Environmental Law

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CHAPTER 1

Approaches to Environmental Regulation

■ ANALYSIS

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A. Methods of Environmental Regulation

There are a number of different techniques that could be used to regulate environmental pollution. Each of the following approaches has its strengths and weaknesses, and each approach is used to some extent in federal environmental regulation.

1. Command and Control

Regulators could simply specify the amount of pollutants a facility may emit or the type of pollution control equipment it must use. Much of federal environmental regulation employs this type of “command and control” regulation. There are two primary approaches to determining how much pollution control will be required.

a. Technology-Based Regulation

A technology-based regulation is a standard or limitation that basically requires as much pollution control as can be achieved with existing technology. Technology-based regulations are based on an assessment of the types of available control technologies and their costs. In most cases, technology-based regulations are set without considering the effect of the emissions on the environment.

Example: EPA determines that a type of pollution control equipment, a carbon filter, is now used by the least polluting facilities in an industry. The Agency determines that the carbon filter could be used by other facilities within that industry and the cost of the equipment is not unreasonable. EPA then sets a technology-based regulation based on the amount of pollutants a typical plant in the industry would emit if it used the filter.

Statutory language requiring use of a technology-based limitation typically includes such terms as “available,” “practicable,” or “feasible.” The “Best Available Technology” (“BAT”) limitations under the Clean Water Act are examples of a technology-based limitation. Chapter 5 describes the process of establishing a technology-based limitation.

In some cases, Congress has required industries to meet limitations that can not be achieved by existing technolo-
gies. For example, Congress imposed automobile emission limitations under the Clean Air Act that required automakers to develop new technology. This is called “technology forcing.”

In most cases, technology-based limitations are expressed as “performance standards.” A performance standard sets a target which may be met by source in any way it chooses. An efficient limitation like BAT is a form of performance standard. EPA sets the limits based on its assessment of available technology, but they are expressed as maximum amounts of pollutants that a facility may discharge. This means that a facility is free to use any type of pollution control equipment or other means of reducing pollution that it wishes as long as the standard is met.

A limitation may also be expressed as a “design standard.” A design standard specifies the design of equipment that a facility must use. In effect this may require industry to use a particular piece of equipment selected by the government.

(1) Strengths
Technology-based regulations include a consideration of the cost of compliance; a regulator may conclude that technology which is “too” expensive is not “available.” Thus, compliance with technology-based regulations, although expensive, should not force an entire industry out of business. Additionally, technology-based regulations have some advantages to the regulatory agency. Development of technology-based regulations requires judgments about technology and cost which, though difficult, are less controversial than setting limits based on health or environmental effects. Technology-based standards merely require judgments about achievable levels of pollution; they do not require a judgment about acceptable levels of pollution.

(2) Weaknesses
Technology-based regulations are set with little or no consideration of their environmental impact; pollution is controlled to the extent technologically and economically possible. The actual level of control required by a technology-based regulation may be either too strict or too lenient to reach an environmental goal. This approach has been criticized as “pollution control for pollution control’s sake.”
b. Environmental Quality-Based Regulation

Environmental quality-based regulations are set to ensure that a given level of environmental quality is achieved. This may include consideration of the impact of pollutants on human health, environmental ecosystems or both. Statutory provisions requiring an environmental quality approach typically require regulations that are adequate "to protect human health and the environment." The National Ambient Air Quality Standards ("NAAQS") under the Clean Air Act are examples of environmental quality-based standards, and individual limits on air emissions are set to ensure that these standards are not violated.

(1) \textbf{Strengths}

Environmental-quality standards are set to achieve a goal that we care about—protection of human health and the environment. If properly set, they should ensure that the "right" amount of pollution control is required.

(2) \textbf{Weaknesses}

Scientific data about the health and environmental effects of pollutants are usually inadequate to allow regulators to set standards with any degree of confidence in their accuracy. Even if adequate data are available, establishing environmental quality-based regulations, especially health-based regulations, may require the regulator to make difficult value judgments about who is to be protected and the degree of protection to be provided.

2. \textbf{Market Incentives}

There are a number of regulatory techniques that attempt to use market forces to control environmental pollution. In general, these techniques are intended to provide incentives for the reduction of pollution by sources that can do so most cheaply and to allow owners of individual facilities, rather than the government, to make decisions about the level of pollution control they are willing to achieve.

a. \textbf{Types of Market Incentives}

(1) \textbf{Effluent Fees}

Taxes or other fee could be imposed based on the amount of pollution produced by an industry. The more the industry pollutes, the more taxes or fees it would pay. This would create an incentive to reduce its pollution. Effluent fees have not been widely used in
the U.S. The Clean Air Act, however, contains an escalating tax on
the production of chlorofluorocarbons to encourage their replace-
ment by other chemicals that are not taxed.

(a) Strengths
Effluent fees allow the facility to choose between reducing
pollution or paying the tax, and the facility should make the
decision that is individually most cost effective. Effluent fees
also raise money that could be used to improve the environ-
ment or enforce the system. Increasingly, fees are being charged
to issue environmental permits (based on the amount of
pollution from the facility) with the money being used to
administer the government's environmental program.

(b) Weaknesses
It is difficult to set the amount of the tax or fee. Ideally, the
amount would be set at a level that would encourage industry
to reduce its pollution to an "acceptable" level. If the tax were
too high it might encourage facilities to reduce pollution more
than is environmentally necessary; if the tax were too low it
would not provide adequate incentive.

(2) Marketable Pollution Rights
Marketable pollution rights also attempt to use market forces. This
approach, for example, may involve 1) establishing a given level of
allowable pollution, 2) allocating to industrial facilities the right to
emit pollutants at a level that will achieve this level, and 3) allowing
facilities to freely buy and sell their allocated right to pollute. If a
facility reduces its emissions to a level below its allocated right, it
may sell to another facility a "right to pollute" equal to this
reduction. The other facility will buy the right to pollute if it can do
so more cheaply than its cost of actually reducing pollution. This
should result in the desired level of pollution being achieved at the
lowest cost. The main purpose of marketable pollution rights is to
encourage pollution control at facilities that can reduce their pollu-
tion most cheaply.

It is important to understand that marketable pollution right
approaches do not address the setting of environmental goals.
Marketable rights are intended to assure that whatever environmen-
tal goal is established is met at the cheapest possible cost.
The sulfur trading program and the “offsets” program under the Clean Air Act, discussed in Chapter 7, are perhaps the most developed examples of marketable rights programs.

(a) Strengths

Marketable rights programs allow facilities to make individual decisions to either reduce pollution or pay for the right to pollute. This avoids problems that arise when the government tries to decide how much each individual facility may pollute. Instead, the combined independent decisions made by each facility should result in the most cost-effective allocation of controls.

(b) Weaknesses

Marketable rights raise difficult questions of implementation. Among other things, some system is necessary to ensure that willing buyers and willing sellers are brought together. This may result in “pollution banking” or the creation of markets to buy and sell pollution rights. Additionally, any sales must result in enforceable restrictions on the buyer and seller. Other issues in implementing a marketable rights program are addressed in the discussion of “offsets” in Chapter 7.

Marketable rights programs also raise troubling ethical questions about whether the right to pollute the environment should be treated as a property right or commodity to be traded like hog bellies.

(3) Subsidies

In some cases, the government can encourage pollution control by giving an economic subsidy to those controlling pollution. For many years, for example, the government paid up to 75% of the cost of building municipal sewage treatment plants. In many cases, tax deductions are also provided for certain expenditures for pollution control equipment. This, in effect, subsidizes the cost of the equipment.

3. Information Disclosure

Improvement in environmental quality may also be achieved by requiring the production and publication of environmental information. International approaches do not require that any specific level of environmental pollution
be achieved or that the information result in specific control measures. Rather, it is the fact of compiling and publicly disclosing the information that is intended to produce beneficial results; the information can result in political or economic incentives to reduce environmentally harmful behavior.

a. Types of Information Approaches

(1) Reporting
Industrial facilities may be required to provide public information about the types and amounts of pollutants they emit. The Emergency Planning and Community Right-to-Know Act ("EPCRA") requires such reporting.

(2) Study and Planning
In some cases, statutes require persons to study and report on the environmental effects of proposed activities. The requirement that the federal government prepare Environmental Impact Statements ("EISs") under the National Environmental Policy Act ("NEPA") is perhaps the clearest example of this approach.

b. Strengths
Informational approaches assume that publication of information will generate pressure to reduce environmental harm. Rather than publicly reporting under EPCRA that it releases large quantities of hazardous substances, a facility may choose to reduce the amount it releases or to switch to the use of less hazardous substances. These decisions will be made without a government mandate.

c. Weaknesses
Although information may be published, there is no guarantee that it will have any affect. Although NEPA has resulted in the publication of numerous, lengthy EIS's, there is considerable controversy as to whether NEPA has actually mitigated the environmental affects of government decisions.

B. Economic Considerations

1. The Issue of "Externalities"
Many economists view environmental regulation as a device for addressing "externalities." An externality is a cost associated with production of a good that is not reflected in the price of the good. Externalities result in economic
inefficiency. For example, when making a widget, a company may have to pay for raw materials and labor (which then affect the price of the widget), but may not have to pay for the costs to neighbors resulting from air or water pollution produced in making the widget. These costs to neighbors are externalities.

Environmental regulation, by forcing the company to pay for equipment to reduce the pollution, is reducing these externalities. Although the price of the widget may rise, economists would view this as an efficient use of resources.

If the goal of regulation is to prevent externalities, the cost imposed by regulation should not exceed the cost of the harms caused by the pollution.

2. Types of Economic Analysis
A major issue in establishing environmental regulations is the way in which the costs and benefits of the regulation are to be evaluated. There are several approaches that can be used to consider costs.

a. Cost-Benefit Analysis
A cost-benefit analysis compares the cost of a regulation with the benefits of the regulation. If the value of the benefits exceed the costs, the regulation could be viewed as economically efficient.

There are two major problems in performing cost-benefit analyses. First, a strict cost-benefit analysis requires that all of the costs and all of the benefits be expressed in dollars so that they can be compared. This raises difficult issues because it requires that dollar values be given to preventing death or injury. Although there is no consensus, there are techniques that economists use to place a dollar value on a human life or a dollar value on reducing the risk of death. There are also difficult problems in placing a dollar value on environmental values, such as beautiful views or preservation of endangered species.

Second, cost-benefit analysis requires that all future costs and benefits be discounted to present value. There are formulas for calculating what the present cost is of the requirement to spend money in the future. It is far more difficult to determine the present value of lives saved in the future.

Consider a regulation will cost an industry $50 million dollars in capital costs and $2 million dollars per year in operating costs. It is projected that the regulation will save 20 lives over the next 15 years. A strict cost-benefit analysis requires that the present and future costs be
discounted to present value. It also would require placing a dollar value on the 20 lives that would be saved and may require discounting the value of lives saved in the future to their present value. Only if the present discounted dollar value of the lives saved exceeds the present discounted dollar value of the cost would this regulation be considered "efficient" under cost-benefit principles.

Few environmental statutes require a strict cost-benefit analysis. Presidents, however, have issued "Executive Orders" that require federal agencies to prepare cost-benefit analyses of major regulations.

b. Cost Effectiveness Analysis
A cost effectiveness analysis compares the cost between two options to achieve a given goal. The least costly method of achieving the goal is more cost effective.

Example: Assume that the government has set a goal of emissions from an industry by 90%. One piece of equipment, Option One, will achieve this goal for $10,000 and a different piece of equipment, Option Two, will achieve the goal for $20,000. Option One is more cost effective.

Some statutes require some form of cost effectiveness analysis. The cleanup method selected by the government under the Comprehensive Environmental Response, Compensation, and Liability Act must be cost-effective. Additionally, most marketable rights programs involve attempts to meet a given goal in the most cost-effective manner.

c. Cost Consideration
In some cases, statutes require costs to be considered without giving any guidance on how the cost information should affect the final decision. In setting BAT limits under the Clean Water Act, for example, the statute requires EPA to consider "costs," but the statute does not give any guidance on what weight EPA is to give to cost considerations. In these cases, the Agency has substantial discretion in deciding how much a regulation may cost.

d. Cost Oblivious
In some cases, regulations are supposed to be established without considering the costs at all. A statute may, for example, require that a
standard be set at a level that is necessary to protect human health. In setting the health based level, the Administrator may not be authorized to consider the costs of meeting the standards. For example, EPA need not consider costs when it sets National Ambient Air Quality Standards under the Clean Air Act.

C. Ethical Considerations

Economic analysis does not consider the ethical implications of regulation. Ethical concerns pervade the field of environmental law, and there usually no clear answers to the ethical questions that are raised.

1. Protecting Nature

A major element of environmental law is the protection of the natural environment. Serious ethical questions are raised about the value of “nature” (independent of its economic benefit to humans) and the inherent value of non-human species.

2. Protecting Future Generations

Environmental regulation also raises ethical questions relating to our obligation to future generations. How much money, for example, should the current generation spend for environmental controls in order to provide a better environment for future generations?

3. Environmental Justice

The areas of “environmental justice” or “environmental racism” focus on the growing concern that environmental regulations impose disproportionate adverse impacts on the poor or on racial or ethnic minorities. A series of studies have suggested that waste disposal facilities and other environmentally harmful industries are disproportionately located in areas with large populations of African-Americans. Interpretation of these studies is still a matter of some controversy.

There are a number of legal theories that are potentially available to address environmental justice concerns. These include:

a. Equal Protection

 Constitutional challenges to state action that disproportionately affect racial minorities are potentially available under the “equal protection” clause of the Fourteenth Amendment. The U.S. Supreme Court, however, has required that plaintiffs prove “intentional discrimination” to establish a violation of the equal protection clause.
b. **Executive Order 12898**
   In 1994, President Clinton issued an executive order that requires federal agencies to consider environmental justice issues, but the order itself creates no private right of action and provides no new authority to federal agencies.

c. **Title VI of the Civil Rights Act of 1964**
   Title VI prohibits discrimination by certain parties receiving federal funds. Title VI has been used, for example, to petition the EPA to determine whether state environmental agencies receiving federal funds are using discriminatory policies. The Supreme Court has held that Title VI does not create a private cause of action allowing private parties to directly sue fund recipients.

d. **Specific Environmental Laws**
   Specific environmental statutes may contain authority to consider environmental justice concerns.
ANALYSIS

A. CONSTITUTIONAL LIMITS ON FEDERAL AND STATE REGULATORY AUTHORITY
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C. JUDICIAL REVIEW  
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A. Constitutional Limits on Federal and State Regulatory Authority

1. Potential Limits on Federal Regulatory Authority

a. Commerce Clause

The federal government does not have any general "police powers" to adopt statutes or regulations to protect human health or the environment; rather, federal statutes must be justified under an enumerated power granted in the U.S. Constitution. The Commerce Clause provides that Congress may regulate "commerce among the several states," Art. I, § 8, cl. 3, and virtually all of the major federal environmental statutes are justified under this authority. Although Congress' authority under the Commerce Clause has been construed quite broadly, the Supreme Court in a series of cases in the 1990's began to impose new requirements on Congress to justify the interstate nature of problems regulated by federal statute. In United States v. Lopez, 514 U.S. 559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), for example, the Supreme Court held that Congress does not have authority under the Commerce-Clause to prohibit the possession of firearms near schools. The Court stated that the regulation did not have a "substantial relation" to interstate commerce since the regulated activity did not "substantially affect" interstate commerce. Although the issue has been raised, the Supreme Court has not ruled that any major environmental program is not justified under the Commerce Clause.

b. Tenth Amendment

Under the Tenth Amendment, the federal government may be prohibited from requiring states to adopt and implement regulatory programs. In New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), the Supreme Court, reviewing a state challenge to a federal statute requiring states to take title to certain low-level radioactive wastes, held that Congress could provide incentives for state action but was limited in its ability to compel state regulation.

Most federal environmental statutes do not require states to adopt federal regulatory programs; rather they provide that the federal government will regulate if the state fails to act. Under the Clean Water Act, for example, water pollution permits are issued by the federal government unless a state requests delegation of the permit program. Under the Clean Air Act, states must adopt "state implementation plans," but if
they do not do so the sanctions include loss of certain federal money or the adoption of implementation plans by the federal government.

c. Eleventh Amendment
Under the Eleventh Amendment, federal courts may not have jurisdiction to hear certain actions by private parties against a state. In other words, the Eleventh Amendment acts in certain cases as a constitutional statement of state sovereign immunity. The Supreme Court has invalidated several federal statutes that authorized private federal causes of action against state governments. In Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) the Supreme Court stated that the Eleventh Amendment barred cost recovery actions against states by private parties under the Comprehensive Environmental Response Compensation and Liability Act. This Eleventh Amendment protection does not, however, apply to counties and municipalities.

2. Potential Limits on State Regulatory Authority

a. Supremacy Clause and Preemption
The U.S. Constitution can also limit the authority of states to adopt certain environmental regulations. Under the "Supremacy Clause," federal statutes "shall be the supreme law of the land," Art. VI, cl. 2, and federal statutes can preempt state laws. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), for example, preempts state ability to regulate federally registered pesticides. Most of the major federal environmental statutes, however, expressly allow states to adopt requirements more stringent than required by federal law.

b. Dormant Commerce Clause
The Supreme Court has held that the Commerce Clause prohibits states from adopting certain types of restrictions that discriminate against out of state products. This is known as the "dormant commerce clause." The Supreme Court has applied a two-tier approach in assessing the constitutionality of state laws under the dormant commerce clause. Under the first tier, a patently discriminatory law (one, for example, which expressly treats out-of-state products differently) is virtually per se a violation of the dormant commerce clause. Under the second tier, a state law that does not facially discriminate against out of state products may still violate the dormant commerce clause based on its indirect effects on interstate commerce. In such a case the court will employ a balancing test to see if the burden on interstate commerce is excessive in relation to the
local benefits. Applying a dormant commerce clause analysis, the
Supreme Court, in Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531,
57 L.Ed.2d 475 (1978), for example, held that New Jersey could not
expressly prohibit the importation of out-of-state wastes for disposal in
New Jersey. In a series of "dormant commerce clause" cases in the 1990's,
the Supreme Court invalidated a variety of other state restrictions that
indirectly discriminated against out-of-state wastes.

B. Administrative Process

Much of environmental law involves the implementation of statutes by admin-
istrative agencies. Therefore, it is important to understand how the administrative
agency operates and the basic rules of law which govern how agencies make
decisions. Students who wish to practice environmental law should seriously
consider taking a course in Administrative Law.

1. Environmental Protection Agency

The Environmental Protection Agency ("EPA") is responsible for implemen-
tation of most of the major federal pollution control statutes discussed in
courses on Environmental Law. EPA was created in 1970, and many of the
environmental statutes adopted since that date give EPA specific responsi-
bility for promulgation of regulations, issuance of permits and enforcement.

EPA is currently headed by an Administrator appointed by the President.
EPA has a headquarters, located in Washington, D.C., and several regional
offices located around the country. The Washington office of EPA is respon-
sible, among other things, for promulgation of regulations implementing
statutes. The regional offices are primarily responsible for issuance of permits
to individual sources and for initiating enforcement actions.

There are, however, numerous other federal administrative agencies with
environmental responsibilities. These include, among many others, the
Department of Interior, the Department of Energy, the Occupational Safety
and Health Administration (part of the Department of Labor), and the Food
and Drug Administration (part of the Department of Health and Human
Services).

2. Administrative Decisionmaking

a. Administrative Procedure Act

Much of the process of federal administrative law is governed by the
Administrative Procedure Act ("APA"). The APA defines the procedures
that agencies must follow and establishes procedures for judicial review. Specific environmental statutes may, however, contain procedures that agencies must follow instead of those specified in the APA.

b. Rulemaking

Federal administrative agencies typically implement and define the general requirements of statutes by promulgating regulations. Regulations, when properly adopted, have the force of law, and persons may be civilly and criminally liable for failure to comply with these agency developed “laws.”

Most regulations promulgated by EPA are issued through a process called “informal rulemaking” or “notice and comment” rulemaking. Section 553 of the APA specifies the requirements of informal rulemaking. 5 U.S.C. § 553(b). These include 1) publication of the proposed rule, 2) providing an opportunity for the public to submit comments on the proposal, 3) issuance of a final regulation, and 4) preparation of the Agency’s explanation of why it adopted the final rule and how it responds to major comments received during the public comment period. Federal regulations are published in the Federal Register and the text of the regulation, the “preamble,” typically contains the Agency’s explanation of the regulation. The Federal Register is a daily publication which contains proposed rules, final rules and other notices issued by the federal government.

In some limited cases, where required by statute, agencies will engage in “formal rulemaking” which involves holding a trial-type hearing on the proposed rule. Formal rulemaking is time-consuming and complex, and it is required by very few statutes.

Additionally, agencies issue large numbers of interpretations of rules and statutes or other policy guidance. These are not typically issued through either informal or formal rulemaking, and they are not binding as a matter of law. As a matter of fact, however, agency statements of policy are taken seriously by affected persons.

c. Adjudication

Regulations involve general requirements typically affecting large numbers of people. Agencies also take actions that focus on a single person, such as issuance of a permit or administrative enforcement actions. These specific actions are typically classified as “adjudications” and under the APA are subject to different procedures than are applicable to rulemaking. 5 U.S.C. § 554.
Adjudications involve a process similar to a judicial trial. Persons objecting to a permit or contesting an administrative penalty are typically given an opportunity to contest the decision before an impartial "administrative law judge" ("ALJ"), to be represented by lawyers, and to cross-examine witnesses. Sections 556 and 557 of the APA specify procedures applicable to many adjudications. 5 U.S.C. §§ 556, 557.

C. Judicial Review

Parties, in most cases, have the opportunity to seek judicial review of actions of the EPA.

1. Jurisdiction

In order to obtain judicial review in federal courts, parties must establish that the federal court has jurisdiction over the matter. There are typically three sources of jurisdiction to review actions of EPA. First, most of the federal environmental statutes provide for judicial review of specific actions of the Administrator. Review under these judicial review provisions are typically in a U.S. Court of Appeals. Second, most of the statutes contain "citizen suit" provisions which allow citizens to sue EPA when the Agency has failed to take a non-discretionary action required by the statute. Typically, this involves an action to force EPA to promulgate a regulation required by statute. These suits are brought in the U.S. District Court. Finally, if an action is not subject to judicial review under the specific provisions of an environmental statute, citizens may claim jurisdiction under the "federal question" provisions of 28 U.S.C. § 1331 which give district courts jurisdiction over disputes arising under the "Constitution, laws, or treaties" of the United States.

Judicial review under specific environmental statutes is discussed in other chapters.

2. Standard of Review

The issue of "standard of review" deals with how stringently a court will review a decision by an agency. Under section 706 of the APA, courts review most regulations issued by federal agencies under the "arbitrary and capricious" standard of review. 5 U.S.C. § 706. Most adjudications are reviewed under the "substantial evidence" standard. It is not clear what difference, if any, exists between these standards, but the "arbitrary and capricious" standard is typically seen as more deferential to the Agency's decisions.
Regardless of the specific standard of review, most courts claim that they will defer to the judgments of the Agency. Some courts, however, developed a “hard look” doctrine which, at a minimum, means that the courts would ensure that the agency has thoroughly reviewed all information in the record and has adequately explained its decision in light of applicable statutory factors and the relevant information.

In Chevron, U.S.A. v. NRDC, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court reaffirmed that courts should defer to agency interpretations of statutes unless the Agency’s construction was contrary to the explicit intent of Congress or is not a reasonable interpretation of the statute.

3. Standing

Not all persons may seek judicial review of an agency action. The doctrine of “standing” prevents persons from litigating unless they have a sufficient stake or interest in the litigation. Standing in federal litigation is, in large part, a constitutional requirement, and arises from the “case or controversy” provisions of Article III of the U.S. Constitution.

In a series of cases, the Supreme Court has stated that persons must satisfy a number of elements to have standing.

a. Zone of Interest

The Supreme Court has stated that parties must establish that they are within the “zone of interest” of the statute under which they are litigating. This requires the court to determine whether Congress intended to protect the type of interest asserted by the plaintiff. In Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), the Supreme Court held that the “zone of interest” requirement was generally satisfied in citizen suit brought under environmental statutes that authorize such suits by “any person.”

b. Injury in Fact

Persons must also establish that they have suffered an “injury in fact” from the agency action. In Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), the Supreme Court indicated that, if properly pleaded, allegations of environmental or aesthetic harm would be sufficient to establish injury in fact. Typically, environmental groups will allege that individual members of the group have suffered injury from the actions of the agency.
In recent years, however, the Supreme Court may have become more demanding in regards to injury in fact. The Court has stated that injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), involved a challenge by an environmental group to actions of the Department of Interior which opened certain public lands to mining activities. The group had submitted affidavits from two of its members alleging that the members visited “in the vicinity” of certain affected federal land and that their aesthetic enjoyment was injured by the agency actions. The court indicated that these vague allegations were not adequate to establish standing.

Reversing the trend of more stringent treatment of standing requirements, the Supreme Court in Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) found that citizens had standing based on allegations that the citizens had ceased using waters as a result of their concern for discharges into the water from an industrial facility. Although the evidence of actual environmental impact was limited, the Court noted that injury in fact was satisfied by evidence of injury to the plaintiff and not necessarily to the environment. Evidence of actual past use and prospective use of a natural resource by the plaintiff together with a lessening of the resource’s recreational or aesthetic value seemed enough to satisfy “injury in fact.”

c. Causation and Redressability

There are two other, related, requirements to establish standing. Persons seeking standing must establish that the defendant’s action caused their injury. This means that their injury is “fairly traceable” to the action they are challenging.

Additionally, persons must establish that judicial relief would “redress” their injury. In other words, they must show that relief would be effective in correcting their injuries.

d. Organizational Standing

Many environmental lawsuits are brought, not by individuals, but by organizations. In Hunt v. Washington Apple Advo. Comm’n, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Supreme Court established three elements that an organization must prove to have standing to sue on behalf of its members. These are 1) some of its members must have
standing to sue in their own right, 2) the interests it seeks to protect are
germane to the organization's purpose and 3) the suit does not require
participation of individual members.
CHAPTER 3

Common Law Torts

■ ANALYSIS

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      b. Public Nuisance
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C. CAUSATION
D. REMEDIES
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CHAPTER THREE

E. PROCEDURAL ISSUES
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   2. Splitting Causes of Action
A. Introduction

Historically, the common law provided the primary legal mechanism for controlling environmental pollution. Through tort actions against persons engaged in harmful conduct, the legal system provided a means both to discourage this conduct and compensate persons who were injured. Today, industrial pollution is largely controlled through statute and regulation, but tort still serves a significant supplementary role. Tort actions are particularly important since they may be the only means for recovering personal injury or property damages.

B. Causes of Action

Facilities which pollute the environment may be liable under a number of different theories. Consider, for example, a hazardous waste landfill which releases "toxic substances" into the groundwater. Neighbors of the landfill who drink water containing the hazardous substances may be able to bring a tort action for compensation under any of the following theories.

1. Nuisance

a. Private Nuisance

A private nuisance is conduct which "unreasonably" interferes with the use and enjoyment of another's land. A private nuisance is essentially a land use tort since it involves a claim that the offensive conduct interferes with rights stemming from property ownership. A nuisance can exist if defendant's conduct is either negligent or intentional; the key issue is whether the conduct unreasonably interferes with the use and enjoyment of land.

Jurisdictions have differing standards over what constitutes a nuisance. Some say that any "substantial" interference with a person's interest in property may be a nuisance. Others, including the Restatement (2d) of Torts, require that the court balance various factors to determine whether the defendant's conduct was "unreasonable." This may involve a determination as to whether the utility of the defendant's conduct outweighs the harm it causes.

b. Public Nuisance

You should distinguish a private nuisance action, brought by private citizens, from a public nuisance action, typically prosecuted by the government. A public nuisance is a common law cause of action that
may be brought, generally by the government, against a person whose conduct "unreasonably" interferes with a right common to the public. Thus, the government may have an action against a party who pollutes public waters or the air. Like private nuisances, finding a public nuisance may require a court to balance the utility of the defendant's conduct with the extent of the harm the conduct causes. In some jurisdictions, a public nuisance may only be brought if the defendant is violating a statute or administrative regulation; in other jurisdictions this is merely one factor to consider.

Private parties generally may not bring an action alleging a public nuisance unless they have suffered damages different in kind from those suffered by the public at large. Thus, a private party may not recover under a public nuisance theory for damages from air pollution if the party has not suffered any different type of damage (or in some cases suffered damages substantially greater) than the type of damages the general public has suffered from exposure to air pollution.

2. Trespass

A trespass typically involves a physical intrusion onto the property of another. It therefore may be available in some cases of environmental contamination where, for example, a person's actions have resulted in pollutants entering a neighbor's land. Courts have split over how "tangible" or visible the physical invasion must be, and whether chemical pollution of the water or air will give rise to a trespass action.

3. Negligence

Environmental contamination may give rise to an action based on negligence if the defendant's conduct falls below the standard of care owed the plaintiff. Among other things, an action in negligence requires that the plaintiff prove the defendant's act (or failure to act) was negligent or otherwise did not conform to some minimum standard of conduct. In some cases, statutes or regulations may define the standard of conduct.

4. Strict Liability

In some cases, the common law has imposed tort liability on parties without regard to whether they were negligent or otherwise at fault. Strict liability with regard to environmental contamination or exposure to toxic substances generally arises in two situations.

a. Ultrahazardous Activity

Since the English case of Rylands v. Fletcher, the common law has recognized the possibility of strict liability where a party engages in an
“ultrahazardous” or “abnormally dangerous” activity. Operation of a hazardous waste landfill in a residential area may, for example, give rise to a claim that the operators should be strictly liable for damages because they engaged in ultrahazardous or abnormally dangerous activity. Liability in such a case could be imposed without regard to whether the defendants were negligent in construction or operation of the landfill.

Courts have differed in their approach to determining which conduct is subject to strict liability. In some cases, courts may consider whether the dangerous activity was “unnatural” to the location. In other words, whether an activity which was otherwise acceptable was conducted in an inappropriate location. Second 520 of the Restatement (2d) of Torts provides for consideration of a variety of factors in judging whether an activity should be subject to strict liability as an “abnormally dangerous” activity. This factors include, in addition to the appropriateness of the location, the risk of harm from the conduct, the ability to minimize the harm, and the extent to which the benefits from the activity outweigh the harms.

b. Products Liability

A distinct claim for strict liability arises in product liability cases. Manufacturers or sellers of products may be strictly liable for damages arising from use of the products if, for example, there is some “design defect” in the product or, more commonly in toxic tort cases, they failed to warn of the risks involved in use of the product.

C. Causation

All private tort actions require the plaintiff to show that the defendant’s actions were the proximate cause of some injury. In tort actions involving exposure to environmental pollutants this can be a difficult element to satisfy.

Proving that a “toxic substance” caused a physical injury can be difficult. Plaintiff’s generally have the burden of showing by a “preponderance of the evidence” that the exposure caused injury.

There are several problems in proving injury. First, there are typically long periods of time between exposure to a toxic substance and development of a disease like cancer. This is called the “latency period.” Thus, persons exposed to toxic substances may not yet have developed any demonstrable injury. Damage claims, such as “cancerphobia,” discussed below, have been advanced to deal with this problem.
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Second, even if a plaintiff has contracted a disease such as cancer, it can be extremely difficult to prove that the exposure to the toxic substance caused the disease. “Scientific” evidence relating to the effects of low level exposures to toxic substances is usually limited. Evidence may consist of epidemiological studies showing a statistical association between exposure to a substance and increased rates of a disease such as cancer. There are, however, several problems with the use of epidemiological evidence. First, there may not be any existing studies, and it can be extremely expensive to perform them. Second, if the studies show only a small association (i.e., the substance increases the risk of cancer by only a few percent), the evidence may not be adequate to demonstrate that exposure to the toxic substances “more likely than not” caused the plaintiff’s injuries.

Plaintiffs may also attempt to rely on expert testimony. Some experts may be willing to testify that, based on their knowledge and experience, they believe that the plaintiff’s injuries were caused by exposure to the toxic substances. There are significant evidentiary questions as to whether the testimony meets standards of admissibility and relevance. In Duber v. Merrill Dow Pharmaceuticals, 309 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court held that for expert testimony to be admissible the trial court judge must determine if it meets some standard of “scientific” validity.

D. Remedies

1. Availability of Injunctive Relief

In many cases involving on-going environmental pollution, plaintiffs are seeking to enjoin the defendants from continuing their injurious activities. An injunction is an equitable remedy, and traditionally courts have considered a variety of factors, including the adequacy of monetary damages, in determining whether it is appropriate to issue an injunction which may shut down an on-going industrial operation.

In many jurisdictions, however, plaintiffs who establish that the tortious conduct is continuing are entitled to an injunction as of right. The economic efficiency and fairness of such a rule has been questioned when the effect of the injunction’s to close an existing business that provides employment and other economic benefits.

Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970), is widely cited for its analysis of whether to issue an injunction to prohibit operation of a cement company which was causing continuing and substantial damages to neighboring property from its air pollution. The
court, among other things, balanced the benefits from continued operation of the facility with the harm to the neighbors and concluded that an injunction requiring that the plant close immediately was inappropriate. Instead, the court issued a “conditional” injunction which required the plant to close only if the owners failed to fully compensate the injured neighbors for present and future damages.

2. Developing Damage Theories
Traditionally, a plaintiff may recover damages for his or her personal injuries that exist at the time of trial and damages for additional injuries that the plaintiff can establish are likely to occur in the future. In only limited cases has the common law allowed recovery where the plaintiff cannot establish some physical injury at the time of trial.

In many cases, however, persons exposed to toxic substances will not exhibit injuries until decades after exposure. Persons who have tried to bring a tort action at the time of exposure have advanced theories to attempt to recover without demonstrating an existing physical injury.

a. Cancerphobia
Some plaintiffs exposed to carcinogenic substances have claimed that they have suffered an immediate harm by being subjected to fear that they may later develop cancer. This has been described as “cancerphobia.”

Traditionally, plaintiffs in tort actions have not been able to recover for emotional distress unless they can demonstrate some existing physical injury or some physical manifestation of their distress. Courts have been reluctant to allow plaintiffs to recover for their subjective fear or distress without some objective manifestation of injury. Courts have been concerned that this would make it too easy for plaintiffs to bring unwarranted tort actions based on their allegation of distress. For this reason, most courts have been reluctant to allow plaintiffs to recover based on allegations of “cancerphobia.”

b. Increased Risk of Cancer
Plaintiffs have also alleged that they have suffered an immediate injury from exposure to carcinogens by being placed at an increased risk of developing cancer in the future. Most courts have not allowed plaintiffs to recover for this alleged injury without demonstrating, with a reasonable medical certainty, that they are likely to contract cancer in the future as a result of the exposure. Given the state of knowledge about the development of cancer, plaintiffs are unlikely to be able to meet this burden.
c. Medical Monitoring

Some plaintiffs exposed to toxic substances have sought to recover the cost of periodic medical examinations to identify diseases that may occur in the future as a result of the exposure. In other words, plaintiffs claim that the costs of medical monitoring are damages that they have immediately suffered as a result of the exposure. Some courts have recognized this claim and have allowed recovery for future medical monitoring where the plaintiff demonstrates that the monitoring is reasonably necessary. Other courts have rejected the claims unless the plaintiffs can demonstrate some existing physical injury.

E. Procedural Issues

1. Statute of Limitations

Statutes of limitation place a limit on the time in which a person may commence a tort action. For many toxic pollutants, however, a long latency period may exist between exposure to the toxic pollutant and the occurrence of a disease. If the statute of limitations period begins to run when the defendant committed the act giving rise to the exposure, the potential plaintiff may not learn of the injury until after the statute of limitations period has run. In such cases, statutes of limitation may create an obstacle to a tort action by an injured person.

Most, but not all, jurisdictions minimize this problem through some version of the discovery rule. In many jurisdictions, the discovery rule starts the statute of limitations period running at the time the potential plaintiff discovers or should have discovered the injury. Other jurisdictions have adopted variations of the rule which start the time period running when potential plaintiffs discover sufficient facts to alert them of injury and the possible existence of a cause of action.

2. Splitting Causes of Action

Most jurisdictions require that all claims arising from a common set of facts be brought in one action. Plaintiffs are not allowed to “split” their claims by suing for some damages in one action and later bringing an action for different damages arising from the same set of facts. This can create a problem for plaintiffs seeking to recover for damages arising from exposure to a toxic substance. If the plaintiff is allowed to sue immediately after exposure but before the occurrence of the disease, the plaintiff may be later barred from bringing an action for damages when the disease actually occurs. Some jurisdictions which allow recovery of costs of medical monitoring may allow a later action if a disease actually develops.