

COVERT OPINION: REVEALING A NEW INTERPRETATION OF ENVIRONMENTAL LAWS

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INTRODUCTION

The standard history of the federal environmental statutes is that Congress fairly consistently chose the protection of water, wildlife, and human health over economic interests.¹ But is the conventional wisdom

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1. See David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 *ECOLOGY L.Q.* 545, 554 (1997) ("Most public health and environmental statutes have the goal of protecting public health and the environment, rather than

correct? Are many of the interpretations in fact the result of agency and judicial creativity? Considering the current U.S. Supreme Court's growing skepticism of far-reaching environmental laws, much of our settled interpretations might now be on shaky ground.² Consider the following story.

THE COVERT OPINION

On a trip to Washington this past summer, I was strolling along 2nd Street one sweltering Monday afternoon behind the U.S. Supreme Court's Greek temple of a courthouse. I glimpsed something shiny out of the corner of my eye; it appeared to emanate from a dumpster behind the regal edifice. Upon closer inspection, the shine came from a plastic wrapping around a paper document. Not seeing any of the usually ubiquitous court police nearby, I retrieved the wrapped document. Even a cursory review revealed that I had stumbled upon something extraordinary; it appeared to be the draft of a pending environmental law decision of great importance. Why this litigation cannot be found in the public records remains a mystery,

balancing that protection against economic interests.”); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1333–35 (1985) (referring to pollution laws as requiring the use of “whatever technology is available to reduce or eliminate . . . risk, so long as the costs of doing so will not cause a shutdown of the plant or industry,” and calling this system an “extraordinarily crude, costly, litigious and counterproductive system of technology-based environmental controls”); DANIEL FARBER, *ECO-PRAGMATISM* (1997) (discussing the idea of following a pro-environmental “baseline” that places economic and other considerations behind); CARNEGIE COMM’N ON SCIENCE, TECH., AND GOV’T, *RISK AND THE ENVIRONMENT, IMPROVING REGULATORY DECISIONMAKING* 76 (1993) (asserting that the environmental laws take an overly protective and risk-averse approach to potential environmental harms); STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993) (arguing that our current environmental laws impose misplaced priorities in favor of certain highly publicized risks, at the expense of other, more serious risks).

2. *See, e.g.*, *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (a plurality of the Court would have restricted the reach of the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000), by rejecting a long-standing agency interpretation in favor of a much narrower one, reached by extrapolating from a dictionary definition); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 167–74 (2001) (narrowing the Clean Water Act, through a variety of tools of statutory interpretation, and holding unlawful a long-standing agency interpretation).

Conversely, the recent decision in *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, 1462 (2007) (holding that automotive “greenhouse gas” emissions must be regulated by the EPA as “pollutants” under the Clean Air Act, 42 U.S.C. § 7521(a)(1) (2000)), appeared to diverge from the more skeptical approach to interpreting environmental laws. One may view this case as a unique aberration, however, in that it reflects a desire of the Court to make a statement about the “hot” issue of global climate change. In any event, the vote of Justice Anthony Kennedy appears to be decisive in deciding major environmental law cases, as it has been in many areas of Supreme Court jurisprudence in the early twenty-first century. Kennedy was in the majority in *SWANCC* (decided by a 5–4 vote), concurred in the judgment in *Rapanos* (4–1–4), and was in the majority in *Massachusetts v. Environmental Protection Agency* (5–4).

but I suspect that it might have something to do with national security or the potentially explosive nature of the Court's draft opinion.³ At the risk of prosecution, I decided that the public held a right to see and comprehend this important document. The imperfect condition of the discarded document made a handful of words illegible. Nonetheless, I suggest, without undue hyperbole, that few documents in the Court's history have revealed so candidly a methodology for deciding statutory cases. The draft is printed here, in full, as far as I could discern.⁴ The task falls to legal commentators, the public, and the political process to decide what sort of response would be appropriate.

*National Association for Better Opportunities for Business and Society
[NABOBS], et al., Petitioners,*

v.

*U.S. Environmental Protection Agency, the U.S. Department of the Interior,
et al., Respondents.*

_____, J., delivered the opinion of the Court. [⁵]

This action raises serious issues relating to the burdens of environmental law on private property, liberty, and enterprise. Over the past forty years, regulatory agencies and lower courts have imposed questionable interpretations of federal statutes, often predicated on an assumption that the environment takes precedence over all other human goals—an assumption that is unsupported, in many instances, by explicit statutory language.

This litigation is brought by a group of advocates for smaller government and for private property rights. They seek declaratory and other relief associated with a wide variety of federal agency actions. The

3. One unusual feature is that the opinion uses footnotes for its citations, contrary to usual Supreme Court practice. The opinion thus reads like a law review article.

4. For the idea of writing a fantasy about a lost document that reveals much about human nature, I owe a debt to Umberto Eco's novel *The Name of the Rose*, a tale of securing and reprinting a lost medieval memoir about life, religion, philosophy, and murder. UMBERTO ECO, *THE NAME OF THE ROSE* (William Weaver trans. 1983) (1980). I also acknowledge the earlier fantasy of Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459 (1994), which I had not read before creating my own fantasy.

5. The author of the opinion was, alas, one of the words that was obscured in the draft. Nor is it clear whether there was a draft dissenting opinion.

defendants include a number of federal agencies. Additionally, a number of environmental advocacy groups have submitted briefs as *amicus curiae*.

In recent decisions in environmental cases, this Court has crystallized a more rigorous form of statutory interpretation.⁶ When Congress has employed a specific word or phrase, and that meaning is in dispute, the first rule of interpretation should be to discern the plain meaning. This can be done readily by consulting a dictionary and then extrapolating from the most reasonable definition.⁷ This task is assisted greatly by relying on traditional canons of interpretation, which often counsel against expansive constructions.⁸

In ascertaining a plain meaning, the Court must give due regard to the principle that the states, not the federal government, retain the chief responsibility in our federal system for regulating (or not regulating) the use of land, water, wildlife, and other resources.⁹ We must also be cognizant, of course, of the principles of personal liberty that underlie our constitutional system. When interpreting statutes that might hobble citizens' free use of private property, we must keep in mind the rule that government cannot, by virtue of the U.S. Constitution's Fifth Amendment,¹⁰ "go too far" in regulating private property without just compensation.¹¹

6. See, e.g., *Rapanos*, 126 S. Ct. 2208 (plurality opinion); *SWANCC*, 531 U.S. 159. These cases are discussed in the text accompanying notes 14–22.

7. See *Rapanos*, 126 S. Ct. at 2220–21 (plurality opinion) (relying on a dictionary definition). In following this form of interpretation, not all of the members of the Court's majority agree that we are seeking to divine the "intent" of the drafters in determining the meaning of a statute. See, e.g., *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (noting that a dictionary issued around the time a statute is enacted is useful in ascertaining meaning). It is possible, of course, that not all of the members of Congress hold a common understanding of a statutory term. Nonetheless, if congressional drafters desire to employ a meaning that is *different* from the plain, dictionary meaning, they can make this different meaning clear through a precise definition in the statutory text.

8. See, e.g., *SWANCC*, 531 U.S. at 172–73 (restricting the reach of the Clean Water Act by employing a doctrine that statutes should be interpreted to avoid invoking the "outer limits" of congressional power).

9. See *Rapanos*, 126 S. Ct. at 2215, 2223 (plurality opinion) (implicitly concluding that the states must retain primary control over water use regulation); *SWANCC*, 531 U.S. at 172–74 (concluding that the traditional authority of the states places congressional regulation of land and water near the "outer limits" of its power under the Commerce Clause, article I, section 8 of the U.S. Constitution.).

10. U.S. CONST. amend. V.

11. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). The past century has witnessed an expansion of this Court's jurisprudence that some regulation of private property may amount to a "taking" that requires compensation. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (setting forth guidelines for concluding that the government has "taken" property by burdensome regulation); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017–18 (1992) (requiring compensation when regulation removes all economically beneficial use of the property).

If we can ascertain a plain meaning through these techniques, our task is complete. We cannot defer, via the famous *Chevron* doctrine, to contrary or unreasonable interpretations by administrative agencies.¹² Nor do we need to bow before an agency's supposed expertise in a particular realm. Even long-standing, supposedly settled administrative interpretations must be held unlawful when they depart from our reading of the plain meanings of the words of the statute.¹³

In both our 2006 plurality decision in *Rapanos v. United States*¹⁴ and our earlier *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,¹⁵ we rejected a method of statutory interpretation that would have this Court slavishly defer to agency interpretations. Often, onerous interpretations have been imposed upon American citizens by agency bureaucrats with little regard for the plain meaning of the statute's text. First, in *SWANCC*, we rejected the U.S. Army Corps of Engineers longstanding interpretation of the federal Clean Water Act's linchpin term "navigable waters" (oddly defined by Congress to mean "waters of the United States"),¹⁶ which included even small ponds that exist in only one state—an interpretation that ignored the interstate commerce limitation on the powers of Congress.¹⁷ We interpreted the statutory term narrowly through a combination of two tools: (1) the doctrine of avoiding the "outer limits" of congressional power under the commerce

12. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (setting forth a two-part test for interpreting statutory terms, the first of which is to discern whether Congress has spoken clearly on an issue, and the second of which is to defer to reasonable agency interpretations if Congress has not spoken on the issue).

13. See *Rapanos*, 126 S. Ct. at 2232 (plurality opinion) (rejecting the notion that an interpretation that has existed for more than 30 years holds "adverse possession" of the law when it disregards statutory text).

14. *Id.* at 2208. Although the citizen challengers to the government regulation prevailed by a 5–4 vote in *Rapanos*, the Court issued no majority opinion. Justice Scalia wrote a plurality opinion, *id.* at 2214, while Justice Kennedy concurred only in judgment, *id.* at 2236. Justice Stevens wrote a dissent for four justices. *Id.* at 2252.

15. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159 (2001).

16. 33 U.S.C. § 1362(7) (2000). In full, the statute defines "navigable waters" as "waters of the United States, including the territorial seas." *Id.*

17. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to regulate "commerce among . . . the several states"). We have recently reaffirmed that this restriction imposes real boundaries on federal legislation. See *SWANCC*, 531 U.S. at 173–74 (restricting the Clean Water Act in order to avoid an interpretation that might exceed the commerce power); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding a statute unconstitutional that provides for federal criminal penalties for violence against women); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act is an unconstitutional exercise of Congress's commerce clause power).

clause; and (2) the principle of the “tradition” of state and local control of water and land use.¹⁸

In *Rapanos*, a majority of the Court reversed agency decisions under the Clean Water Act that had required permits for discharging into a wetlands area and into a channel that were not immediately adjacent to truly navigable-in-fact bodies of water.¹⁹ A plurality of the Court extrapolated from a dictionary definition to limit the fundamental term “waters” to include only relatively permanent oceans, rivers, streams, and lakes. In doing so the Court implicitly rejected agency interpretations that had broadly covered wetlands, intermittent water bodies such as arroyos, and man-made channels.²⁰ In addition, this reading rejected an argument for administrative deference based on the fact that agency bureaucrats, hounded

18. *SWANCC*, 531 U.S. at 172–73. As for the first jurisprudential tool, we wrote that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’s power, we expect a clear indication that Congress intended that result.” *Id.* at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). This doctrine arises from a desire to avoid deciding constitutional issues needlessly. *Id.* at 172. We note that the concept of avoiding even the “outer limits” of a power bears a strong resemblance, in reverse, of the notion that constitutional rights exist when they are in the “penumbra” of enumerated rights. *See Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (setting forth the “penumbra” notion to create a right to privacy).

The concern over avoiding “outer limits” is “heightened,” we wrote, when a possible interpretation would “alter the federal-state framework by permitting federal encroachment upon a traditional state power.” *SWANCC*, 531 U.S. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). We concluded that state and local governments have a “traditional and primary power over land and water use.” *Id.* at 174 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)). Our blanket conclusion that the federal government has no “tradition” of control of land or water use was not affected by more than thirty years of federal laws on the environment or the body of law establishing federal control of interstate water disputes. *See, e.g.*, Reclamation Act of 1902, 43 U.S.C. § 371 (2000) (federal law to stimulate water projects in dry states); *Winters v. United States*, 207 U.S. 564, 577 (1908) (setting forth a federal law principle that the federal government holds a reserved water right when it reserves or withdraws public land, such as for an Indian reservation or a national park).

19. *See Rapanos*, 126 S. Ct. at 2214–15 (plurality opinion) (explaining the expansive interpretation of “waters of the United States” under the Clean Water Act, and the costs associated with wetland permits).

20. *See id.* at 2220–26 (relying on the definition of “waters” in WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)). Since the *Rapanos* decision, some writers have criticized the plurality opinion for its apparent assumption that wetlands are categorically not “permanent” or “standing.” *See, e.g.*, Paul Boudreaux, *A New Clean Water Act*, 37 ENVTL. L. REP. 10,171, 10,188 (2007). For example, the WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1961) [hereinafter WEBSTER’S THIRD], replaced the definition in the “Webster’s Second” edition of 1954, quoted by the plurality in *Rapanos*, 126 S. Ct. at 2220–21, in favor of a definition of “waters” that included “the water occupying or flowing in a particular bed.” WEBSTER’S THIRD, *supra* at 2581. This revised definition certainly could include even intermittent wetlands. We decline, however, to use the instant opinion to revisit the issue.

by the so-called environmental community, had applied the broader interpretations for many decades.²¹

Rapanos and *SWANCC* offer a bold new vision for re-interpreting the environmental laws. They offer a vision that clears away the clouds and dust of choking agency rules and stifling lower court decisions, to reveal a clear blue vista of liberty.²²

With this in mind, we consider the petitioners' challenges to (1) the National Environmental Policy Act, (2) the Comprehensive Environmental Response, Compensation and Liability Act, (3) the Clean Water Act, and (4) the Endangered Species Act.²³

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

In 1969 Congress enacted the National Environmental Policy Act (NEPA),²⁴ which for the first time insinuated a significant federal presence into the realms of land, water, and other resources, which for nearly 200 years had been almost exclusively the regulatory province of the states and local governments.²⁵ Buried in the middle of the statute was a seemingly innocuous requirement that each federal agency include, along with proposals for legislation and other proposed actions, a "detailed statement"

21. After criticizing the agency interpretations as burdensome, the *Rapanos* plurality rejected what it called the agencies' "Land is Waters" approach, which the plurality chastised as "beyond parody." *Rapanos*, 126 S. Ct. at 2214–15, 2222. The plurality then rejected the invitation that it should "defer" to what it had concluded was an unreasonable agency interpretation. *Id.* at 2232–33.

After the split decision in *Rapanos*, some lower courts have followed the "significant nexus" test set forth by Justice Kennedy, who concurred in the judgment but not with the reasoning of the plurality. See *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring in the judgment). These lower court decisions employed the rather dubious logic that regulation of a water body with a "significant nexus" to navigable-in-fact waters probably would have been approved of by five members of the Court in 2006 (Justice Kennedy and the four *Rapanos* dissenters). See *United States v. Johnson*, 467 F.3d 56, 58 (1st Cir. 2006) (applying "significant nexus"). But see *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d. 605 (N.D. Tex. 2006) (following the *Rapanos* plurality's reasoning). We give no encouragement to such a reading of precedent. Undoubtedly, the issue of "waters" will return to the Supreme Court.

22. By "blue," we do not mean to refer to partisan politics, of course.

23. We do not render any judgment today on claims seeking reinterpretation of the Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000). To be frank, we believe that the petitioners' arguments concerning this Act are, categorically, not as plainly correct as their claims under the other statutes. In fact, we find the Clean Air Act to be very confusing. [Note to judicial law clerks: Ensure that this last sentence does not appear in the final draft; replace it with more appropriate language.]

24. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370d (2000).

25. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 174 (2001) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)) (referring to the "States' traditional and primary power over land and water use").

of the environmental impact of the proposed action when it “significantly affect[s] . . . the human environment.”²⁶

From this simple provision, however, an extraordinary industry has mushroomed. The lower courts and a federal agency, the Council on Environmental Quality (CEQ), have created a byzantine system of requirements for bulky “environmental impact statements” (EISs).²⁷ CEQ regulations demand an exploration of environmental impacts through a cumbersome and regimented process of considering various “alternatives” to an agency’s proposed action and comparing the expected impacts.²⁸ For major agency actions, the construction of an EIS can take more than a year, cost millions of dollars, and result in a scientific study that fills many volumes.²⁹

26. 42 U.S.C. § 4332(2)(c) (2000). Even environmentally-oriented academicians have noted that NEPA was “apparently innocuous” when enacted in 1969; but then, “like a snake in the grass,” NEPA became an “accidental legislation” that imposes significant burdens on federal agencies. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 476–77 (3d ed. 2004).

27. See 40 C.F.R. §§ 1500.1–1508.28 (2007) (CEQ regulations concerning the implementation of NEPA).

28. The CEQ regulations prescribe details such as: (1) whether to create an “environmental assessment” to decide whether to take on the larger task of a full-blown EIS, 40 C.F.R. § 1501.4(b); (2) the “timing” of the EIS, *id.* § 1502.5; (3) the recommended format, *id.* § 1502.10; (4) how various “alternatives” should be considered, *id.* § 1502.14; and (5) which categories of environmental impacts to consider (confusingly renamed both “consequences” and “effects” in the CEQ regulations, *id.* § 1502.6 (referring to § 1508.8)).

Among the most brazen of the CEQ’s expansions of the law is a requirement that an EIS include “appropriate mitigation measures.” *Id.* § 1502.14. The statute contains no such requirement. Indeed, this Court has stated that NEPA imposes only procedural requirements, and does not require any particular substantive decisions to further any particular environmental interests. See *Stryker’s Bay Neighborhoods Council, Inc. v. Karlen*, 444 U.S. 223 (1980), *cited in* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

29. Even the CEQ conceded, in a comprehensive review of NEPA in 1997, that compliance with the Act “takes too long and costs too much,” that “documents are too long and technical for people to use,” that the EIS process “is still frequently viewed as merely a compliance requirement,” and that in consequence “millions of dollars, years of time, and tons of paper have been spent on documents that have little effect on decisionmaking.” COUNCIL ON ENVTL. QUALITY (CEQ), THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 7 (1997), available at <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf>.

In a recent academic study of NEPA, it was noted that a typical Department of Energy EIS took two and a half years to complete. DANIEL R. MANDELKER & CHARLES ECCLESTON, COMMENTS ON THE TASK FORCE ON IMPROVING THE NATIONAL ENVIRONMENTAL POLICY ACT, at para. 7 (2006) (citing DEP’T OF ENERGY, NATIONAL ENVIRONMENTAL POLICY ACT, LEARNED LESSONS 40 (2005)). Although the academicians found that the average EIS was 204 pages long, some EISs can run “several thousand pages” in length. *Id.* Another report found that the average cost of producing a programmatic EIS at the DOE was \$12.5 million. NAT’L ACAD. OF PUB. ADMIN., MANAGING NEPA AT THE DEPARTMENT OF ENERGY, at pt. IV.C (1998), available at http://www.eh.doe.gov/nepa/process/nepa_rep/nepa_rep.html.

The heavy regulatory burden of NEPA began, to a large extent, with a famous and audacious decision of the U.S. Court of Appeals for the District of Columbia, in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*.³⁰ In this extraordinary opinion—the first major appellate decision under the new law—Judge J. Skelly Wright used powers of creativity to turn a seemingly small and harmless statute (a “paper tiger,” some called it) into a regulatory dragon.³¹ Judge Wright concluded that NEPA required the creation of an EIS even for projects that had been tentatively approved, such as nuclear power plants.³² The CEQ followed by imposing its intricate regulations for the timing and preparation of an EIS.³³ Among other things, the *Calvert Cliffs* opinion helped established the principle that, if a federal agency does not follow requirements to the letter, it exposes itself to a court-ordered injunction that may stop the agency in its tracks. Through such an injunction, the benefits to the American people of the proposed agency action may be lost.³⁴

Interestingly, the government did not petition for a writ of certiorari in the *Calvert Cliffs* case. Perhaps the Nixon administration was seeking to avoid controversy in an election year. For whatever reason, today, more than thirty-five years later, we address for the first time the appropriate meaning of the fundamental provisions of NEPA.

A. “Detailed Statement”

As we have noted, NEPA simply requires an agency to prepare a “detailed statement” on the environmental impact.³⁵ What does this

30. *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971). We note that this decision has become somewhat of a heroic “model” for some who advocate in favor of judicial activism to foster environmental protection.

31. Indeed, Judge Wright’s opinion appeared to revel in its ground-breaking. The opinion began by stating, “These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment.” *Id.* at 1111. It concluded by stating, “No less is required if the grand congressional purposes underlying NEPA are to become a reality.” *Id.* at 1129.

32. *Id.* at 1127–29 (requiring an overhaul of the NEPA rules created by the Atomic Energy Commission). The opinion in *Calvert Cliffs* held that agencies must always consider environmental impacts in their decision-making, regardless of language in the statute saying that the burdens were to be imposed “to the fullest extent possible.” *Id.* at 1114–15 (disregarding the importance of the “fullest extent possible” language in 42 U.S.C. § 4332 (2000)).

33. CEQ issued its first regulations on NEPA in 1978. 43 Fed. Reg. 55,994 (Nov. 29, 1978). The current panoply of regulations are at 40 C.F.R. §§ 1500.1–1508.28 (2007).

34. See *Calvert Cliffs*, 449 F.2d at 1129 (enjoining the agency from going ahead with nuclear plant projects that had already been tentatively approved, until it had complied with the letter of the court’s interpretations).

35. 42 U.S.C. § 4332(2)(C).

requirement of a “statement” mean? Let us consult Webster’s Dictionary.³⁶ “Statement” is defined as “a single declaration or remark.”³⁷ This plainly implies a short document. A “statement” does not mean, by contrast, a *study*, an *analysis*, or an *exposition*, which imply longer and more multifaceted documents. Had Congress intended to require a longer study, it could have used one of these other terms; but it required only a “statement.” To write a “detailed” statement means only to recite specific particulars.

To understand the appropriate meaning of a *statement*, consider an example of the environmental impacts of starting up a nuclear power plant. It would be a sufficiently “detailed statement” to note that a power plant would (1) require the use of a large amount of water for cooling of the plant, (2) discharge warm water that might harm fish and water plants, and (3) pose a small risk of radioactive hazard because it uses radioactive materials (such as uranium and plutonium) and disposes of other radioactive elements. After considering a handful of alternative approaches to the proposed action and a few other minor points, this statement is all that the statute requires.³⁸ To impose more, such as the CEQ’s complex commands, simply goes beyond the statutory text. It is a usurpation of legal authority. Accordingly, we hold today that the CEQ’s regulations

36. In *Rapanos*, a plurality of this Court relied on WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1954)—affectionately called “Webster’s Second” by many who were educated in the 1950s. *Rapanos v. United States*, 126 S. Ct. at 2220–21. In 1961, however, Merriam-Webster, Inc., released WEBSTER’S THIRD, *supra* note 20. In contrast to the Second, which followed a *prescriptive* approach, through which definitions were based on traditional usage, the Third followed a more *descriptive* approach, through which words were defined by how they were being used at the time of publication. A descriptive approach is far more susceptible to change, of course. See W. Mich. Univ., Finding Word Information: English Language Dictionaries, <http://www.wmich.edu/library/guides/find/dictionaries.php> (last visited Sept. 13, 2007). Many traditional critics were upset. See, e.g., Wilson Follett, *Sabotage in Springfield*, ATLANTIC MONTHLY, Jan. 1962, at 73 (calling Webster’s Third “a dismaying assortment of the questionable, the perverse, the unworthy, and the downright outrageous”). In a sense, the Third was a harbinger of the more “permissive” society of the 1960s, when many young Americans rejected traditional values in favor of “finding yourself” and “doing your own thing.” For more on the debate surrounding the Third, see generally HERBERT CHARLES MORTON, THE STORY OF WEBSTER’S THIRD: PHILIP GOVE’S CONTROVERSIAL DICTIONARY AND ITS CRITICS (1994). The Third, updated mostly recently in 2002, remains the most scholarly unabridged dictionary of the English language published in the United States. For a discussion of the uses of dictionaries by the Supreme Court, see Note, *Looking It Up: The Supreme Court’s Use of Dictionaries in Statutory and Constitutional Interpretation*, 107 HARV. L. REV. 1437 (1994).

37. WEBSTER’S THIRD, *supra* note 20, at 2229.

38. 42 U.S.C. § 4332(2)(C)(iii) (2000) (requiring the consideration of alternatives). The statute also requires a statement on “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” and “any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.” *Id.* § 4332(2)(C)(iv), (v).

concerning the creation of a complicated and regimented EIS are unlawful interpretations of NEPA and may not be enforced.

B. “Accompany”

Next, *Calvert Cliffs* required that high-level agency decisionmakers must actually read and *consider* the EISs before making their decision.³⁹ But NEPA does not compel this duty. The statute requires only that a statement “accompany” a proposal through the agency decisionmaking process.⁴⁰ To *accompany* means merely to “go along with,” according to Webster’s.⁴¹ If Congress had meant to require agencies to *consider* the statement, it could have said so.

The reasoning in *Calvert Cliffs* on this point is symptomatic of the activist method of interpretation that we disavow. Judge Wright asked rhetorically, in the face of the plain meaning of the statute: “What possible purpose could there be in the section 102(2)(C) requirement (that the ‘detailed statement’ accompany proposals through agency review processes) if accompany means no more than physical proximity? . . . The word ‘accompany’ in section 102(2)(C) must not be read so narrowly as to make the Act ludicrous.”⁴²

Although it may be tempting for a federal judge to interject his personal belief as to whether a decision of Congress is “ludicrous,” such a belief must not interfere with the interpretation of a statute. To *accompany* means to “go along with,” and nothing more.⁴³ Congress required only that the statement accompany an agency proposal through the review process. Congress plainly left it to the sound discretion of the agency whether to consider the substance of the statement. Accordingly, we reject the reasoning of *Calvert Cliffs* that an agency must consider the content of the environmental statement, and we hereby hold unlawful any CEQ interpretations that go beyond the simple “accompany” requirement.

39. *Calvert Cliffs*, 449 F.2d at 1117.

40. 42 U.S.C. § 4332(2)(C) (2000). To be precise, the statute requires only that the statement “accompany the proposal through the existing agency review processes.” *Id.*

41. WEBSTER’S THIRD, *supra* note 20, at 12.

42. *Calvert Cliffs*, 449 F.2d at 1117.

43. As we wrote in another environmental opinion nearly thirty years ago, “When *I* use a word,’ Humpty Dumpty said, in a rather scornful tone, ‘it means just what *I* choose it to mean—neither more nor less.’” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 n.19 (1978) (quoting *Through the Looking Glass*, in THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939)).

C. “Human Environment”

NEPA limits an agency’s statement to those impacts that affect the quality of the “human environment.”⁴⁴ In its regulations, however, the CEQ has stretched this term with considerable force. The regulations state that the term “shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. . . . [E]conomic or social effects are not intended by themselves to require preparation of an environmental impact statement.”⁴⁵ The term “effects” is defined to encompass consequences that are “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”⁴⁶ Some lower courts have blindly followed the CEQ’s complex commands.⁴⁷

This extraordinary stretch of the scope of NEPA (in a manner that seems to disregard the traditional limits of proximate causation by its inclusion of “indirect effects”⁴⁸) once again runs counter to the plain meaning of the statute. The meaning of “human” is self-apparent. According to *Webster’s*, the plain meaning of “environment” relates to surroundings that “influence.”⁴⁹

Accordingly, the CEQ regulations expand impermissibly and illogically the definition of “human environment.” Indeed, the simple fact that the CEQ’s definition refers to *both* “the relationship of people with [the] environment” (which roughly encompasses the plain meaning of “human environment”) *and* “the natural and physical environment” (which fails to relate to humans at all) clearly shows that the regulations define “human environment” far too broadly.⁵⁰

We hold today that “human environment” is limited to those facets of the environment that directly affect human beings. Air pollution in cities, water used for drinking, and animals hunted as game each are part of the “human environment,” of course. But other aspects of what the CEQ calls

44. 42 U.S.C. § 4332(2)(C) (2000).

45. 40 C.F.R. § 1508.14 (2007).

46. *Id.* § 1508.8(b).

47. *See, e.g., Pit River Tribe v. Bureau of Land Mgmt.*, 306 F. Supp. 2d 929, 936 (D. Cal. 2004) (including within “human environment” things such as “wildlife” and American Indian “traditional cultural values”), *rev’d*, 469 F.3d 768 (9th Cir. 2006) (reversing some holdings in favor of the government and leaving untouched the conclusions about the reach of “human environment”).

48. *See* 40 C.F.R. § 1508.8(b) (2007) (requiring a discussion of “indirect effects”).

49. *Webster’s* defines “environment” as “the aggregate of social and cultural conditions . . . that influence the life of an individual or community.” WEBSTER’S THIRD, *supra* note 20, at 760.

50. 40 C.F.R. § 1508.14 (2007).

“ecological” effects (a word never used in the statute) plainly are outside of the “human environment.” Indeed, the fact that Congress chose to modify “environment” with “human” (as opposed to “natural” or no modification at all) shows Congress’s exclusive focus on human-oriented effects. Accordingly, the effects of agency actions on the “natural” environment are excluded from NEPA’s reach. Effects on wildlife, forests, mountains, and water bodies are not part of the “human environment” unless these consequences have a direct effect on human interests.

Consider, for example, an agency action to approve logging in a national forest, which might affect some sea birds that nest in the trees.⁵¹ Under the CEQ’s regulations, the agency would have to study the effects of logging on the trees and on the birds. Under the plain words of NEPA, however, the agency need only study effects upon the “human” environment, which, depending on the circumstances, might include the logging’s destruction of a popular recreational trail or the loss of a population of deer that are hunted for sport.⁵² However, effects on “nature” alone are excluded under the plain meaning of the statute.

These clarifications to NEPA will significantly decrease the federal government’s workload and costs necessitated by the law. Our interpretations, which shear away from NEPA the accretions imposed by lower courts and overzealous agencies, will allow the government to pursue important and essential work, such as protecting the nation’s security, unimpeded by senseless paperwork and intolerable delay.

51. *See, e.g.,* *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996) (affirming an injunction against a federally permitted logging operation because of the possibility that the logging would harm an endangered species, the sea bird called the marbled murrelet).

52. How close must the causal link be? Absent a contrary congressional command, we rely on a presumption of using the traditional legal doctrine of proximate causation, which excludes liability for effects that are too “remote” from the causal actor. *See* RESTATEMENT (SECOND) OF TORTS § 431(a) (1965) (discussing the requirements for legal causation). The requirement of proximate causation has been incorporated by federal courts into many federal statutes that impose liability, including: (1) the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B) (2000); *see* *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 696–97 n.9 (1995) (referring to “ordinary requirements of proximate causation and foreseeability”); (2) the Lanham Act, 15 U.S.C. § 1114 (2000) (governing advertising misrepresentation); *e.g.,* *TeleRep Caribe, Inc. v. Zambrano*, 146 F. Supp. 2d 134, 143 (D.P.R. 2001); (4) the Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b) (2000) (governing the sale of stocks and bonds); *e.g.,* *In re IBM Corporate Sec. Litig.*, 163 F.3d 102, 106 (2d Cir. 1998); and (4) certain civil provisions of the Racketeer-Influenced Corrupt Organizations Act; *e.g.,* *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 n.11 (1992).

II. CERCLA

A lame-duck Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act in late 1980, just before Ronald Reagan was inaugurated as President.⁵³ The statute serves almost as a symbol of the passing of an era of heavy government intervention into private affairs and private property. Nonetheless, lower court and agency interpretations of CERCLA since 1980 have saddled American businesses with the burdens of multi-million dollar “responses” (more easily understood as “cleanups”) of hazardous waste sites, typically lasting many years.⁵⁴ These duties have been imposed retroactively, even for waste that was disposed of lawfully many decades ago.⁵⁵ Property owners have been required to remove, in effect, every last molecule of hazardous wastes, even though many economic studies have shown the inefficiency of a “not-good-enough-until-the-last-drop” approach.⁵⁶ By reviewing the text of the statute, however, we conclude that CERCLA’s interpretations must be significantly restrained.

A. Interstate Commerce

In CERCLA, Congress authorized the President to “respond” to “releases” of hazardous substances.⁵⁷ The President has delegated his

53. Congress passed CERCLA on Dec. 11, 1980. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (2000)).

54. Many commentators have noted that CERCLA cleanups are extraordinarily time-consuming and very expensive. One study found an average of more than ten years between the EPA’s discovery of a release and completion of a Superfund cleanup. See PLATER ET AL., *supra* note 26, at 933 (noting the average time between principal steps in the Superfund process).

The authors of a leading environmental text refer to the costs of CERCLA cleanups as “staggering.” *Id.* at 940. A 1994 report by the Congressional Budget Office predicted that future cleanups would cost more than \$16 million apiece, on average, and that the total bill for cleaning up all the Superfund sites would be more than \$237 billion. *Id.* at 941. Another study by a noted environmental professor stated that, in 1992, the average cost of a cleanup was \$24 million. William H. Rodgers, Jr., *A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws*, 22 ENVTL. L. 417, 422 (1992).

55. See sources cited *infra* note 81 for a discussion on retroactive application.

56. See, e.g., BREYER, *supra* note 1, at 10-19 (calling the system of trying to avoid *all* risks a “classic administrative disease” that brings minimal good at a huge cost); see also W. KIP VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE 114-15 (1983) (noting the fundamental principle that costs tend to escalate as regulation tries to address the final, and most intractable, aspects of risk).

57. 42 U.S.C. § 9604(a) (2000).

authority to the U.S. Environmental Protection Agency (EPA).⁵⁸ Remarkably, however, the statute holds no textual link to Congress's constitutional limitation in regulating interstate commerce.⁵⁹ Before CERCLA, regulation of land and pollution on land was the prerogative of state and local law, not federal law.⁶⁰

As we explained in *SWANCC*, a doctrine of statutory interpretation compels us to avoid a reading that would allow Congress to push the "outer limits" of its authority under the commerce power.⁶¹ This is especially true when the statute intrudes, as CERCLA does, on an area of law that traditionally has been the realm of state prerogative.⁶² Accordingly, the term "release" must be limited to hazardous waste spills that significantly affect interstate commerce.⁶³ All other situations are reserved to the states. We hold today that before the EPA may "respond," it must make an explicit finding that the "release" significantly affects interstate commerce. An acceptable example might be an explosion that causes a large toxic-liquid fire that extends across state boundaries, threatening interstate highways and important interstate trade. By contrast, a simple discovery of hazardous waste disposed of carelessly within one state typically would *not* significantly affect interstate commerce and thus cannot fit the properly cabined meaning of "release" under CERCLA.⁶⁴

58. By Executive Order in 1987, President Reagan delegated the Presidential power to the EPA. Exec. Order No. 12,580, § 4(d)(1), 52 Fed. Reg. 2923 (Jan. 23, 1987), *reprinted as amended* at 42 U.S.C. § 9615 (2000).

59. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to regulate "commerce . . . among the several states"); see also *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 173–74 (2001) (restricting the Clean Water Act in order to avoid an interpretation that might exceed the commerce power); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that a federal statute was unconstitutional under the commerce power); *United States v. Lopez*, 514 U.S. 549, 549 (1995) (holding a federal statute unconstitutional under the commerce power).

60. See *SWANCC*, 531 U.S. at 174 (2001) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)) (referring to "States' traditional and primary power over land and water use").

61. See *SWANCC*, 531 U.S. at 172–73 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)) (interpreting the Clean Water Act's scope so as to avoid a reading that would push the statute to the "outer limits" of Congress's powers).

62. See *SWANCC*, 531 U.S. at 172–73 (stating that concerns over excessive federal powers "are heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," such as the traditional state and local control of land and water use).

63. The broadest construction of Congress's interstate commerce power is that it allows for the regulation of activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558–59. At least one court of appeals has suggested that CERCLA may apply to releases in which there is no evidence that the release has extended over state lines. *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997). The decision in *Olin* appears not have taken seriously our jurisprudence on the commerce power. We disapprove of any language or holding in *Olin* that is inconsistent with our opinion today.

64. A quick review of many famous CERCLA cases does not show any readily apparent link to interstate commerce. See, e.g., *United States v. Bestfoods Corp.*, 524 U.S. 51 (1998) (release at a

B. *Strict Liability*

Additionally, the petitioners challenge the application of CERCLA to circumstances in which businesses have acted reasonably in handling the waste. CERCLA's section 107 states only that certain parties "shall be liable" for the costs of the response.⁶⁵ The definitional section states that the terms "'liable' or 'liability' . . . shall be construed to be the standard of liability which obtains under § 1321 of Title 33."⁶⁶ Accordingly, definitional gymnastics send us to the Clean Water Act's provision that imposes liability for cleanups of oil spills.⁶⁷ Unfortunately, this provision does not resolve the issue because its reference to "liability" is as vague and unhelpful as that in CERCLA.⁶⁸ The respondents suggest that it was "understood" at the time of the passage of CERCLA that the standard of liability under 33 U.S.C. § 1321 was strict liability.⁶⁹ But statutory interpretation does not rely on what advocates, congressional staffers, or so-called environmentalists might have "understood;" rather, it is based on the statutory text itself.⁷⁰

As for the proper standard of liability under the oil spill provision, it appears that certain lower courts had reasoned, rather woodenly, that because Congress expressed great concern over the problem of oil spills, the courts must interpret the statute broadly.⁷¹ Similar arguments have been made for reading strict liability into CERCLA.⁷² Indeed, certain lower

factory in Missouri); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (release at a pig farm in Rhode Island).

65. The strangely worded section 107(a) of CERCLA states that four categories of persons—present owners of property, former owners of property, arrangers, and transporters—"shall be liable" for cleanup costs. 42 U.S.C. § 9607(a) (2000). This section does not specify any standard of liability.

66. *Id.* § 9601(32) (referring to 33 U.S.C. § 1321).

67. 33 U.S.C. § 1321(f) (2000) (authorizing "liability" for cleanup costs related to oil spills, with certain exceptions).

68. *See id.* (failing to set forth a standard of liability, although it does provide a clear defense to spills caused by a third person).

69. Philip T. Cummings, *Completing the Circle*, ENVTL. FORUM, Nov.-Dec. 1990, at 10, 15–16.

70. *See Rapanos v. United States*, 126 S. Ct. 2208, 2332 (2006) (plurality opinion) (concluding that the fact that an interpretation has existed for 30 years does not change the meaning of a statute that is contrary to the long-time interpretation).

71. *See, e.g., United States v. West of England Ship Owner's Mut. Prot. & Indem. Ass'n*, 872 F.2d 1192, 1195–96 (5th Cir. 1989) (finding strict liability, in large part by imposing a burden on the defendants to show that Congress intended to create a system of fault-based liability); *Burgess v. M/V Tamano*, 564 F.2d 964, 981–82 (1st Cir. 1977) (concluding, rather boldly, that the purpose of the statute would be undermined unless strict liability were imposed), *cert. denied*, 435 U.S. 941 (1978); *Sabine Towing & Transp. Co. v. United States*, 666 F.2d 561, 565–66 (Ct. Cl. 1981) (imposing strict liability following a conclusion that the Clean Water Act holds a "remedial" purpose).

72. *See Alexandra B. Klass, From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 920–34 (2004)

federal courts have resorted to merely citing each other without basis in the statute itself, for the proposition that CERCLA imposes strict liability.⁷³

This approach is illogical. In cases outside CERCLA, we have rejected the unwise practice of interpreting a statute by trying to extrapolate from its general “purpose.”⁷⁴ Such a methodology inevitably leads to applications that are broader than the words of the statutory text and that intrude into the liberties of American citizens. As the plurality stated in *Rapanos*, “no law pursues its purpose at all costs, and . . . the textual limitations upon a law’s scope are not less a part of its ‘purpose’ than its substantive authorizations.”⁷⁵ Accordingly, neither Congress’s reference to 33 U.S.C. § 1321, nor the supposed remedial “purpose” of CERCLA, answer the liability question.

In the absence of clear direction from Congress, we look to the well-established doctrine that derogations from the common law must be made explicit by the statutory text.⁷⁶ There is no doubt that CERCLA is a species of statutory tort law; it does not regulate activity, but rather imposes liability for past acts that allegedly contribute to current harm.⁷⁷ Every first-year law student knows that common law tort liability typically is predicated on a showing of *negligence* (with certain explicit and highly limited exceptions, such as abnormally dangerous activities).⁷⁸

(setting forth an argument that the legislative history and purpose of CERCLA is served by strict liability).

73. See, e.g., *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 184 (2d Cir. 2003) (assuming, without much analysis, that CERCLA imposes strict liability, apparently because the statute did not specify a standard of liability); see also *O’Neil v. Picillo*, 883 F.2d 176, 182 n.9 (1st Cir. 1989) (baldly asserting that CERCLA imposes strict liability, without any support); *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1078 n.18 (9th Cir. 2006) (merely relying on *Picillo*, 883 F.2d 176, *cert. denied*, 493 U.S. 1071 (1990), without any independent analysis); *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1357 (9th Cir. 1990) (relying solely on the supposedly broad purpose of the Act); *S.C. Dept. of Health and Envtl. Control v. Commerce & Indus. Ins. Co.*, 372 F.3d 245, 251 (4th Cir. 2004) (relying exclusively on the Ninth Circuit’s decision in *3550 Stevens Creek Assocs.*, 915 F.2d 1355, without any independent analysis).

74. See, e.g., *Rapanos*, 126 S. Ct. at 2232 (plurality opinion) (calling the “purpose” argument “that last resort of extravagant interpretation”); *Dir., Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135–36 (1995) (calling the “purpose” argument “the last redoubt of losing causes”).

75. *Rapanos*, 126 S. Ct. at 2232 (plurality opinion).

76. *Pasquantino v. United States*, 544 U.S. 349, 359 (2005) (“[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)); BENJAMIN CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 9–10 (1928) (“[S]tatutes derogating from the common law are to be strictly construed . . .”).

77. See 42 U.S.C. § 9607(a) (2000) (imposing liability for the cost of cleaning up releases of hazardous substances that have been disposed of in the past).

78. It does the government no good to argue that the handling of “hazardous substances” is the equivalent of an “abnormally hazardous activity,” which triggers strict liability under some

Accordingly, the doctrine concerning derogations from the common law compels us to conclude that liability under CERCLA can be imposed only when the defendant has been *negligent* in its actions. As with all civil litigation, the plaintiff holds the burden of proving this element in litigation.⁷⁹

C. Retroactivity

Next, we respond to the petitioners' argument that CERCLA cannot be interpreted to impose liability for conduct taken before its enactment in 1980. Once again, Congress was frustratingly silent as to whether it intended to make the statute retroactive. And once again, courts in the early days of the statute used the "purpose" argument to impose retroactive liability—a logic that later cases have simply repeated in circular fashion.⁸⁰ Needless to say, such an interpretation implicates serious issues of procedural due process and *ex post facto* application.⁸¹ Even today, in the twenty-first century, CERCLA litigation still ensnares many pre-1980 disposals—undoubtedly to the shock of businesses and citizens who acted in full accordance with the laws when they disposed of waste before 1980.⁸²

circumstances. See RESTATEMENT (THIRD) OF TORTS § 20 (Proposed Final Draft No.1 2005) (holding actors strictly liable for abnormally dangerous activities). Even strict liability is imposed only on those parties whose actions were a *proximate* cause of alleged injuries. See W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984 & Supp. 1988) (proximate causation is a requirement for strict liability). Lower courts' interpretation of CERCLA have imposed liability *without* such a restriction; they have imposed strict liability even upon parties who owned land on which hazardous substances were disposed of decades before the release—hardly fulfilling the requirement of proximate cause. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 732–33 (1995) (Scalia, J., dissenting) (noting the useful role of proximate cause in limiting "environmental" liability in an Endangered Species Act case).

79. RESTATEMENT (SECOND) OF TORTS § 433B(1) (1965).

80. See *United States v. Ne. Pharm. & Chem. Co., Inc. (NEPACCO)*, 810 F.2d 726, 733 (8th Cir. 1986) (concluding that "to be effective, CERCLA must reach past conduct" and that the "statutory scheme itself is overwhelmingly remedial and retroactive"); *United States v. R. W. Meyer, Inc.*, 889 F.2d 1497, 1506 (6th Cir. 1989) (relying on *NEPACCO* and "the broad remedial purposes underlying CERCLA").

81. The problem of whether a retroactive application violates due process was recognized as early as the *NEPACCO* case in 1986. See *NEPACCO*, 810 F.2d at 733 (affirming the district court finding that retroactive application of CERCLA does not violate due process). The U.S. Constitution prohibits *ex post facto* laws, which seek to make unlawful conduct that was lawful when it occurred. U.S. CONST. art. I, § 9, cl. 3. Although the principle applies with full force only to criminal laws, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798), the principle that government should avoid upsetting the expectations of parties can inform us in crafting a proper interpretation of civil laws such as CERCLA.

82. See, e.g., *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006) (evaluating disposals from World War II); *United States v. Gen. Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005) (affirming liability for disposals from the 1930s through the 1960s), *cert. denied*, 127 S. Ct. 41 (2006).

Happily, we can avoid the constitutional problems⁸³ by relying on the venerable doctrine that statutes apply only prospectively, unless the legislature clearly commands that liability is to be imposed retroactively.⁸⁴ Congress made no such statement in the statutory text of CERCLA. Accordingly, we hold that CERCLA does not apply to any conduct, including the disposal of hazardous waste, which was engaged in before its enactment in 1980.

D. The “Order” Authority

Finally, the petitioners argue that the EPA has exceeded its powers under CERCLA by claiming an extraordinary power to unilaterally “order” a private party to conduct a cleanup, even on private property. A typical cleanup costs multiple millions of dollars.⁸⁵

The EPA asserts a power to order through section 106(a) of the Act.⁸⁶ But this subsection does not authorize precisely what the government says it does; indeed, Congress enacted here another puzzling provision. The subsection sets forth two authorizations. The first sentence empowers the President to authorize a civil action in federal court, but only when there is an “imminent and substantial endangerment.”⁸⁷ Then, the subsection states, in almost an afterthought: “The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.”⁸⁸ From this obtuse sentence, the EPA, in a daring leap, has asserted a power to command a citizen to spend unlimited funds to cleanup one’s own property. This power is made even more

83. See *SWANCC*, 531 U.S. at 172–73 (doctrine of avoiding constitutional issues).

84. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”); see *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (“Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.”); *Dash v. Van Kleeck*, 7 Johns. *477, *503 (N.Y. 1811) (“It is a principle of the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.”). See generally Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936) (discussing the rejection of retroactive legislation throughout history).

85. See *supra* note 54 for a discussion on the costs of a CERCLA cleanup.

86. 42 U.S.C. § 9606(a) (2000).

87. *Id.* (“In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of hazardous substance from a facility, he may authorize the Attorney General to secure such relief as may be necessary [in the U.S. District Court].”).

88. *Id.*

totalitarian by the fact that CERCLA prohibits a federal court from hearing a challenge to such an order—a situation that raises serious questions of procedural due process.⁸⁹ We find it inconceivable that Congress sought to create such a dictatorial control of private property and private funds through a vague reference to an “order.” Among a myriad of problems with the EPA’s interpretation is that the “order” sentence never refers to the “release” of hazardous substances. Another crippling fault is that such a tyrannical power to order a cleanup would in effect make the civil lawsuit authorization in section 106(a) a nullity, in violation of a principle of statutory interpretation.⁹⁰ Next, a nearly unlimited federal invasion of private property by “order” raises a grave question whether the EPA’s interpretation constitutes an unlawfully uncompensated regulatory “take” of property, in violation of the Fifth Amendment.⁹¹ Appropriate compensation would, of course, require full reimbursement of the costs of the cleanup.

Invoking again the principle of avoiding unconstitutional interpretations,⁹² we conclude that, in order to avoid the looming barriers of due process and the taking of private property, as well as avoiding a statutory nullity, CERCLA’s section 106(a) does *not* authorize the federal government to issue an order to clean up a release of hazardous substances. A “response” directive may be secured only through a civil judgment in federal court, as plainly authorized by the first sentence of section 106(a). The final sentence, however, is properly limited only to administrative “orders” concerning the *details* of a response, but only after such a response has been directed through a judgment of a federal court.

89. 42 U.S.C. § 9613(h) (stating no judicial review of a CERCLA order). A party must wait until it has already paid for the cleanup before suing for reimbursement. *Id.* § 9606(b)(2)(A). This blocking of access to the federal courts raises serious issues of due process. *See* *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that a state violates due process when it imposes certain conditions on the right to appeal in a civil case); *Griffin v. Illinois*, 351 U.S. 12 (1956) (explaining that due process requires the state to furnish an indigent criminal defendant with a free trial transcript).

90. Courts at all levels have followed the principle that a statute should be read to avoid rendering any part of it a nullity. *See, e.g., In re Cervantes*, 219 F.3d 955, 961 (9th Cir. 2000) (“We have consistently reject[ed] interpretations that would render a statutory provision surplusage or a nullity.”); *State v. Beard*, 22 P.3d 116, 121 (Idaho Ct. App. 2001) (“It is incumbent upon a court to give a statute an interpretation, which will not render it a nullity.”); *Bailey v. Joy*, 810 N.Y.S.2d 644, 648 (Sup. Ct. 2006) (“It is a fundamental canon of statutory construction that a Court must avoid an interpretation of a statute that renders it a nullity.”).

91. *See* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.) (holding a regulation requires Fifth Amendment compensation as a “taking” when it “goes too far”); *see also* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (setting forth guidelines for concluding that government has “taken” property by burdensome regulation).

92. *See* *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 172 (2001).

In sum, we conclude that CERCLA addresses only releases that significantly affect interstate commerce, imposes liability only through a showing of negligent conduct that occurred after 1980, and authorize cleanups only through a federal court order. The government suggests that our interpretation would “gut” CERCLA and expose the public to great risks from hazardous waste. But it is not for this Court to make policy; our role simply is to apply the statute Congress enacted. It is worth noting, however, that our clarified interpretations of CERCLA merely return much regulatory power to the states and relieve American citizens from some of the extraordinary costs of hazardous waste liability and litigation, much of which ends up in the pockets of so-called environmental lawyers.⁹³

III. THE CLEAN WATER ACT

Next, we return to the Clean Water Act,⁹⁴ the subject of our decisions in *Rapanos* and *SWANCC*. In the former case, the Court’s plurality, but not a majority, reasoned that the linchpin term “waters of the United States” covers only relatively permanent bodies, such as oceans, rivers, streams, and lakes, but not locations that are intermittently wet, such as many wetlands.⁹⁵ While we do not revisit the “waters” definition, we do interpret other terms in the Clean Water Act and conclude that the regulatory agencies and lower courts have imposed greater burdens on American citizens than the Act imposes.

A. “Addition”

The Clean Water Act reflects a break with American tradition in that it intrudes federal regulation into a domain that traditionally has been the province of state law.⁹⁶ Most obligations in the Clean Water Act arise from section 301(a), which generally makes unlawful the “discharge of any pollutant” by any person (but subject to a number of important exceptions, such as a permitting requirement).⁹⁷ An effort to understand this phrase sends us to the definitional section 502, which is, alas, akin to a trip to

93. See Dashiell Shapiro, Comment, *Superdumb Discrimination in Superfund: CERCLA Section 107 Violates Equal Protection*, 2002 U. CHI. LEGAL F. 331, 334 (2002) (citing studies concluding that attorneys fees constitute nearly half of all CERCLA cleanup costs).

94. Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000).

95. *Rapanos v. United States*, 126 S. Ct. 2208, 2225 (2006) (plurality opinion) (interpreting 33 U.S.C. § 1362(7) definition of “navigable waters”).

96. See *SWANCC*, 531 U.S. at 174 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)) (referring to the “States’ traditional and primary power over land and water use”).

97. 33 U.S.C. § 1311(a) (2000).

Alice's Wonderland, where straightforward answers may be sought but never found.⁹⁸ Although subsection 502(16) provides a definition of “‘discharge’ when used without qualification,”⁹⁹ the statute provides no definition whatsoever of the term “discharge of any pollutant”—a term that plainly is a discharge *with* a qualification (the qualification being that it must involve a “pollutant,” which is further defined).¹⁰⁰ The term “‘discharge’ when used without qualification” is defined as “includ[ing] a discharge of a pollutant and a discharge of pollutants.”¹⁰¹ The latter two terms—“discharge of a pollutant” and “discharge of pollutants”—are of course not precisely the same as section 301’s reference to “discharge of any pollutant.”¹⁰²

We are tempted at this point to toss up our hands and conclude that Congress bizarrely provided no definition at all of section 301’s key term—“discharge of any pollutant.” But we need not go so far today. Assuming, *arguendo*, that “discharge of any pollutant” is approximately the same as “discharge of a pollutant”—and commonsense indicates that it is—we find that the Act’s coverage is somewhat limited. “Discharge of a pollutant” is defined to mean “any addition of any pollutant” to “navigable waters” or the ocean¹⁰³ from a “point source.”¹⁰⁴

We focus today on the appropriate reading of the word “addition.” The federal courts have struggled with the question whether the movement of already polluted water to another location is an “addition” that triggers regulation.¹⁰⁵ Control and movement of water is essential for activities such as protection against floods, which have killed more people than any other

98. In this story, the Caterpillar remarks to Alice:

“One side will make you grow taller, and the other side will make you grow shorter.”

“One side of what? The other side of what?” thought Alice to herself.

“Of the mushroom,” said the Caterpillar. . . .

Alice remained looking thoughtfully at the mushroom for a minute, trying to make out which were the two sides of it; and, as it was perfectly round, she found this a very difficult question.

LEWIS CARROLL, *ALICE IN WONDERLAND & THROUGH THE LOOKING GLASS* 51 (Oxford University Press 1992) (1865).

99. 33 U.S.C. § 1362(16).

100. *Id.* § 1362(6).

101. *Id.* § 1362(16).

102. Indeed, the primary section dealing with permits, section 402, again refers to “discharges of any pollutant.” *Id.* § 1342(a).

103. The exact phrase is “contiguous zone or the ocean.” *Id.* § 1362(12).

104. *Id.* “Point source” is defined at § 1352(14).

105. *See, e.g.,* S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians 541 U.S. 95 (2004) (remanding for a determination whether the movement of polluted water from one part of southern Florida to another was a movement among “meaningfully distinct water bodies”); Nat’l Wildlife Fed. v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (discussing water moved from a reservoir to below a dam).

type of natural disaster,¹⁰⁶ and the provision of water supplies for American households and businesses. Can such critically valuable movements of water be considered an unlawful discharge of pollutants under the Clean Water Act, necessitating an expensive permitting process? Some lower courts have held that relocations are regulated by the Act.¹⁰⁷

A simple consideration of the word “addition,” however, reveals that these decisions are misguided. According to Webster’s, the word “addition” means “the joining or uniting of one thing to another.”¹⁰⁸ The two “things” at issue here are pollutants and navigable waters. The pollutants that are destined for relocation were *already* “joined” to the navigable waters before their relocation. When they are relocated, they are simply rejoined to the navigable waters. Accordingly, by the plain words of the statute, the relocation of pollutants through the relocation of water is *never* an “addition” of pollutants, and thus not a “discharge of any pollutant” regulated by the Clean Water Act.¹⁰⁹ We disapprove of any lower court opinions that reached contrary conclusions.

B. “Designate Uses”

Next, the petitioners ask us to interpret obligations imposed by section 303 of the Act.¹¹⁰ This section requires states to create and implement “water quality standards”—something that many states had done years before Congress enacted the current amendments to the Clean Water Act in 1972.¹¹¹ Accordingly, section 303 may be seen as a partial federalization of state regulation of the quality of waters within that state. But Congress wisely and appropriately reserved to the states a great deal of discretion. As stated in section 101 of the Act, it was Congress’s policy “to recognize,

106. The destructive power of water has made flooding the most fatal of all natural disasters. See Marquis Canada, *The Greatest Natural Disasters of All Time*, ASSOCIATED CONTENT, July 25, 2007, http://www.associatedcontent.com/article/321448/the_greatest_natural_disasters_of_all.html (attempting to list the worst disasters in world history, including the 2004 tsunami that killed an estimated 200,000 people).

107. See, e.g., *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1298 (1st Cir. 1996) (holding that movement of water for snowmaking at a ski resort is an “addition”); *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) (movement of water from a landfill to a wetland is an “addition”).

108. WEBSTER’S THIRD, *supra* note 20, at 24.

109. See 33 U.S.C. § 1311(a) (2000) (regulating the “discharge of any pollutant”).

110. *Id.* § 1313.

111. By referring to “existing water quality standards,” section 303 identifies that states enacted water quality standards before Congress took action. *Id.* § 1313(a). For a history of water quality standards leading up to the 1972 Clean Water Act, see generally Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation under the Clean Water Act*, 27 ENVTL. L. REP. 10,329 (1997).

preserve, and protect the primary responsibilities and rights of the States” with regard to water pollution, prevention, planning, and development.¹¹²

Under the statute, the threshold responsibility for states is to “designate uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.”¹¹³ The law imposes no restriction whatsoever on the designated uses that the state may choose.¹¹⁴ The discretion granted to the states is absolute. To quote a venerable environmental decision of this Court: “One would be hard pressed to find a statutory provision whose terms were any plainer”¹¹⁵

Despite this, the federal EPA has issued regulations that hamstringing the states. Specifically, the EPA requires that states choose a designated use that is at least as demanding on water quality as a “fishable/swimmable” use.¹¹⁶ Such a constraint upon the states has no basis in the statute. EPA points to a prefatory “goal” in the Clean Water Act’s introductory section.¹¹⁷ But the relevant passage only reads: that “[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.”¹¹⁸ This “interim goal” was supposed to be a step toward the final goal that “discharges of pollutants into navigable waters be eliminated by 1985.”¹¹⁹

Needless to say, these “goals” were merely pie in the sky—hardly statutory commands. At the same time that Congress whimsically set forth a “national goal” of no discharges into navigable waters by 1985,¹²⁰ it set forth a complex system (necessary, of course, if the nation were to continue as we know it) for permits to discharge pollutants into navigable waters, without any miracle plan to eliminate discharges by 1985.¹²¹ Our calendar

112. 33 U.S.C. § 1251(b) (2000).

113. *Id.* § 1313(c)(2)(A).

114. The fact that Congress did not wish to intrude on a state’s prerogative to choose water quality standards is borne out of the fact that, if a state had adopted such standards before the 1972 Act, the state was not required to make changes to its standards unless the EPA Administrator concluded, by October 18, 1972, that the water quality standard did not “meet the requirements” of the new federal Act. *Id.* § 1313(a)(1), (2).

115. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (interpreting the Endangered Species Act § 7, 16 U.S.C. § 1536 (2000), which requires that federal agencies not “jeopardize” the continued existence of endangered species). We return to this provision of the ESA later in this opinion.

116. 40 C.F.R. § 130.10(6)(xii) (2007).

117. 33 U.S.C. § 1251(a)(2) (2000).

118. *Id.* § 1251(a)(2).

119. *Id.* § 1251(a)(1).

120. *Id.*

121. *See id.* § 1342(a) (authorizing permits for discharges); § 1311(b) (setting forth various levels of technology to be used by permittees); § 1314(b) (giving guidance as to the creation of these technology requirements).

reveals that 1985 has long since passed. Just as the dewy-eyed “national goal” of no discharges was never a command, the “interim goal” of fishable and swimmable waters by 1983—which was prefaced by a caveat that it should be achievable “wherever attainable”—is, *a fortiori*, not a statutory command.

We return, then, to section 303’s unrestrained grant of discretion to states to “designate uses.”¹²² In some cases, a state may designate a water body as a public drinking supply, a freshwater fishery, a route of navigation, or a public swimming area. In other instances, if it sees fit, a state may designate a water body as a dump for liquid wastes.

Although we recognize concerns over water pollution, we note that Americans have for centuries used water bodies as inexpensive and practical means of disposing liquid wastes in a way that both dilutes the pollutants and minimizes exposure to people.¹²³ Indeed, another federal statute, the Safe Drinking Water Act, imposes tight pollution-removal restrictions on public water supplies that are used for drinking, food preparation, and other household demands.¹²⁴ For many navigable water bodies, of course, the water is not used for any human purpose; it seems wholly reasonable for Congress to have left discretion to the states. State governments are closer to the people and businesses that they serve than is the EPA in Washington; states are more in touch with their own citizens’ desires to create balances between economic activity, water needs, and the demand for fish and recreation.¹²⁵

Accordingly, as a plain reading of the Act, we hold that states retain unlimited discretion to “designate uses” as each state sees fit. Along with our clarification of “addition,” we return to the states and to the people some of the authority that the federal government has hoarded for itself under the Clean Water Act.

IV. THE ENDANGERED SPECIES ACT

Finally, the petitioners challenge agency interpretations of the Endangered Species Act of 1973.¹²⁶ This statute has been called the “pit bull” of environmental law because of its supposedly un-nuanced

122. *Id.* § 1313(c)(2)(A).

123. *See, e.g.*, THEODORE STEINBERG, NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND 49, 191–239 (1991) (discussing the link between the rise of industrialization of New England in the nineteenth century and the dumping of pollutants into the waters).

124. Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (2000).

125. *Cf. Younger v. Harris*, 401 U.S. 37, 44 (1971) (the famous statement of “Our Federalism”).

126. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000).

commands (“unfeeling” or “inhumane” might also be appropriate terms) to give certain species priority over the interests of humankind.¹²⁷ But, as we explain today, the proper construction of the ESA is not as ruthless and animalistic as some have interpreted it.

The power of the ESA hinges largely on two verbs. First, federal agencies may not “jeopardize” the continued existence of any endangered species.¹²⁸ Second, no person may “take” an endangered species, with certain limited exceptions.¹²⁹ Despite the oft-repeated assertion that Congress intended to give the protection of imperiled species the highest of priorities,¹³⁰ Congress did not see fit to provide useful definitions for these key verbs.¹³¹ “Take” is defined with a list that raises more questions than it answers.¹³² “Jeopardize” is not defined at all. Today, we guide the proper interpretations of the two verbs.

A. “Take”

The verb “take” is defined with a long list of words (many of which are synonyms), including kill, trap, and harm.¹³³ In 1995, this Court, divided, upheld administrative regulations that give astonishingly broad readings to the “harm” component of “take.”¹³⁴ Among other things, the regulations make it unlawful to use land in a way that leads to an injury of a member of the species, even if the actor does so unintentionally and indirectly.¹³⁵ We do not revisit this opinion today.

127. For a reference to the ESA as a “pit bull,” see George Cameron Coggins, *An Ivory Tower Perspective on Endangered Species Law*, 8 NAT. RESOURCES & ENV'T 3, 3 (1993).

128. 16 U.S.C. § 1536(a)(2). For simplicity’s sake, we use the term “endangered species” to refer to the categories of both endangered and threatened species, which are also called colloquially “listed” species in section 4 of the Act. *Id.* § 1533.

129. *Id.* § 1538(a)(1)(B).

130. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978),
quoted in Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1033 (9th Cir. 2007).

131. *See* 16 U.S.C. § 1532 (2000) (defining terms in the ESA).

132. *Id.* § 1532(19).

133. *See id.* (“The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”).

134. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (holding that the Secretary of Interior “reasonably construed Congress’ intent when he defined ‘harm’ to include habitat modification”). If and when we do revisit this opinion, we may take note of the fact that the common understanding of the term “take,” to sportsmen in the context of wildlife, means to kill or to capture such wildlife. Certainly no hunter would consider conduct that merely impaired an animals’ ability to breed, feed, or shelter, to be a “take” of the animal! *See* 50 C.F.R. § 17.3 (2007) (describing situations that qualify as a “take”).

135. The definition of “harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.* Accordingly, action that significantly modifies a species’ habitat,

Rather, we focus on the *application* of the take section. Petitioners point out that the provision most often infringes on liberty when plaintiffs use it to seek an injunction against conduct that has not yet occurred. For example, advocates for birds have sued to stop the construction of a high school because of possible adverse effects to an endangered pygmy owl,¹³⁶ and a court has enjoined logging because of a threat to an obscure sea bird called the marbled murrelet.¹³⁷ Indeed, landowners across America fear that plans to use their property might get them hailed into court and possibly enjoined, based on a possibility that the planned conduct *might* cause some harm to an endangered species.¹³⁸ Such an application of law is Orwellian.

While some birdwatchers may wish to give their feathered friends a higher status under law than enjoyed by humans, we must bring them back down to earth. It is an established principle that injunctions are a disfavored remedy; an injunction is available only if there is not an adequate monetary remedy at law.¹³⁹ This notion is bolstered by the concept that liberty allows American citizens freedom of action unless a law specifically proscribes the action.¹⁴⁰ The ESA's take prohibition does

leading to an injury by an inability to breed, feed, or shelter, can be considered a "take" of the species. See, e.g., *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995) (enjoining the proposed logging of a forest because of potential "harm" to endangered spotted owls).

136. See *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (2000) (rejecting a claim for an injunction because of a lack of proof of harm).

137. *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996). For other cases of injunctions, see *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995) (logging might harm a spotted owl); *United States v. Town of Plymouth*, 6 F. Supp. 3d 81 (D. Mass. 1998) (enjoining a town's permitting off-road vehicles on a public beach, for fear of harm to endangered plovers); *Palila v. Haw. Dep't of Land & Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979) (ordering a state to eradicate sheep that grazed on plants that were also eaten by an endangered bird; failure to do so would be a "take" of the bird), *aff'd*, 639 F.2d 495 (1981).

138. Critics of the ESA "have disparaged it as a federal roadblock that puts too high a price on preserving species that serve no useful purpose to humans." James K. Hein, *The "Sound Science" Amendment to the Endangered Species Act: Why It Fails to Resolve the Klamath Basin Conflict*, 32 B.C. ENVTL. AFF. L. REV. 207, 236 (2005). One of the leading critical works is CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* (1995), in which the authors catalog how the ESA places animal priorities over human needs, especially by imposing costs and restrictions on landowners unlucky enough to find an endangered species on their land. See generally Todd Woody, *Taking on Endangered Species: The Rat, the Farmer, and the Feds*, LEGAL TIMES, July 24, 1995, at 8 (imposing restrictions on private property to protect a rat); J. Madeline Nash & James Willwerth, *The \$25 Million Bird: As Endangered California Condors Return to the Wild, the Law That Saved Them Is Under Attack*, TIME, Jan. 27, 1992, at 56, available at <http://www.time.com/time/magazine/article/0,9171,974760,00.html> (discussing criticisms of the ESA, including the belief that it "is an inflexible barrier to economic progress").

139. E.g., *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 380-81 (1992); *N. Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1306 (1984); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).

140. For example, the well-known "rule of lenity" provides that criminal laws must be narrowed when they are unclear, in order to give "fair warning" to citizens. *James v. United States*, 127 S. Ct.

nothing to alter this presumption.¹⁴¹ Indeed, a commonsense reading of the take prohibition in context reveals that Congress provided for civil monetary and criminal liability only *after* the take has occurred.¹⁴² The citizen suit provision authorizes an action only against persons who are *already* “in violation” of the Act.¹⁴³ The regulations similarly predicate liability on “actual” harm.¹⁴⁴

Accordingly, we hold that the ESA’s prohibition against “take” can be enforced only *after* proof that a take has occurred.¹⁴⁵ It cannot be enforced through a suit to enjoin conduct *before* it occurs simply because a plaintiff asserts that it might threaten the possibility of a future take.¹⁴⁶

B. “Jeopardize”

We turn next to the appropriate definition of the verb “jeopardize.” Although we stated in an early ESA decision that the prohibition against jeopardy was straightforward and “plain,”¹⁴⁷ we had no occasion to address the precise definition of the term in the ESA’s section 7.¹⁴⁸ Although the respondents and amicus seek to convince us that the verb imposes great duties upon federal agencies, Congress did not see fit to define the word. In their regulations, the federal wildlife agencies have defined “jeopardy” to cover any action “that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a

1586, 1603 (2007); *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Violation of the ESA’s section 9 can result in criminal prosecution for “knowing” violations. 16 U.S.C. § 1540(b) (2000).

141. *See id.* § 1538(a) (describing what constitutes a “take”).

142. *Id.* § 1540(a), (b).

143. *Id.* § 1540(g)(1)(A). We have held that a nearly identical citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a)(1) (2000), permits suits to be brought only *while* an alleged violation is occurring—not before and not after. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 56–67 (1987) (stating that “Congress could have phrased its requirement in language that looked to the past (“to have violated”) but it did not choose this readily available option”).

144. *See* 50 C.F.R. § 17.3 (2007) (stating that significant habitat modification may be a “take” only when the conduct “actually kills or injures” the wildlife).

145. *See* 16 U.S.C. § 1540(a), (b), (g) (discussing civil and criminal penalties and citizen suits).

146. *See supra* note 136 for examples of injunctions issued before any take had occurred. These sorts of suits for an injunction may no longer be maintained.

147. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (discussing how the ESA fails to define the verb “jeopardize”).

148. In the *Hill* case, we assumed, based on the stipulated facts as then known, that the planned agency action would eradicate a little fish called the snail darter. *Id.* at 173–74. As it turned out, the stipulation was inaccurate; the snail darter survived the eventual agency action, was downlisted from endangered to threatened, and lives on today in three states. *See* U.S. Fish & Wildlife Service, Species Profile: Snail Darter (*Percina tanasi*), <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=E010> (last visited Feb. 10, 2008).

listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”¹⁴⁹

Through this regulation, the agencies once again have inflated a statutory term. The regulation would make it unlawful merely to diminish “appreciably” a species’ prospects. What this means in practice is left to a case-by-case determination, which is convenient for the wildlife agencies, if not for American citizens. The regulation grants to the wildlife agencies nearly dictatorial discretion in deciding, Caesar-like, whether to give a thumb-up or thumb-down to an agency project through a “Biological Opinion,”¹⁵⁰ regardless of how important to the nation the project might be.¹⁵¹ For example, if a planned initiative by the U.S. Department of Homeland Security to stop potential terrorists at our nation’s borders made it more difficult for endangered ocelot cats to copulate at night along the border, might this constitute an unlawful “jeopardy” action?¹⁵² The nation (and its security) would have to await the imperial decision of the wildlife agencies, acting in their self-created discretion.¹⁵³

Fortunately for the nation, however, the plain meaning of the ESA’s section 7 shows that the agencies have once again exceeded their permissible powers. “Jeopardize” is defined by Webster’s as to “imperil” or “to expose to danger (as of imminent loss, defeat, or serious harm).”¹⁵⁴ These plainly require the risk of *imminent* injury, not injury in a distant and uncertain future—an element that the agency’s regulatory definition fails to countenance.¹⁵⁵ Moreover, the statute clarifies that “jeopardize” concerns

149. 50 C.F.R. § 402.02 (2006).

150. 16 U.S.C. § 1536(b)(3)(A) (authorizing the wildlife agencies to write a Biological Opinion as to whether the proposed action would “jeopardize” a listed species).

151. *See* Bennett v. Spear, 520 U.S. 153 (1997) (holding that a citizen aggrieved by a “jeopardy” Biological Opinion that blocks a proposed action is entitled to judicial review of the wildlife agency’s opinion).

152. Environmental groups have brought a number of cases to challenge the government’s activities on the banks of the Rio Grande in South Texas, along which the endangered ocelot creeps at night. *See, e.g.*, Sierra Club v. Baker, No. 89-3005-RCL, 1990 WL 116845 (D.D.C. July 31, 1990) (approving an ESA consent order).

153. The ESA includes a process for allowing a “jeopardy” action nonetheless to go forward, through an exemption. 16 U.S.C. § 1536(g)–(l). But this process of appealing to the Endangered Species Committee, colloquially known as the “God Squad,” has proven to be very difficult and cumbersome in practice. *See* DALE D. GOBLE & ERIC. T. FREYFOGLE, WILDLIFE LAW 1310–13 (2002) (explaining the “elaborate mechanism” and discussing the two times where it has been invoked successfully).

154. WEBSTER’S THIRD, *supra* note 20, at 1213.

155. This requirement fits with our constitutional jurisprudence concerning standing to sue, which requires an allegation of an “imminent” injury. *See, e.g.*, Lujan v. Defenders of Wildlife 505 U.S. 555, 560 (1992) (holding that a plaintiff does not have standing if he cannot show plans to visit the area of the alleged harm in the immediate future).

only the “continued existence” of the species.¹⁵⁶ Accordingly, the plain interpretation of the term “jeopardize the continued existence” of a species refers only to threatening an *imminent eradication* of the species.¹⁵⁷ An action that merely threatens an appreciable decrease in numbers, with a possible extinction only in the distant future, is not implicated by the ESA’s section 7.

The wildlife agencies seek to preserve their totalitarian discretion over the rest of the federal government by arguing that a “jeopardy” determination may be made by *accumulating* harm from the agency action with other threats to the species.¹⁵⁸ But the statute plainly does not call for such accumulation. To be sure, if other events have *already* decreased a species’ numbers to, say, a dozen animals or plants, this fact can be used in deciding whether an agency action will constitute a final coup de grace. But jeopardy is not created simply because an agency’s action is expected to diminish the species’ population by, say, thirty percent.¹⁵⁹ As long as the remaining numbers would remain viable in the immediate future, there has been no “jeopardiz[ing] the continued existence.”¹⁶⁰

Accordingly, we hold that the jeopardy prohibition in the ESA’s section 7 is limited by its words to cover only actions that, by themselves, are reasonably expected to eradicate completely an endangered species.¹⁶¹

156. 16 U.S.C. § 1536(a)(2).

157. At what level of certainty of the eradication is the statutory prohibition triggered? Here, for once, the agencies’ definition follows the proper path in its use of the standard of “reasonably to be expected.” 50 C.F.R. § 402.20 (2006). After all, decisions based on a “more likely than not” benchmark are the touchstones of American civil law. The presumption in civil law is that the standard of proof is the “preponderance of the evidence” or “more likely than not” standard. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 141 (1996) (applying the presumption unless the statute indicates otherwise); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 490 (1985) (same).

158. The regulations require a Biological Opinion to determine, among other things, whether the action, taken together with cumulative effects, “is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.20.

159. This conclusion is reminiscent of the law of regulatory “takings,” in which a total taking of the value of property triggers governmental compensation, but a regulation that decreases the value only 80% or 90% does not necessarily do so. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting) (noting how the Court’s new rule is arbitrary by allowing “[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land’s full value”). To the extent that environmentalists disagree with the imminent eradication standard we have clarified for the ESA’s section 7, through the argument that even a 30% decrease is unwelcome, it is worth asking whether they would support a similar loosening of the total takings rule. *See id.* at 1019 n.8 (noting that the law might, in some cases, provide for compensation to a landowner who suffers less than a total taking).

160. 16 U.S.C. § 1536(a)(2).

161. A similar analysis concerning destruction or adverse modification of a species’ designated critical habitat applies to the final phrase of section 7(a)(2). *Id.* Congress clarified that “critical habitat” was to cover only those areas that are “essential for the conservation of the species,” but cannot include the entire geographic range of a species. *Id.* § 1532(5)(A), (B). From these restrictions, we conclude

We trust that these properly cabined interpretations of “take” and “jeopardize” will remove some of the infamous fangs from the ESA and return some freedom of action to American citizens and their government.

CONCLUSION

We recognize that, through these interpretations, we revise many commonly held perceptions of environmental laws. The statutes are revealed as *not* consistently placing the interests of wildlife, clean water, and risk-avoidance above the interests of economic development. Rather, it has been the regulatory agencies and lower courts that have created much of the common perceptions of unbalanced statutory commands. Environmentalists may complain that our interpretations have gutted some of the most prominent federal laws. But their complaints are properly directed to Congress, which drafted the often-unfocused statutes, and to the American citizens, who elect our representatives. If the American public truly desires a legal system in which environmental protection is a cardinal principle, Congress has yet to enact statutes that fulfill this aspiration.

that “critical habitat” may cover only the *minimum* area needed by a species to avoid extinction. The inclusion of any greater acreage would be contrary to the plain meaning of the requirement.