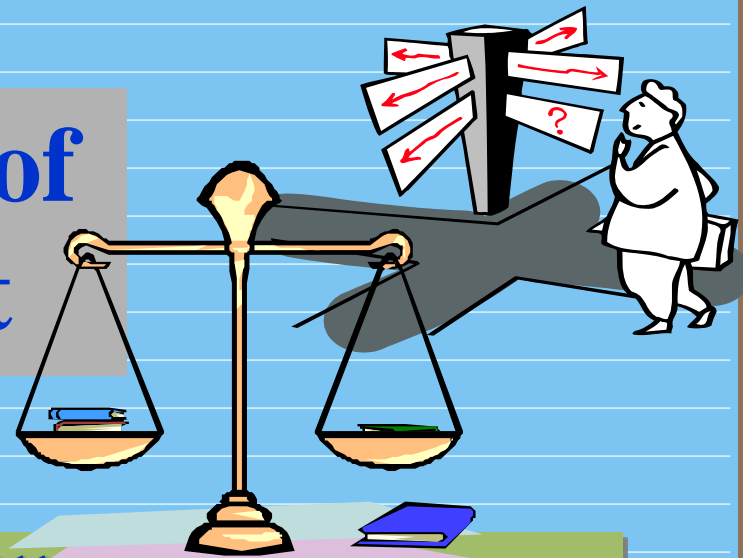


ELI Summer School: Basics of the Clean Act Act

A Critical History of the Clean Air Act



E. Donald Elliott

delliott@cov.com



Yale Law School

COVINGTON

COVINGTON & BURLING LLP

Major CAA Amendments



- 1970-Federalization
 - “Cooperative Federalism”
 - Technology Forcing
 - Aspirational/ Deadlines
- 1977-Midcourse Correction
 - Nonattainment & PSD
- 1990-Modernization
 - Acid rain trading
 - Air Toxics – MACT
 - Regional (OTR and RGGI)
- 20?? – 3P/4P

Statutory Amendments Are Less Necessary after Chevron

“*Chevron* rendered the legal system more adaptable and more capable of undergoing substantial policy changes without the benefit of legislation. One might even speculate that the increased ability of the law-making system to adapt to new conditions without legislation may in turn help to account for the relative paucity of significant environmental legislation since 1990.”

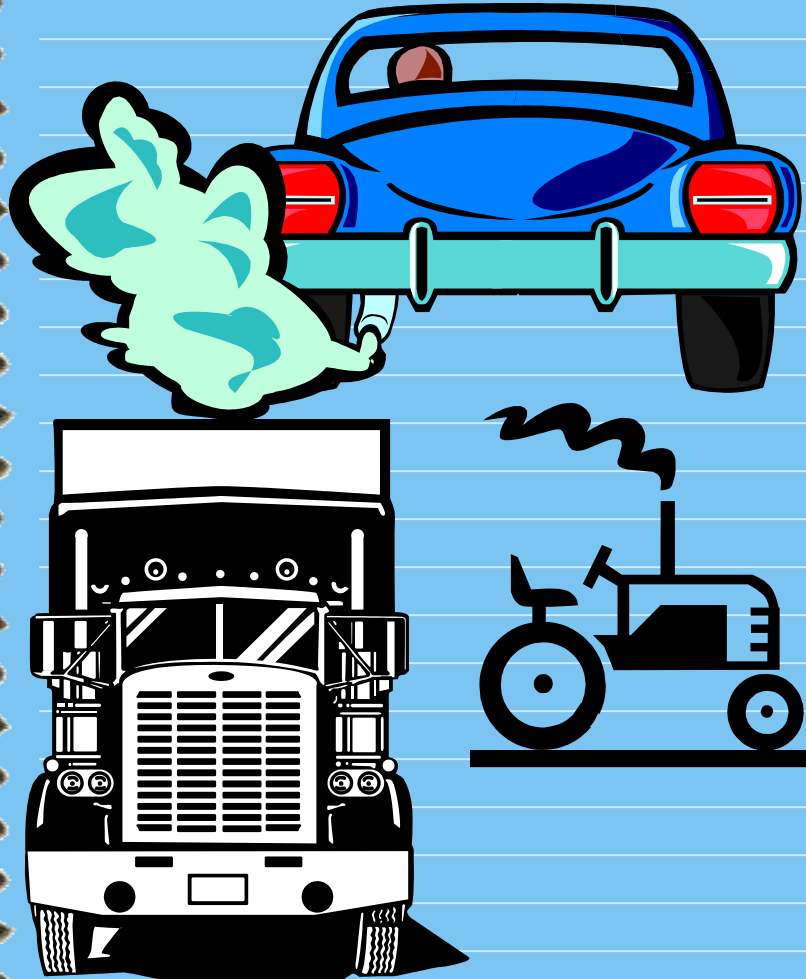
E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Re-Defined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 Vill. Envtl. L.J. 1, 4-5 (Spring 2005).

CAA as Toolbox



- “Cooperative Federalism”
 - NAAQS & SIPs
 - §§ 108, 109 110
 - Permits
 - Nonattainment & PSD
- Direct Federal Regulation
 - Mobil Sources – Title II
 - NSPSs - §111
 - Air Toxics –MACT §112
 - Nonattainment & PSD enforcement
- Interstate and International
- Enforcement
 - “Coordinate authority”
 - EPA, states, citizens
 - Admin, civil, criminal

Title II-Mobil Sources



- **New car regulation**
 - Technology forcing
 - California car
 - ZEVs and LEVs
- **Fuels regulation**
- **I&M and OBD**
- **Vehicle Miles Traveled**

Title I-Stationary Sources



- **NAAQS & SIPs**
- **PSD + NA = NSR**
- **NSPS**
- **NESHAPs/MACT**
- **Trading**

State Implementation



- **§108 –Criteria Docs**
- **§109 – NAAQS**
 - **Primary- health**
 - **Secondary – welfare**
 - **No consideration of costs – ATA case**
- **§ 110 – SIPs**
 - **Emission Limitations**
 - **EPA approval**
 - **SIP Calls**
 - **FIPs**

NSR

- PSD-Clean-Part C

- New or Modified

- “physical change or change in method operation that increases”
 - “routine repair/replacement”

- BACT

- Increments

- Significance (“unPSD)

- Nonattainment-Part D

- Plan – RFP

- LAER

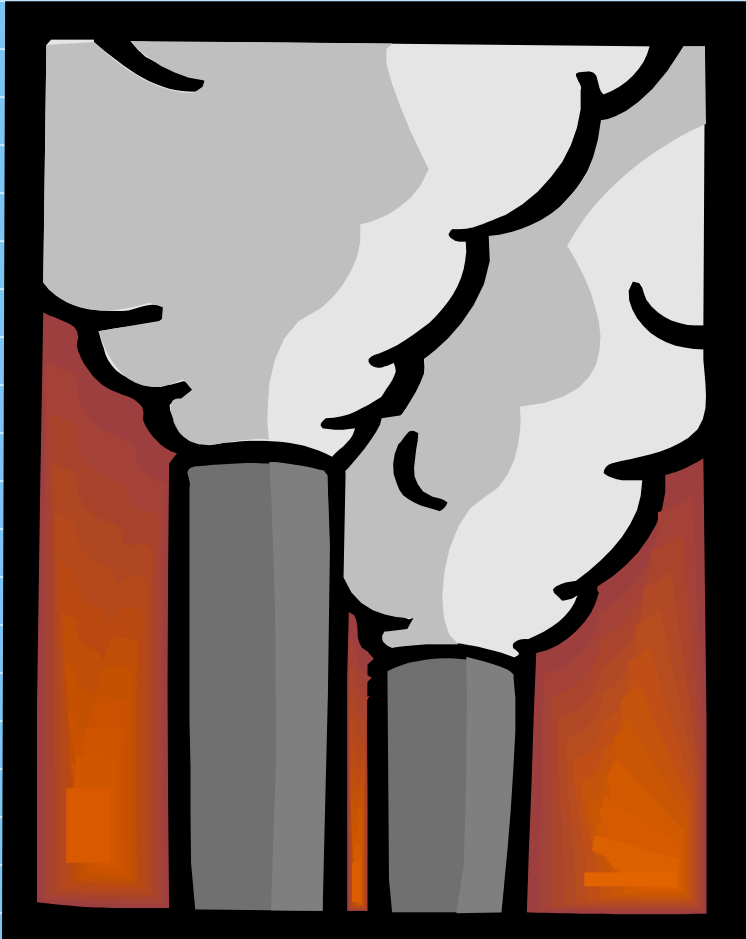
- Offsets

- serious, severe, moderate

- **Cannot Classify**



CAA §111 - NSPS



Additional Layer

- Source category “causes or contributes” to air pollution
- **New or Modified or Reconstructed Plants**
- **Technology Based**
 - Exemplary plants
 - Considers Costs, Energy

CAA §112 - NESHAPs



- **Air Toxics**
 - New and existing
- **1990 Re-write**
 - Modeled on §111
- **189 substances listed**
- **MACT**
- **Residual Risk**

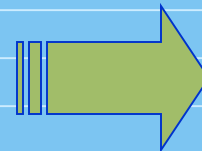
“Bubbles”



Chevron v. NRDC,
467 U.S. 837 (1984).

- **Efficiency Gains**

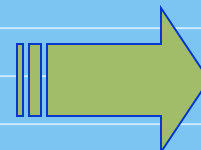
- Depends on
difference



- diversity of control
costs

- **Measurement Issues**

- **Lower cost**



Acceptability

Logic of the Bubble

A: -10=\$10

-15=\$25

-20=\$45

-30=\$60


B: -10=\$ 5

-15=\$10

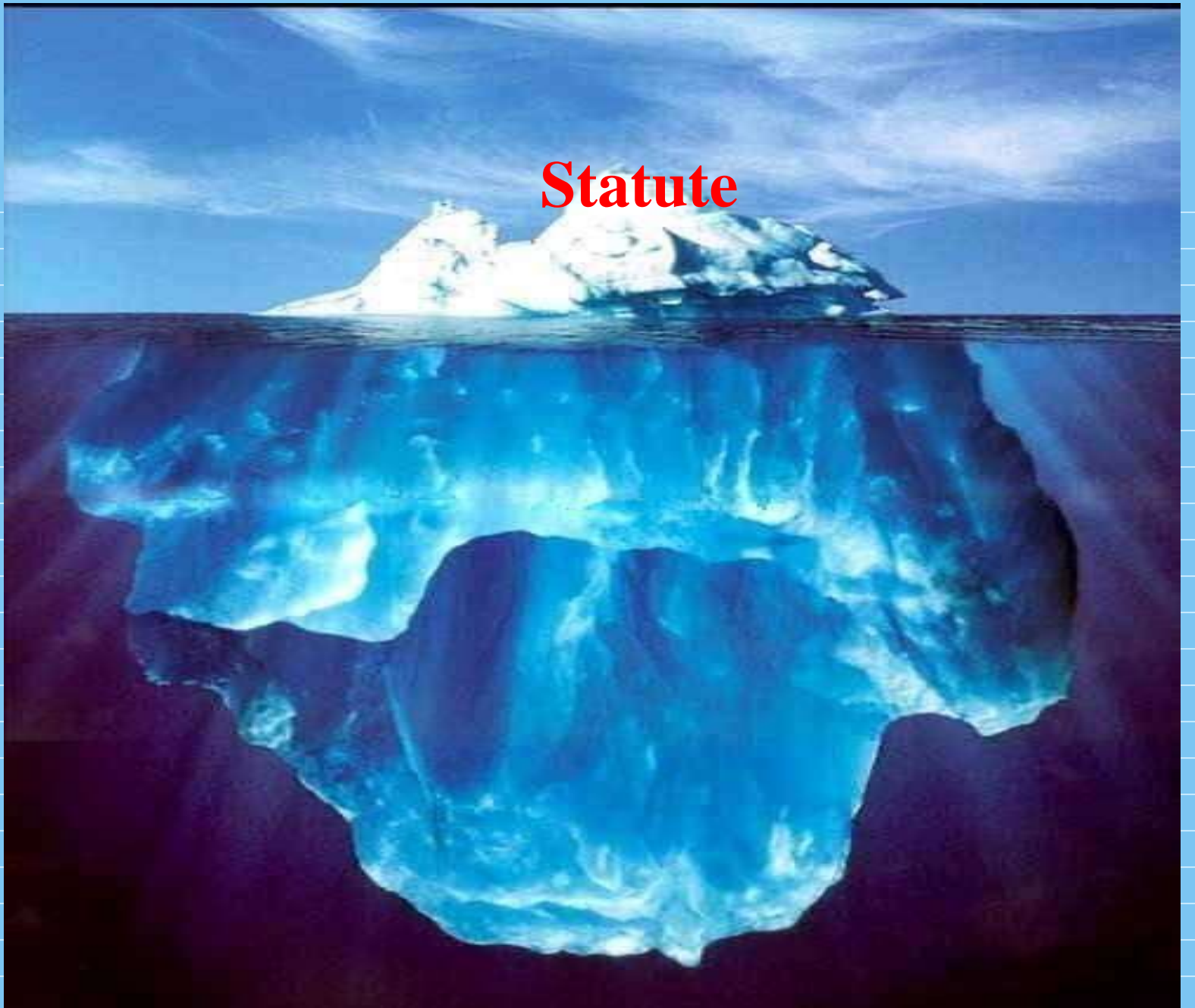
-20=\$15

-30=\$25



- Uniform control requirements 
higher total costs:
20 & 20 = -40 @ \$60
30 & 10 = -40 @ \$35
- Market shifts controls to most efficient but costs borne by all

Statute





Chevron Two Step

Chevron v. NRDC, 467 U.S. 837 (1984).

I-Did Congress decide this issue?

II-If not, implied delegation-defer to
agency construction if rational

U.S. v. Mead Corp., 533 U. S. 218 (2001).

Peter H. Schuck & E. Donald Elliott, *To the Chevron Station:
An Empirical Study of Federal Administrative Law*, 1990
DUKE L. J. 984 (1991).

“Interpretive Pyramid”

from

E. Donald Elliott,
The Last Great Clean Air
Act Book?

5 Env'tl. Law. 321 (Sept.
1998)

“Wholesale” Law

Statute

Court Opinion

Legislative Rule

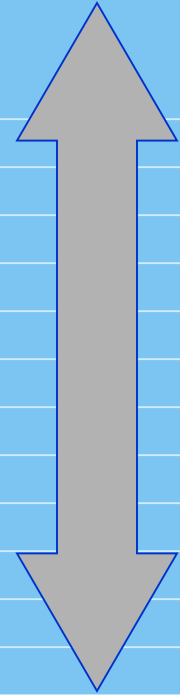
Interpretative Rule
(e.g., preamble)

Individual Agency Applications

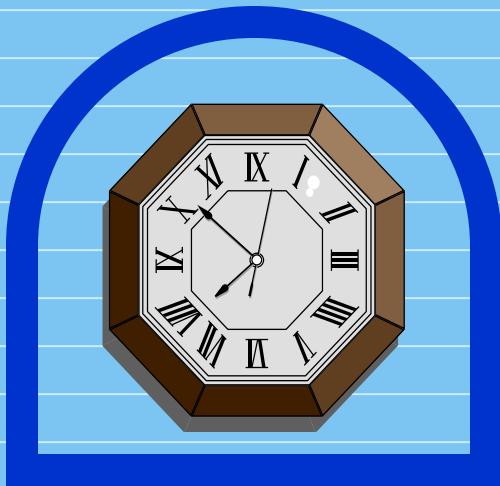
“Retail” Law

“Guidance” (memos, handbooks, manuals)

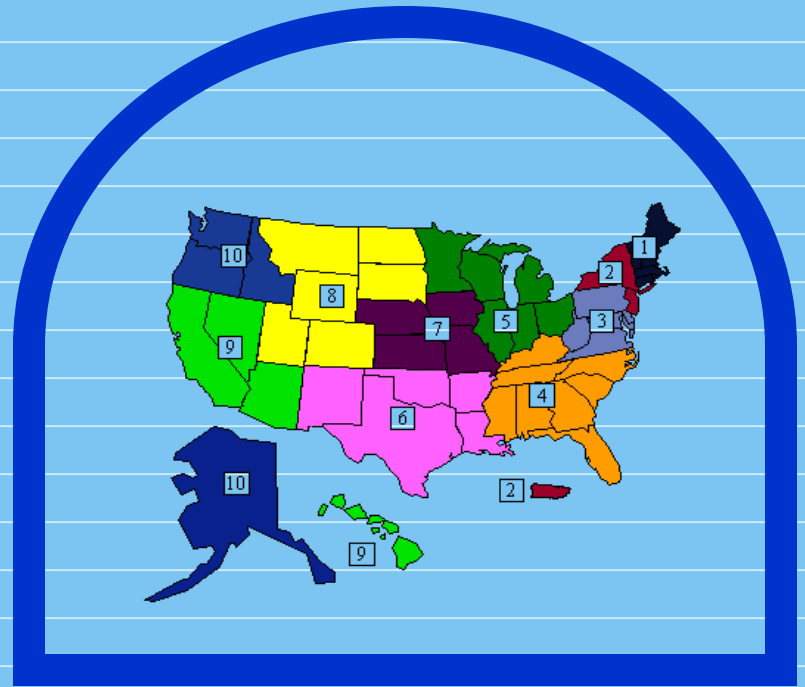
State Rules and Interpretations



“Bigger” Bubbles



Time (“banking”)



Geography (Acid Rain, NO_x)

Title IV-Acid Rain Trading



- 1/2 Cost
- Leverages EPA resources
- On top of other requirements
- Grandfathered allowances
- Not property
- CEMs
- Model for Multi-Pollutant and Climate?
 - Waxman-Markey
- CAIR/CSPR

Regional Issues



- CAA §126 & 110(a)(2)(D)
- 1990 CAA §176A
 - OTR/OTAG
 - NO_x SIP Call/Trading Option
- Regional Haze Rule
- CAIR/CSPR

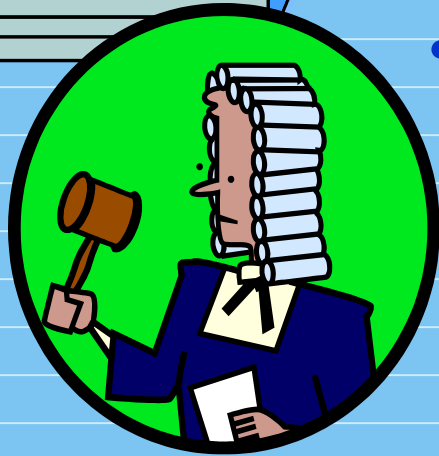


Enforcement

- Monitoring - CEMs
- Administrative
- Civil
 - injunctive &
 - civil penalties
- Criminal
 - individuals
 - debarment
- States & Citizens Suits
 - Federal facilities - FFCA of 1992
- Audit “Privilege”



Record & Judicial Review-§307



- “Little APA”
- Docket & Procedural Record
- Nationally Applicable – DC Cir
- Local
- Citizens Suits
 - Enforcement
 - Non-discretionary Duty
 - Standing Issues