

TOPIC 22: ENVIRONMENTAL LAW

Overview

Environmental laws include federal and state statutes and regulations that govern the conduct of individuals and businesses that have an impact on the natural habitat or resources. This chapter introduces the concept and purpose of environmental law. It introduces the major federal environmental laws and the agencies primarily charged with enforcing these laws. It then explains the available enforcement mechanisms. For each of these laws, it explains the primary government obligations in enforcing the law and the obligations of individuals in complying.

VIDEO LESSON - INTRODUCTION



VOCABULARY & CONCEPTS

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| <ul style="list-style-type: none"> • Environmental Law • Structure of Environmental Law • Environmental Protection Agency (EPA) • Enforcement Mechanisms • The National Environmental Policy Act (NEPA) <ul style="list-style-type: none"> - Environmental Impact Statement | <ul style="list-style-type: none"> • The Clean Air Act (CAA) <ul style="list-style-type: none"> - State Implementation Plan - New Source Performance Standards & New Source Review - Prevention of Significant Deterioration - Non-Attainment Areas - Interstate Pollution Enforcement | <ul style="list-style-type: none"> • The Clean Water Act (CWA) <ul style="list-style-type: none"> - Variances & Exceptions • The Endangered Species Act (ESA) • Federal Pesticide Laws • The Solid Waste Disposal Act (SWDA) • The Toxic Substance Control Act (TSCA) • Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) |
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TOPIC 22: ENVIRONMENTAL LAW - QUESTIONS & ANSWERS

1. What are “environmental laws”?

Environmental law is a combination of state and federal laws aimed at protecting individuals from the negative consequences of environmental degradation. More specifically, environment law addresses pollution, natural resource management (including forests, minerals, and wildlife), and the environmental impact of human activity.

- **Discussion:** How do you feel about the role of the federal and state governments in protecting the environment? Are the environmental laws adequate? How should the burden of these laws be balanced against individual rights?
- **Resource Video:** <http://thebusinessprofessor.com/what-are-environmental-laws/>

2. What is the structure of environmental protection law?

The Federal Government has promulgated numerous laws that provide a national framework for environmental protection and management. Under these frameworks, states have the ability (and sometimes requirement) to pass state standards for environmental protection. These regulations govern public and private conduct that has an effect or impact on the environment. The federal system is set up to allow multiple levels of enforcement. Federal and state administrative agencies are charged with implementing and enforcing the various environmental laws through administrative, civil, and criminal actions. Further, individuals can bring private civil causes of action against violators of environmental laws (including actions against the federal or state government for failing to adequately enforce the environmental laws). These actions may be pursuant to a particular federal or state environmental statute or pursuant to common-law tort actions.

- **Discussion:** What do you think about the system of environmental law? Why do you think federal law allows for state regulation? Is the multi-layer system of federal, state, and private actions sufficient to achieve the objectives of environmental law?
- **Practice Question:** William plans on opening a factory that will potentially discharge matter into the air and water. He is curious about what laws may affect his operations. Can you explain to William the structure of the environmental protection laws?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-structure-of-environmental-protection-laws/>

3. What is the Environmental Protection Agency?

The Environmental Protection Agency (EPA) is a federal agency created to protect the environment by policing activities that have a negative impact upon the environment. Specifically, the EPA is charged with enforcement of the various federal environmental statutes, writing regulations, conducting environmental assessments, conducting environmental research, and educating the public on environmental standards. In carrying out its functions, the EPA works closely with state and local governments, as the environmental regulatory regimes are closely integrated. Particularly, much of the

responsibility for enforcing environmental laws rests with the states. As part of its enforcement function, the EPA has administrative authority to levy fines, sanctions, and other punitive measures for failure to adhere to environmental law.

- **Discussion:** How do you feel about the role of the EPA? Is the role overly broad? Does the integration with state and local regulatory agencies and regime affect your opinion? Why or why not?
- **Resource Video:** <http://thebusinessprofessor.com/environmental-protection-agency/>

4. How are the environmental laws enforced?

The EPA is charged with enforcement of federal environmental law, while state administrative agencies are similarly charged with enforcing violations of state environmental law. These agencies may cross-enforce the other's law in conjunction with enforcing their own provisions. Enforcement actions may be administrative, civil, or criminal.

- **Administrative Actions** - The EPA may pursue administrative remedies against violators of environmental law. This involves subjecting alleged violators to trial by judge in an administrative court. The remedies available to the administrative court include penalties, negotiated settlements, and supplemental environmental projects (such as public works projects). Administrative settlements may include monetary penalties and orders to clean up the contamination or pay for the contamination cleanup. An important administrative function for the EPA is determining liability for contamination and cleanup enforcement. Administrative enforcement actions must generally follow the procedures outlined under the Administrative Procedures Act.
- **Government Civil and Criminal Actions** - The EPA or state environmental agencies may also initiate civil or criminal actions against violators of environmental law. Civil actions may be federal lawsuits filed by the EPA in federal court or lawsuits by state agencies filed in state or federal court. The EPA or state environmental agencies, in conjunction with the US Department of Justice or a state attorney general's office, may also initiate criminal actions against violators of environmental law. Criminal actions are generally reserved for particularly egregious violations that are intentional, knowing, or reckless. Generally, the US Justice Department files federal civil and criminal actions on behalf of the EPA. Likewise, state attorneys general generally file civil and criminal enforcement actions at the state level.
- **Private Actions** - Individuals may also bring private civil actions in state or federal court against violators of environmental law. Generally, these actions are based upon tort theory. The following are common types of private civil action for violations of environmental law:
 - **Public Nuisance** - A public nuisance is any activity that causes damage or harm to the general public or environment rather than to a specific individual's person or property. Generally, only a public official appropriately charged with protecting the public may bring an action for public nuisance.
 - **Private Nuisance** - Nuisance generally entails the use of one's property that unreasonably interferes with the use or enjoyment of another person's property. Private nuisance is an action by an individual or group of individuals against a defendant or group of defendants. A court must determine what is an "unreasonable" use of one's property.

- *Other Tort Doctrines* - Other private causes of action against violators of environmental laws include:
 - *Trespass* - Trespass is when a person intentionally enters or causes something (e.g., trash, smoke, water, noise, fumes, etc.) to intentionally enter another person's land without permission.
 - *Negligence* - This tort is based on the defendant's failure to use ordinary and reasonable care in its actions affecting the plaintiff.
 - *Strict Liability* - Some activity by a defendant may be subject to strict liability for any injury resulting from the conduct. This is the case when undertaking any activity deemed to be ultrahazardous in nature.

In some cases, individuals may file actions against representatives of state or federal agencies for failure to adequately enforce the federal or state environmental laws. In a civil action, the defendant has failed to comply with environmental statutes, regulations, or administrative orders.

- **Discussion:** How do you feel about the enforcement mechanisms available for violation of environmental laws? Why do you think the law allows for agency and private civil actions?
- **Practice Question:** ABC Corp is a large manufacturer of textiles. ABC pulls water from the river to cool the large company boilers. This water, once cooled, is re-deposited in the river. If ABC violates federal and state environmental laws by also dumping chemical wastes in the river, what are the potential actions available against ABC?
- **Resource Video:** <http://thebusinessprofessor.com/enforcement-of-environmental-protection-law/>

MAJOR ENVIRONMENTAL PROTECTION LAWS

The following are the major environmental protection laws in the United States.

5. What is the National Environmental Policy Act of 1970?

The National Environmental Policy Act of 1970 (NEPA) was first major federal environmental statute. It lays out broad goals and steps for federal agencies to incorporate environmental considerations into decision-making. NEPA has been held to not be a substantive act; rather, it is made up of procedural statutes requiring federal agencies to consider the environmental impact of proposed projects before taking action. NEPA applies to all federal agencies. It does not apply to states or private parties, unless there is sufficient federal involvement to bring the actions within the "federal nexus" (i.e. federal financing or federal permitting). Most notably, NEPA requires that the federal government undertake an "environmental assessment" and prepare an "environmental impact statement" before undertaking certain projects. The agency is not required to prepare an impact statement if the initial assessment deems that the project will have no significant adverse impact on the environment. If the agency moves forward with the impact statement, it must include the statement in every procedural reporting aspect of the project.

- **Note:** Before the environmental statement is completed, NEPA requires that agencies designate significant

environmental issues associated with a contemplated action.

- **Resource Video:** <http://thebusinessprofessor.com/national-environmental-protection-act/>

An environmental impact statement is a detailed document that estimates the environmental impact of the proposed action. NEPA requires that an impact statement include the following:

- environmental impact (direct and indirect; beneficial and detrimental),
- any adverse environmental effects unavoidable if implemented,
- alternatives to the proposed action,
- short versus long-term use or productivity of the proposed project, and
- any irreversible or irretrievable commitment of resources involved in implementation.

The impact statement is often critiqued as a compliance rather than a decision-making tool, as federal agencies are not mandated to comply with any findings or recommendations in the statement. NEPA contains numerous provisions about litigating impact statement adequacy on procedural grounds. The process for developing an impact statement is as follows:

- *Identify Issues* - The agency should follow public process to determine the scope or key issues to be included;
- *Public Comment on Draft of Statement* - The agency should develop a draft impact statement, file it with the EPA, and allow time for public comments;
- *Final Draft* - The final impact statement is filed with the EPA, and a supplemental statement is prepared as required.

There is no private right of action under NEPA; instead, plaintiffs must sue under the Administrative Procedures Act for violations. The APA requires final action by the EPA before undertaking judicial review. Fifteen states and the District of Columbia have environmental policy acts modeled on NEPA. States may generally only be sued under their own NEPA statute, except when a sufficient federal nexus is created with the state project (such as through federal funding).

- **Resource Video:** <http://thebusinessprofessor.com/environmental-impact-statement-nepa/>

- **Discussion:** How do you feel about the procedural requirements of NEPA? Do you believe the environmental assessment and environmental impact statements are necessary procedures for administering the environmental laws? Does it affect your opinion to know that agencies are not required to follow the impact statement recommendations? Should these requirements be measured against the burden imposed upon the agency by these requirements?

- **Practice Question:** The Department of Agriculture is pursuing a plan to construct a large water distillation facility in New Mexico. What environmental law procedures must the agency follow before undertaking this project?

6. What is the Clean Air Act?

Clean Air Act (CAA), along with numerous amendments, was passed with the purpose of developing and achieving air quality standards throughout the US. It gave rise to the National Ambient Air Quality Standards (NAAQS), which limit the amount of certain air pollutants discharged into the air based upon air quality standards averaged over specific intervals of time. The EPA issues primary and secondary quality standards.

- *Primary Air Quality Standards* - These standards relate to levels of air particulates that pose a risk to public health; and
- *Secondary Air Quality Standards* - These standards relate to the negative consequences of the pollution on the environment or property (but generally outside of the threat to human health).

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-clean-air-act/>

The primary components of the CAA are as follows:

- *State Implementation Plans (SIPs)* - States bear the burden of implementing a plan to comply with national air quality standards (NAAQS). The NAAQS provide a maximum concentration level for certain pollutants in the air. A state has a great deal of latitude in developing a plan to implement these standards, or “state implementation plan” (SIP). Under this structure, each state must submit a SIP to the EPA that provides for implementation, maintenance, and enforcement in each air-quality control region. The EPA Administrator must approve SIPs as complete and meeting all requirements. If EPA finds a SIP inadequate to attain or maintain NAAQS, it can require revision of the plan. If the EPA finds a SIP incomplete, a state fails to make the required submissions, or if it disapproves a SIP in whole or part, it will promulgate a federal implementation plan (FIP). The EPA must promulgate the FIP within 2 years of disapproval of the SIP unless the state corrects the deficiency and the Administrator approves it.

- **Resource Video:** <http://thebusinessprofessor.com/state-implementation-plan-clean-air-act/>

- *New Source Performance Standards (NSPS) and New Source Review (NSR)* - This is a federal set of uniform technology-based standards for new and modified sources of air pollution. These rules envision a best available technology (BAT) for categories of stationary air pollution sources. Standards can vary within each category according to class, type, and size of source. The NSPS establishes emission limitations achievable through application of adequately-demonstrated BAT, taking into account cost, non-air quality health or environmental impacts, and energy requirements. There is often controversy over what constitutes BAT, whether the EPA took into account the cost and other factors associated with compliance, and whether technology has been adequately

demonstrated. NSR is one of the key programs designed to achieve compliance with the NAAQS through a pre-construction review process for new and modified stationary sources.

- *Note:* Existing sources of air pollution must meet NAAQS but are exempt from many of the NSPS requirements.

- **Resource Video:** <http://thebusinessprofessor.com/clean-air-act-new-source-performance-standards-and-new-source-review/>

- *Prevention of Significant Deterioration (PSD)* - Amendments to the CAA in 1997 established a PSD structure which requires permits for areas that have achieved better air quality standards than required under NAAQS. These areas are known as “attainment areas”. The state administers this permitting process with EPA approval. This system includes ambient (increment & NAAQS compliance) and Best Available Control Technology (BACT) components. The BACT standards tend to be more stringent than NSPS. As with the BAT standards, BACT standards do not require a particular technology; rather, they provide a process for choosing what control technology to employ.

- **Resource Video:** <http://thebusinessprofessor.com/clean-air-act-prevention-of-significant-deterioration/>

- *Non-Attainment* - Congress amended CAA in 1977 to add Part D for “non-attainment” areas. Under these new provisions, states unable to achieve NAAQS must comply with Part D. Part D imposes construction and operating permit requirements on new and modified sources of pollution in these areas. Before issuing permits to create new or modified sources, the EPA must find:

- *Comply with Lowest Achievable Emission Rate (LAER)* - This is a category-wide determination of whether the new or modified source would meet the most stringent emission limitations contained in a SIP or achieved in general practice (whichever is more stringent).

- *Note:* The source can demonstrate that an emission limitation is not achievable, but it can never emit above the NSPS level.

- *Reasonable Further Progress (RFP)* - The source must demonstrate a decrease in total allowable emissions in the region or annual incremental reductions in emissions of applicable air pollutants sufficient to provide for attainment of NAAQS by the specified deadline. A new source can demonstrate RFP by obtaining offsets (decreases in emissions) from existing sources. Basically, the source can employ under-pollution credits from other sources and apply it to the current source to meet overall standards. The offset policy intends to strike a balance between economic and environmental protection interests.

- *Note:* This provision enables non-attainment areas to continue to develop economically while moving toward NAAQS attainment.

- *Compliance Schedule* - The new or modified source must provide a schedule for compliance of all

sources owned by this source's owner.

In 1990, Congress created levels of non-attainment for individual pollutants, with different target dates for compliance with NAAQS. States are also required to demonstrate RFP in their SIPs. This amendment also added two more requirements before issuing a permit (in addition to RFP, LAER, compliance of owner):

- Administrator must not have found a SIP was inadequately implemented by the state, and
- An alternative analysis must demonstrate that the benefits of the proposed new source outweigh the environmental costs.

- **Resource Video:** <http://thebusinessprofessor.com/clean-air-act-non-attainment-areas/>

- *Interstate Pollution* - The CAA statutes are poorly designed to address interstate externalities, as no programs require consideration of the effects in other states of the placement or number of new pollution sources. The EPA addresses this concern by conditioning SIP approval on a states' plan not contributing significantly to non-attainment in, or interfere with maintenance by, any other state of a primary or secondary NAAQS. Also, the SIP cannot interfere with measures required in another state's SIP.

- *Note:* This allows a downwind state to sue the EPA Administrator for approving a SIP (or revision) that interferes with downwind attainment. The 1977 Amendments authorized states or political subdivisions to petition the EPA (at any time) for a finding that a major source or group of sources in another state are causing them to violate NAAQS. It also requires a state to provide notice to nearby states when it proposes to build a new or modified PSD source or one that might contribute significantly to compliance with downwind NAAQS.

- **Resource Video:** <http://thebusinessprofessor.com/clean-air-act-interstate-pollution/>

- *Enforcement* - The EPA can initiate or take part in enforcement actions for violations of the CAA. This includes seeking administrative orders, civil sanctions, or participating in criminal actions through the Justice Department. The CAA authorizes fines of up to \$25,000 per day for emissions violations. Criminal sanctions include fines of individuals up to \$250,000 and up to 15 years in prison. Corporations can be fined up to \$1 million per incident for knowingly endangering people with emissions and up to \$500,000 per incident for negligent emissions.

- *Note:* The EPA has approved numerous state plans to allow polluters to save or "bank" any amount that the company falls below its maximum pollution threshold. This allows the company to use this amount as a sort of credit and pollute more at a later period. Companies are also allowed to sell or trade in these banked pollution rights. This allows cleaner companies to sell their benefits to heavier polluters.

- **Resource Video:** <http://thebusinessprofessor.com/clean-air-act-enforcement-provisions/>

- **Discussion:** How do you feel about the Clean Air Act's combination of state and federal enforcement regime? Do you believe the regulatory measures are sufficient to achieve the Act's objectives? Should the individual requirements on polluters be balanced against the economic needs of a region?
- **Practice Question:** ABC Corp plans on building a new factory in New Mexico and very close to the border of Arizona. Under the Clean Air Act, what procedures might ABC have to follow in order to receive the necessary permissions to build and operate this facility?

7. What is The Clean Water Act?

The Clean Water Act (CWA) is made up of several water pollution control acts including, the Federal Water Pollution Control Act, the Clean Water Act, and the Water Quality Act. The CWA protects society from the harmful effects of discharge of pollutants into navigable waterways by municipal and industrial dischargers. It regulates discharges from what are known as "point sources" and "non-point sources".

- **Point Sources** - These include direct discharges from an immediate point, such as a pipe or drainage culvert. The CWA requires point source polluters to install or implement best practicable technology (BPT) and best available technology (BAT), based upon new or existing point sources. The CWA further prohibits discharges from a point source without a permit, which requires that the discharge meet defined effluent limitations. This is a similar approach to CAA's new source limitations.
- **Non-point Sources** - These include indirect discharge such as drainage and run-off from spraying. While this type of discharge is not directly regulated by the CWA, the EPA is authorized under the CWA to require polluters to adopt limitations necessary to meet state water-quality (WQ) standards. The CWA also requires that a state implement any of the following plans to regulate non-point discharges:
 - **Area-wide Waste Management Plans** - This may include broad-scale waste treatment plans for areas with substantial water quality problems.
 - **State Management Plans** - A management plan must include best management practices for non-point sources such as agricultural operations.
 - **Permit Program** - A state can use a marketable permit scheme approach to regulate non-point discharge of pollutants.

The EPA requires that states designate uses of intrastate waters with the goal of fishable or swimmable quality and set standards for the total "maximum daily load" of pollutants in a body of water. States must determine the water quality criteria necessary to support the designated use. Either numerical concentrations or narrative criteria may be considered. States must then meet the non-degradation policy limiting any degradation from prior water quality. The EPA also has a means for controlling interstate pollution such that a downstream state can enforce its water-quality standards against upstream pollution sources.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-clean-water-act/>

The CWA allows for variances from its requirements when circumstances justify exemption. There are two main exemptions available to existing sources:

- *Economic Justification* - If a party cannot afford the BAT requirements, it must show that the technology employed to prevent discharge of pollution is all that the company can afford and that it will be effective in reducing pollution to within allowable levels. This variance effectively modifies the BAT for this party.
- *Process Justification* - A Fundamentally Different Factor (FDF) variance allows certain exemptions from the BPT permitting requirements. The EPA will consider the cost of implementation (such as facility or manufacturing costs), but the ability of the party requesting the variance to pay the cost is not considered.

- **Resource Video:** <http://thebusinessprofessor.com/clean-water-act-exceptions-or-variances/>

Other relevant Clean Water laws include the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA) and Safe Drinking Water Act of 1974 (SDWA). The MPRSA requires a polluter to receive a permit system before discharging potential pollutants into the ocean. The SDWA requires the EPA to set maximum acceptable levels for certain contaminants in drinking water.

- **Discussion:** How do you feel about the protective requirements of the Clean Water Act? Why do you think the CWA focus on point, rather than non-point, polluters? Do you have confidence that the best practical and best available technology standards, along with the permit system, are sufficient protections? Do you believe that the standards applicable to non-point polluters are appropriate? Why do you think the CWA allows for exemptions from its provisions based upon economic impact or process issues?
- **Practice Question:** ABC Corp is a manufacturer of textiles. For the last 30 years, ABC has runs a factory located on a river that emits some level of point-source pollution in the local river. What Clean Water Act standards must ABC meet in order to continue its operations?

8. What is the Endangered Species Act of 1973?

The Endangered Species Act (ESA) protects animals and plants that the Secretary of Interior or marine species that the Secretary of Commerce lists as “threatened” or “endangered”. The Fish and Wildlife Services (FWS) and National Marine Fisheries Services administer (NMFS) administer the ESA. The determination of whether a species is endangered or threatened is made “solely on basis of best scientific and commercial data available” without consideration of cost of protection. A species is “endangered” if “in danger of extinction throughout all or a significant portion of its range”. A species is “threatened” if likely to become endangered in the “foreseeable future”. The Secretary must also designate a “critical habitat” for the endangered or threatened species. The secretary will take the “economic impact” and “other relevant impact” into consideration in making this designation.

Protections - The ESA provides the following protections for endangered or threatened wildlife:

- *Federal Agency Action* - The ESA prohibits any federal action that jeopardizes endangered or threatened species or results in destruction or adverse modification of their critical habitat. Under these rules, no federal agency can authorize, fund or carry out any action that jeopardizes an endangered species. The ESA states that all federal agencies shall carry out programs for conservation of endangered or threatened species. “Conserve” is defined as “use of all methods and procedures necessary to bring any endangered or threatened species to the point” where they do not need saving. A federal agency can only take actions that are “not likely to jeopardize a protected species”. The Endangered Species Committee is authorized to exempt certain agency actions from the “no jeopardy” requirements. Exemption requires a supermajority vote, finding that there are “no reasonable and prudent alternatives to the agency action”, and that benefits of the action “clearly outweigh” benefits of non-jeopardizing alternative courses of action. The ESA requires consultation between agency contemplating a project and the ESA administering agency to determine if the no jeopardy regime would be violated.
 - *Note:* The law authorizes civil actions against the Secretary for failure to perform non-discretionary duty.
- *Private Actions* - The ESA makes it unlawful for any person to “take” any listed species. “Taking” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” This is a slightly more lenient than the “no jeopardy” requirements since it only applies to endangered species (not threatened species). Also, private parties may apply for permits for actions that otherwise constitute violations of the law. The Secretary may issue permits for otherwise proscribed takings that are “incidental to the carrying out of otherwise lawful activity or exemptions for scientific purposes”. As a condition of the incidental taking permit, the holder must submit a conservation plan to “minimize and mitigate” the impact of the taking. Usually this involves a commitment to acquire and conserve some land to provide a suitable habitat for the species.
 - *Note:* Section 9 of the ESA prohibits any person from transporting or trading in any endangered species of fish or wildlife or from taking any such species with in the United States.

The ESA strictly prohibits considering the financial or economic impacts of implementation the act’s provisions. A review board can grant exemptions to the ESA for certain important federal projects, but not for private activities. The ESA requires recovery plans for species it protects.

- **Discussion:** How do you feel about the protections afforded under the Endangered Species Act? Do you feel like the restrictions are sufficient to achieve the results of the law? What do you think about the exemption from prohibitions on federal actions and private takings? Why do you think the private taking restrictions do not apply to threatened species? How do you feel about the granting of permits for private takings?
- **Practice Question:** ABC Corp is thinking of expanding its manufacturing footprint. It intends to clear cut about 200 acres of land beside its current plant to construct a new facility. ABC is aware that the forest is full of animals. What limitations might ABC face when attempting to clear the land?
- **Resource Video:** <http://thebusinessprofessor.com/endangered-species-act/>

9. What federal laws control pesticides?

There are two primary federal pesticide acts:

- the Federal Insecticide, Fungicide, and Rodenticide Act of 1947, and
- the Federal Environmental Pesticide Control Act of 1972.

Both of these acts require registration and labeling of agricultural pesticides. The EPA is directed to register those pesticides and certify that they are properly labeled, that they meet the claims made as to their effectiveness, and that they will not have unreasonable adverse effects on the environment. Further, manufacturers must label them as “general” or “restricted use” and place training requirements on applicators. The EPA can deny or suspend registration or it can halt manufacture of the product. The EPA defines what the pesticides can and cannot be used for and may seek penalties against violators.

- **Discussion:** Why do you think pesticides are regulated by federal law? Do you think the requirement to register pesticide products is sufficient to protect the public and environment from adverse effects? Should the need for the pesticides be weighed against its environmental impact?
- **Practice Question:** ABC Corp manufactures chemicals. It seeks to introduce a new chemical used to rid crops of specific bugs. What requirements must ABC meet before introducing the pesticide?
- **Resource Video:** <http://thebusinessprofessor.com/primary-federal-laws-governing-pesticides/>

10. What laws govern solid waste disposal?

The Solid Waste Disposal Act (SWDA) was the first major federal law directed at waste disposal. It recognizes the potentially negative health and environmental consequences associated with certain waste disposal practices. The SWDA provides waste management standards for municipal and industrial waste, promotes waste management technology, and charges municipalities with responsibility for disposal of solid waste. The SWDA is subject to numerous amendments expanding its coverage as follows:

- *The Resource Recover Act of 1970 (RRA)* - This act added to the SWDA by introducing waste reduction provisions (such as recycling) and laid out criteria for disposal of hazardous waste.
- *The Resource Conservation and Recovery Act of 1976 (RCRA)* - This act added again to the SDWA by expanding its coverage and focus to include the development of new waste disposal technology. Notably, the RCRA banned the use of open-land dumping and placed additional liabilities on creators of waste (even after entry into a waste disposal system). It made creators of hazardous waste ultimately responsible for waste generated at any point in its existence. This is known as “cradle-to-grave” responsibility. It established a system for tracking hazardous waste throughout its life.
- *The Hazardous and Solid Waste Amendments* - These amendments to the SDWA were passed in 1984 to place more stringent requirements on the management and disposal of hazardous waste and established underground waste storage standards.

- *The Federal Facilities Compliance Act of 1992* - This act amended the SDWA yet again to make federal facilities accountable and subject to the provisions of the SWDA.

The EPA is primarily charged with enforcing the provisions of the SWDA through administrative, civil, and criminal actions. The regulations developed by the EPA to administer the provisions of the SWDA are a primary compliance concern for businesses.

- *Note:* The SWDA prohibits retaliation against employees for providing information about environmental infractions to the EPA. Retaliation may be any form of negative action against an employee motivated by the employee's disclosure of information.

- **Discussion:** Why do you think waste disposal is a concern of the Federal Government? Do you think the breadth of coverage of waste disposal laws is adequate?
- **Practice Question:** ABC Corp is accused by an employee of failing to comply with federal standards in the disposal of solid waste. What are the methods for the employee to enforce the laws against ABC? What are the risks to the employee of doing so?
- **Resource Video:** <http://thebusinessprofessor.com/solid-waste-disposal-act/>

11. What is the Toxic Substance Control Act of 1976?

The Toxic Substance Control Act (TSCA) regulates the introduction of new and existing chemical substances into the market. The TSCA defines a chemical substance as "any organic or inorganic substance of a particular molecular identity, including any combination of these substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and any element or uncombined radical". Many of the provisions of the TSCA focus on chemicals that pose an unreasonable risk of harm to health and the environment. The TSCA specifically prohibits the manufacture or importation of chemicals not previously registered with the TSA without notifying the EPA beforehand. Following notification, the EPA reviews the chemical to determine if it poses an unreasonable risk to human health or the environment. The EPA may ban production and importation or impose lesser limitations on its production and use.

- *Note:* Exceptions to the TSCA notification requirement include small quantities of chemicals used in research and development and items regulated under other acts, such as food, cosmetics, pesticides, alcohol, tobacco, explosives, and radioactive material.

- **Discussion:** Why do you think controlling the importation of toxic substances is of concern to the Federal Government? Do you think the definition of chemical substance is sufficiently broad? Do you agree that the EPA should be charged with determining whether chemicals should be admitted for importation?
- **Practice Question:** ABC Corp has subsidiaries in other countries that develop new products. ABC develops a new chemical used to remove paint from cement surfaces. The chemical is very caustic. What steps must ABC Corp take before importing the substance?
- **Resource Video:** <http://thebusinessprofessor.com/toxic-substance-control-act-of-1976/>

12. What is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)?

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address cleanup cost of unsafe hazardous waste dumps or spills. CERCLA allocates billions of dollars under a congressional authorization for environmental cleanup of dangerous hazardous wastes. This is known as the “Superfund”. The continued funding of the superfund is through civil actions against polluters and three separate taxes levied on chemicals, petroleum products, and general corporate profits. The superfund pays for cleanups where private parties are insolvent or the responsible party is unknown. It advances money to the EPA for cleanups pending recovery of costs, which often leads to suits for reimbursement from the responsible parties.

- *Note:* Funds allocated to the superfund are largely depleted and the long-term sustainability of the program is consistently in question.

Liability - CERCLA imposes strict liability on those responsible for unauthorized discharges of hazardous waste. Federal and state agencies charged with managing natural resources may sue a responsible party to force clean up of hazardous substances and to recover any damages to the natural resources. Liability also includes the cost of remediation of the waste itself. Responsible parties include:

- *Owner Operators* - Those who currently (or previously) operate or own waste disposal sites during the time that the pollution occurred. An “operator” is someone who directs the workings of, manages, or conducts operations specifically related to pollution. Responsible parties also include owners or operators who learned of the pollution and did not disclose that information prior to transferring the land.
 - *Note:* CERCLA exempts people who hold indicia of ownership to protect a security interest without participating in management of a facility. This provision generally protects banks holding a security interest in contaminate property.
- *Arranger Liability* - Those who arrange for disposal of wastes may be responsible parties. Most courts hold that an intent to dispose of the waste is necessary for liability. The intent inquiry is only relevant for determining if an individual is a responsible party. After that step, the responsible party is strictly liable and intent to have disposed of the waste in a different manner is irrelevant.
- *Transporters* - Transporters of hazardous wastes are only liable if they actively and substantially participate in the decision-making process that ultimately identifies a facility for disposal. It does not need to be an independent decision to select the particular site, but the transporter must have a significant influence in the selection process for liability.

The responsible party may be able to seek contribution from former owners of the polluted land for any damages paid. A finding that harm is divisible lets responsible parties divide liability. Responsible parties have the burden of showing their waste and cleanup costs are divisible from other parties. This avoids the unfair consequences and prevents a party from escaping liability when other parties are insolvent or cannot be found.

Defenses to Liability - The purchaser of contaminated property may escape liability through a number of defenses, as follows:

- *Good Faith* - The owner had no knowledge of the waste at the time of purchase and used due diligence in checking the land for toxic hazards.
- *Force Majeure* - The pollution was caused by an act of God (natural occurrence) or was caused during war.
- *Third Party Liable* - The pollution was the result of an act or omission of an identifiable third party. A responsible party may avoid liability if it can show that someone else was the sole cause of the harm, it was not the responsible party's employee or agent, and the acts or omission causing the pollution did not occur in connection with a contractual relationship with the responsible party. Finally, the potentially responsible party must also show that she exercised due care with respect to the discharge of a hazardous substance and took precautions against foreseeable acts or omissions of the polluter.

Individuals can purchase CERCLA insurance for potential liability.

- **Discussion:** What do you think about the CERCLA protections? Do you think the superfund program is adequate to provide for hazardous waste cleanup? Do you think the liability provisions are fair and serve the intended purpose? How do you feel about the available defenses to personal liability under CERCLA?
- **Practice Question:** ABC Corp purchases land from 123 Corp. ABC continues using the land in the same manner as used by 123 Corp. Several years later, ABC becomes aware that the land is contaminated? What potential liability does ABC face? What are their options for deferring or sharing liability with 123 Corp?
- **Resource Video:** <http://thebusinessprofessor.com/comprehensive-environmental-response-compensation-and-liability-act-cercla/>