every dredging operation necessarily also involves some filling as well.

8. *Under the Clean Air Act, do permits only apply to pollutants that there are NAAQS for? I understand that other "pollutants" may be regulated under a PSD or NSPS system where other pollutants may be considered in choosing technology, but can they be independently regulated without a NAAQS?*

The PSD and non-attainment NSR programs only require permits for emissions of criteria pollutants with NAAQS. Once a facility needs a NSR or PSD permit for emissions of a criteria pollutant, however, that permit can select a control technology that also limits emissions of other non-criteria pollutants.

Remember, though, that this limit only applies to NSR and PSD permits under Title I of the Clean Air Act. You still need permits under Title III for hazardous air pollutants, even if the facility otherwise does not emit any criteria pollutants, as well as Title IV acid rain permits (if applicable).

9. *Under RCRA, is a generator responsible for spent product they sell for reclamation by a third party? I am thinking of the platinum-containing catalyst that Valero sold when they were done with it to be reclaimed by some independent third party. I understand that the third party would be liable for being a "generator" of the byproduct of the reclamation, but would Valero be responsible even though they sold it as a commercial product?*

Of course, it depends. In general, a producer does not need a RCRA permit if they sell a legitimate commercial product for recycling or reclamation. But as we discussed in class, certain types of reclamation or recycling can count as "discarding" under RCRA, and in those cases the person who sold the material was actually discarding a solid waste. That leaves Valero on the hook if its sale of spent catalyst actually constituted the disposal of a spent material via reclamation (if the spent material was hazardous).

10. *Under RCRA, are batteries and lightbulbs exempt from being waste at all, or just hazardous waste?*

If spent batteries and light bulbs contain enough mercury or metals to be characteristically hazardous, they are hazardous waste once discarded unless an exemption applies. For most batteries and light bulbs, you would either look to (i) the household hazardous waste exemption for bulbs and batteries discarded from homes, and (ii) the universal waste exclusion for bulbs and batteries managed by commercial facilities in ways mandated by EPA prior to disposal. Under either exemption, EPA only excludes them from the universe of "hazardous waste" – they remain solid wastes. But in reality, EPA's universal waste management standards effectively substitute for solid waste management regulations as well.

11. *Also under RCRA, we talked about exceptions for exploration and production chemicals at the wellhead and petroleum. Could you explain this a bit, or tell me if I am even correct.*

You're correct. EPA has exempted wastes uniquely associated with the exploration and production of oil and natural gas from regulation as a hazardous waste. As a result, any wastes generated by drilling a well and its associated storage or immediate transport does not require a RCRA permit. This exemption would cover, for example, chemicals sent down the borehole to hydraulically fracture a well, or chemicals used to treat natural gas before it can be placed into a pipeline for transport.

Not that RCRA's E&P exclusion is NOT the same as CERCLA's petroleum exclusion. RCRA's exclusion only applies to exploration and production activities – the exact same wastes created

downstream may require a RCRA permit. And CERCLA's petroleum exclusion applies to all petroleum and natural gas, whether they're at the wellhead or the gas station.

12. *Under CERCLA, is a past owner/operator liable only if there is disposal of a CERCLA hazardous waste while they owned it, or if there is any disposal at all?*

A past owner or operator of a facility is liable under CERCLA only if "disposal" occurs while they had the facility. The tricky question is whether the continued passive migration of pre-existing contamination constitutes qualifies as "disposal." While the circuits are split, the majority position (including the Fifth Circuit) says no.

13. *Can you briefly explain the re-opener provision in consent decrees under CERCLA?*

A reopener provision in a CERCLA consent decree allows the United States or other settling party to sue for additional costs discovered during the cleanup that fall outside the scope of the consent decree. They effectively limit the full scope of a covenant not to sue. They're usually pretty tightly limited to unusual situations where new contamination or circumstances are discovered that could not fairly fall within the original settlement.

14. *I have that 106 removal orders are limited to 1 year and 1 million or 2 years and 2 million. Can you explain this discrepancy?*

CERCLA limits removal actions (not 106 orders) to $1 million and 1 year, but EPA can issue a waiver to extend those limits to $2 million and 2 years. EPA frequently and routinely does so. Section 106 orders, however, are not limited to removal actions because they can apply to any "imminent and substantial endangerment." As a result, EPA can issue them for any dangerous situation to require action even if the cost far exceeds $2 million or lasts well beyond two years.

15. *Under the ESA, I have incidental taking permits listed under Section 7, which is only federal action. Can private parties seek incidental taking permits?*

You can get an incidental take permit as a private party if you enter into a Habitat Conservation Plan.

16. *What's the difference between a CESQG and a VSQG?*

They're the same thing. "Conditionally exempt small quantity generator" was the original name, and EPA changed the term to "very small quantity generator" in 2016 to make it less confusing to the general public.

17. *Will Storm Water Permits be a concern on the test? Will we benefit from mentioning them or since it wasn't covered in depth, should we simply ignore them?*

Without disclosing what will be on the final exam, I'll simply note that the issues with storm water permits focus on the ways that EPA and states have permitted them. First, you need to have a point source to trigger permitting requirements (even for storm water). Second, you can use a general permit

or other administrative tool to handle a large number of applications in a quick and inexpensive way (remember *NRDC v. Costle*).

18. *In Pronsolino, the court seems to hold that the state may regulate non-point sources where the sources of pollution in a body of water to meet the TMDLs of that water body when the sources of pollution were solely non point sources was permissible. How far does that holding extend? To what extent do non-point sources have to constitute the pollution of a water body before the States can step in under 303 (or do they always have the authority to balance the interests of the point sources and non-point sources)? Is it even good law? Because it seems like a strange loophole in the CWA.*

It is a strange gap in the Clean Water Act, but Congress explicitly excluded non-point sources from any NPDES permit requirements. This decision reflected the concern that large agricultural, forestry, and mining operations might have to get cumbersome and expensive permits for operations that covered large swaths of land. The TMDL option outlined in *Pronsolino* is one of the few extensions of the TMDL program to require reductions of non-point source pollution.

19. *First, this may have been addressed in class, but it isn't in my notes and I'm concerned it will be pertinent. Between the bar of citizen suits for wholly past violations, and the ruling in Laidlaw regarding mootness, there seems to be an inconsistency which isn't easily resolved.*

    a. *The part of the Gwaltney reasoning where the Court stated that citizen suits couldn't be brought for wholly past violations because it would render the purpose of the sixty day notice requirement incomprehensible because of the fact that it was intended to give alleged violators the chance to bring themselves into compliance; and the Laidlaw ruling regarding mootness, stating that voluntary compliance arguments for mootness were insufficient because of the risk of recurring bad behavior, seem to be in open conflict with each other. How are these two rulings reconciled?*

You've identified a clear tension between *Gwaltney* and *Laidlaw*, and – to be honest – there's disagreement on how to harmonize them. My take is that *Gwaltney* deals with statutory prerequisites to bring a citizen suit, which Congress can restrict beyond the constitutional standards for standing set by Article III. *Laidlaw* addresses constitutional limitations on standing in citizen suits imposed by Article III which Congress cannot expand.

The larger question, of course, is whether the "capable of repetition" doctrine for constitutional standing also extends to citizen suits where a permit holder routinely and repetitively violates a permit but, briefly, pulls itself into compliance after it receives a citizen suit notice letter. The courts have issued conflicting opinions, but it is clear that a citizen suit lawsuit can continue - even if the defendant later cures the violation – after the citizen files a complaint. This answer, however, still leaves open the possibility of later dismissal for constitutional mootness (as Ginsburg noted in *Laidlaw*) or diligent prosecution by the government that leads to a settlement or decree (so long as the settlement "reasonably assures" that the violations have ceased and will not recur).

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b. *Second, there seems to be a conflict between the diligent prosecution bar and the rights of citizens to intervene in suits the government brings. So my question is, is it a prerequisite to a citizen suit that the government not be diligently prosecuting the violating parties?*

Yes. If the government has begun "diligent prosecution," you cannot bring a citizen suit while the prosecution remains underway. I'm not as clear on whether the presence of diligent prosecution is an element for the prima facie complaint or an affirmative defense (which would affect the burden of proof). But every complaint and notice letter I've seen for citizen suits routinely alleges that the government has not undertaken diligent prosecution of the action.

20. *Will FIFRA be covered on the test beyond the reasoning behind the exemptions under TSCA?*

Without disclosing what is on the final exam, I'll simply note that we studied FIFRA briefly in the context of our larger study of TSCA. Any reasonable final exam question would need to keep that in mind.