

# Environmental Law

## Chapter 17



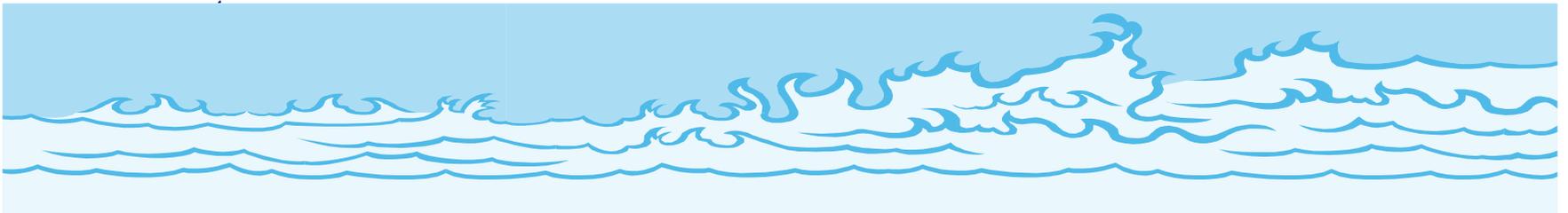
# Pollution and the Common Law

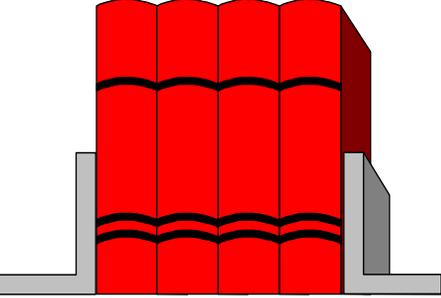


- **Nuisance Law**
  - used to protest interferences with rights—either public (a right held in common by the community) or private
- **Trespass**
  - physical invasion
- **Trespass and nuisance hard to distinguish in environmental cases.**

# Water Rights and Pollution

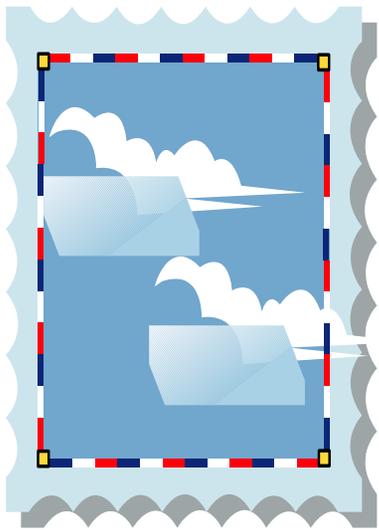
- **No common law right to pollute water**
- **Most states rely on *riparian water law***
  - **People living along bodies of waters have a right to use reasonable amounts of water, but must allow water to flow downstream in usable form**
  - **No right to use and pollute water for later downstream users**
  - **Nuisance and other common-law rights used in the enforcement of *riparian water rights***
- **Western states have variety of other water rights, but none allow harmful pollution to be imposed on other**



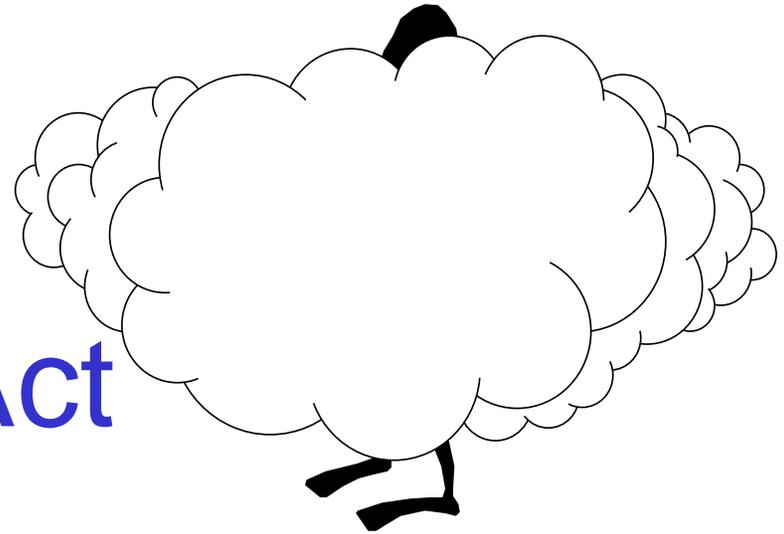


# Federal Environmental Regulation

- During 1960's environment became major issue
- Since 1970, explosion of federal regulation:
  - Created Environmental Protection Agency (EPA)
  - Clean Air Act
  - Clean Water Act
  - Resource Conservation and Recovery Act
  - Toxic Substance Control Act
  - Endangered Species Act
  - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) generally called *Superfund*



# Clean Air Act



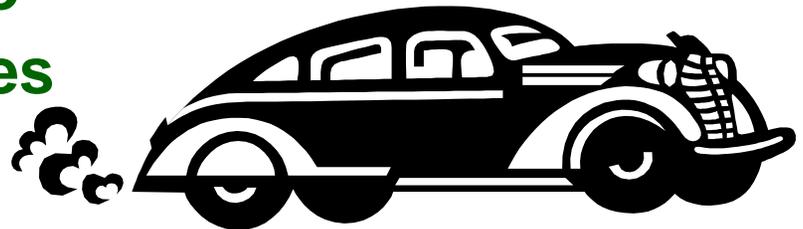
- **EPA establishes National Ambient Air Quality Standards (NAAQS) for major pollutants (Ozone, Particulates, Lead, Carbon Monoxide, Nitrogen Oxide & Sulfur Dioxide)**
  - **Each state develops a State Implementation Plan (SIP) which must include:**
    - **enforceable emission limits**
    - **schedules and timetables for compliance**
    - **measures for monitoring air quality & emissions**
    - **adequate resources for implementing and enforcing SIP**

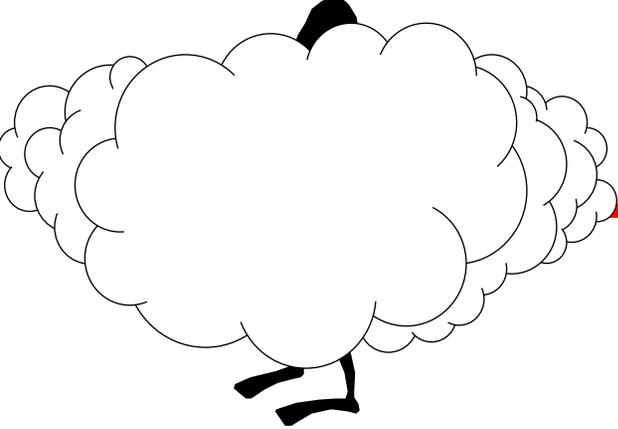
# Clean Air Act permit system

- **Clean air area (better than NAAQS)**
  - attainment areas or prevention of significant deterioration (PSD) areas
  - only slight increase allowed (*maximum allowable increase*)
  - can construct in PSD only if:
    - agree to Best Available Control Technology (BACT)
    - won't exceed maximum allowable increase
- **Dirty air area**
  - nonattainment areas - even more restrictions than for PSD areas
  - emissions offset policy has three requirements for construction
    - use Lowest Achievable Emissions Rate (LAER) technology
    - any other plants they own meet SIP requirements
    - pollution from new plant must be *offset* by more than 1 to 1 from other plants in area
    - when plant operates air quality should improve

# Mobile Sources of Pollution

- **Vehicles are a primary source of pollution that affects the ozone**
- **The law imposes direct controls on certain emissions**
- **State Implementation Plans (SIPs) may impose tougher standards**
  - **Vehicle emission inspections**
  - **Vapor recovery systems at gas stations**
  - **Reformulated gasoline**
  - **Alternative fuel sources**
  - **Forced carpooling**





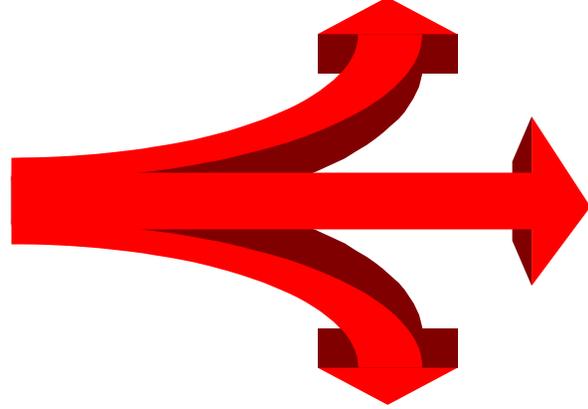
# Toxic Pollutants

- 1990 amended Clean Air Act lists 191 substances declared as hazardous air pollutants
- EPA sets *minimum emission rates (MERs)* for each one
- General goal:
  - 90% reduction in emissions for pollutants that had been uncontrolled
  - 75% reduction in cancer caused by air pollution

A black silhouette illustration of a power plant structure. Several workers are shown on scaffolding, engaged in maintenance or construction work. The structure includes a large cylindrical tank and various pipes and beams.

# Acid Rain

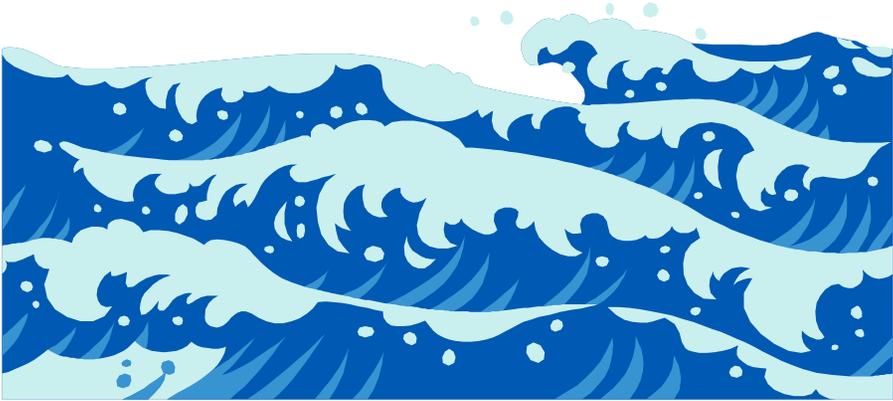
- Main sources are sulfur dioxide and nitrous oxides
- Usually created from burning coal or oil to produce electricity
- Chemicals become sulfuric and nitric acid, and return to earth in rain or other precipitation
- Occurs in the northeast - winds carry acids from electricity plants mostly in the Midwest and Appalachian region (esp. from burning soft coal)
- 1990 amendments to Clean Air Act required 1/2 of sulfur dioxide and nitrous oxide emissions produced in 1990 be eliminated.



# Enforcement

- EPA has primary authority to enforce Clean Air Act & other environmental statutes
- State agencies also are involved
- Citizens can bring *citizens suits*
- Environmental groups also bring citizens suits
- Recently more environmental offenses have been criminally prosecuted
  - Over 100 criminal indictments per year
- Size of fines that are imposed have risen as well

# Clean Water Act



- Passed in 1972, amended in 1977 and 1986
- Objective: “restore and maintain the chemical, physical and biological integrity of Nation’s waters.”
- 5 main elements:
  - national *effluent* stds for each industry
  - water quality stds set by states w/EPA approval
  - *discharge permit* program
  - special provisions for toxic chemicals & oil spills
  - construction grants and loans for *publicly owned treatment works (POTWs)*

- **Point Source Pollution**

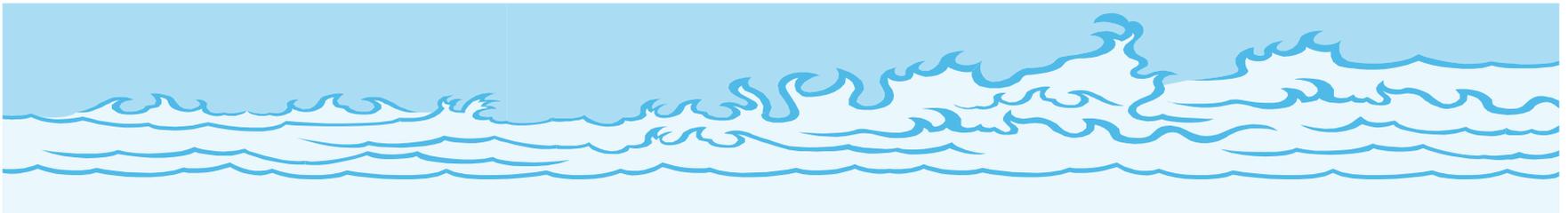
- water pollution that comes out of a pipe (point source) is easiest to identify
- billions spent to treat it
- water dumped into drinking areas must be cleaner than water in recreation areas
- controlled with permit system

- **Nonpoint Source Pollution**

- construction sites, run-off from streets, forestry, agriculture, etc.
- difficult to solve technologically and politically

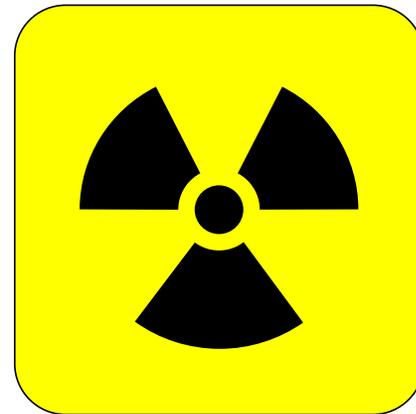
- **Wetlands**

- formerly filled in and drained, now protected
- use permit system
- Permit to dredge or fill wetlands may require restoration to wetlands

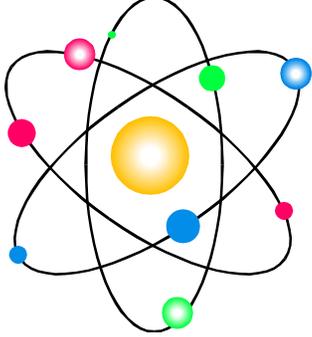


# Land Pollution

- **Toxic Substance Control Act passed in 1976**
  - EPA controls, tracks chemicals
  - biotechnology monitored
- **Pesticides**
  - Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) in 1947
  - most are toxic, some extremely so



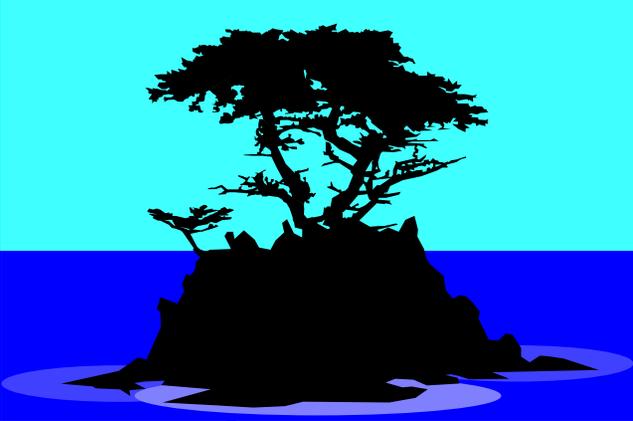
- **Registration of pesticide good for 5 years if:**
  - product does what claim it will
  - registration material accurate, label accurate on proper product use
  - will do what it should w/out “unreasonable adverse effects on the environment”



# Resource Conservation and Recovery Act

- **Covers toxic substances in market or at disposal**
  - **transportation, storage, treatment and disposal**
- **Old procedure: out of sight; out of mind**
- **Now need EPA permit to run TSD sites**
- ***Hazardous wastes:***
  - ***Ignitable; Corrosive; Reactive and Toxic***
- **Manifest system**
  - **TSD (treatment, storage & disposal) sites must keep manifests**
  - **waste must be packaged and labeled appropriately**
  - **provides cradle to grave control over hazardous waste**

# Superfund

- Clean up old hazardous waste sites
  - May have many potentially responsible parties (PRPs) liable for a site:
    - current owners
    - prior owners at time of waste disposal
    - waste generator who arranged for disposal at site
    - transporters to site
  - Joint and several liability
  - Most Superfund money is spent on legal and engineering rather than actual clean up
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- Owners can be responsible for cleanup of toxic waste they did not generate; minimize by use of *environmental audit* of property before purchase
  - Because of potential liability, some property is abandoned (*brownfields*) & not used productively

# Endangered Species Act

- **Covers all species – focus on habitat for threatened & endangered species**
- **Little federal money for habitat, so usually activity is blocked or altered**
- **Federal court stopped logging on federal land in Washington, Oregon and California to protect habitat of spotted owl at cost of \$20 billion**





# *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*

- Logging harms habitat of the red-cockaded woodpecker & spotted owl, endangered species
- Landowners, logging companies and others challenge Secretary of Interior's definition of the word "harm" in the Endangered Species Act, stating that the Sect. went beyond what Congress intended in the Act
- The court of appeals agreed; Interior Secretary and the Fish & Wildlife Service (FWS) appealed
- **HELD**: Judgment reversed. Supreme Court stated that Congress gave broad interpretive power to the Secretary when it enacted the ESA

# Global Environmental Issues

- **Ozone**

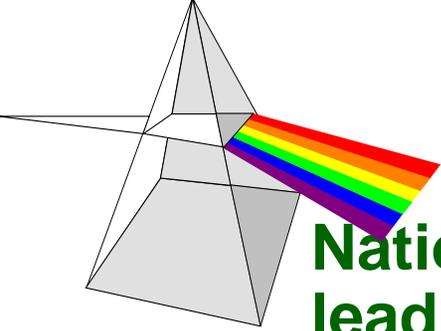
- Chlorofluorocarbons (CFCs) damage ozone layer which protects earth from ultraviolet radiation

- producers of CFCs agreed to phase out production

- **Global Warming**

- Looked at by developed nations but as yet not a serious or major unified approach





# *“High Tech Toxic Trash”*

**National Safety Council says a billion pounds of lead, 2 million of cadmium, and 400,000 pounds of mercury from discarded PCs will pile up in landfills by 2004.**

- **Problem: leaching into groundwater.**
- **Europe has same problem and EU adopted the Waste Electrical and Electronic Equipment (WEEE) Directive**
  - **Requires firms to cleanup obsolete equipment**
  - **Companies must collect, transport, treat and recycle all electronics products.**
  - **Requires toxic chemical use be phased out in electronics products. (May violate WTO rules.)**
  - **Are continuing to study and come up with innovative solutions.**

# Pollution Prevention Act of 1990



- Framework for the environment as we plan our future
- Focus on waste management
- Priority given to reducing sources of pollution
- Emphasis on reduction of industrial hazardous wastes
- Encourages changes in equipment and technology
- Redesign productions (minimize damages from production process and consequences of the product)
- Substitute raw materials
- Improve maintenance, training & inventory control.



# *“Is Species Preservation in Poor Countries Possible?”*

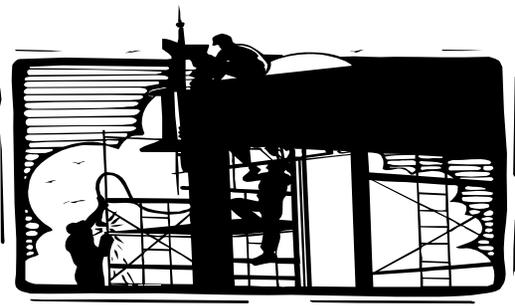
- **In the U.S., significant resources are dedicated to habitat preservation under the ESA**
- **Most nations don't have this kind of law**
- **Even if they did, economic conditions do not favor preservation in poor nations**
- **In Indonesia, the baby macaques are endangered, but trappers capture them for eating**
- **Unique ecosystems of Indonesia under threat (more species than any country except Brazil)**
- **Coral reefs are ravaged by dynamite fishing; depletion of rainforests; rare animals taken for meat and hides**

End of Chapter 17

# *Bradley v. ASARCO*



- **Bradleys sued ASARCO for trespass and nuisance due to metals from a refinery deposited on their land. Refinery met EPA requirements.**
- **The district court certified several issues to the Washington State Sup.Ct. asking for the status of the common law of nuisance and trespass as applied to air pollution.**
- **Washington Court stated**
  - **ASARCO committed intentional trespass**
  - **Deposit of microscopic particulates gives rise to trespass and nuisance action**
- **The case then returned to federal court which dismissed the case for lack of evidence that there were actual damages to plaintiffs' person or property from the air pollution**



# Negligence, Strict Liability and Pollution

- **Negligence**
  - Failure to use reasonable care to prevent pollution from causing a foreseeable injury
- **Strict Liability for Abnormally Dangerous Activities**
  - Applied to businesses producing toxic chemicals or emitting toxic pollutants
  - Courts look at the location of a business relative to population centers

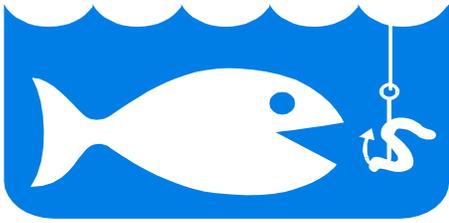


# *Whalen v. Union Bag & Paper Co.*

- Whalen used water from a creek for livestock and plants; Union built a mill upstream and polluted the creek; Whalen could not use the water then
- Whalen sued for damages & an injunction to stop the pollution
- The trial court awarded \$312/year and issued an injunction
- Appellate court reduced damages to \$100/per year & eliminated injunction; Whalen appealed to NY's highest court
- The court ruled that the injunction could not be eliminated because it would cause great expense for Union and could eliminate 500 jobs, as compared to the slight damage done to Whalen
- The Court of Appeals reinstated the injunction and awarded costs to Whalen

# *Chevron USA v. Natural Resources Defense Council*

- **The EPA allowed Chevron to use the bubble concept at one of its refineries—measures all pollution at facility rather than measure each stack.**
  - **The NRDC opposed the bubble concept and sued Chevron. The appeals court agreed with NRDC and set aside the regulations. Chevron and EPA appealed.**
  - **The Supreme Court upheld the EPA’s decision and reversed the appeals court.**
- 
- **The Court stated that, “when a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy... the challenge must fail.” EPA has substantial discretion.**



# *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*

- **Solid Waste Agency of Northern Cook County (SWANCC)--** 23 towns join to develop nonhazardous waste disposal site
- **Corps said it had jurisdiction over “navigable waters” and would not give a permit to use abandoned gravel pit because the area was too sensitive for a habitat for migratory birds; “Navigable waters” are “lakes, rivers streams, mudflats, sandflats, wetlands”**
- **SWANCC challenged the Corps’ jurisdiction**
- **Lower courts held for Corps; SWANCC appealed to S.Ct.**
- **HELD: Courts have held that the word “navigable” has “limited import.” The Corps has jurisdiction to wetlands adjacent to navigable waters.**
- **However, here there are ponds not adjacent to open water.**
- **Judgment reversed. Jurisdiction is over navigable waters “or which could reasonably be so made . . . .” Not here.**