

I. (90 min.)

jurisdiction

- Corps regulates filling of wetlands under CWA § 404.
 - a citizen can bring a citizen's suit against a violator of CWA if he falls within the "zone of interests" conferred by the act.
 - the citizen must be "adversely affected" economically or non-economically. *SCRAP*.
 - here, the hunters group will its hunting access if the Cattail Lake is filled; that confers APA standing.
- jurisdictional wetlands are those which lie in or adjacent to "navigable waters".
 - "navigable waters" are defined as "waters of the United States," not traditional "navigable waters of the United States."
 - "waters of the United States" are considered by legislative history as waters in the United States in the geographical sense. *Riverside Bayview*.
- Cattail Lake contains water and is in the United States.
- however, wetlands must also be "adjacent" to a jurisdictional water which is connected by watercourses to a traditional navigable waters. *Riverside Bayview*.
- the Corps by regulation had treated waters hydrologically connected to a watercourse as "adjacent" and subject to § 404 jurisdiction.
 - [- furthermore, the Corps asserted jurisdiction over "isolated" wetlands under the migratory bird rule.]
 - [- however, the Supreme Court rejected the migratory bird rule in 2001 as beyond the scope of the language in CWA. *SWANCC*.]
- but, in 2006, the Supreme Court limited the scope of "navigable waters." *Rapanos*.
 - the plurality (*per* Scalia J) held that the connection between an adjacent wetland and a jurisdictional water must be a permanently flowing one on the surface of the ground.
 - the concurrence (*per* Kennedy J) opined that a nexus of pollution transmission between the adjacent wetland and the jurisdictional water must exist, but rejected the idea that it must be on the surface.
- RESULT: *Rapanos* is unclear whether Cattail Lake is a jurisdictional wetland. Under the plurality it is not, because there is not a surface connection. Under the concurrence, it is because a pollution transmission nexus exists. DECIDE.

endangered species – federal agencies

- under ESA § 4, no federal agency can take an action which will adversely affect the existence of an endangered species or its habitat. *TVA v. Hill*.
- but ESA does not confer jurisdiction where none exists under other statutes.
- thus, if the Corps has jurisdiction over Cattail Lake (*see* above), the Corps must deny a fill permit to Brown.

endangered species – individuals

- under ESA § 9, no individual can take any action to take, harass, or harm an endangered species.
 - "harm" includes habitat modification. *Babbitt v. Sweet Home*.
- such a suit can be brought by any citizen against a violator to enforce the Act.
 - any citizen can sue. *Bennett v. Spear*.
 - the usual APA § 10 "adversely affected" and "zone of interests" standing rules do not apply, because ESA expressly confers jurisdictional on all citizens.

Bennett v. Spear.

- Brown can be enjoined from filling Cattail Lake because that adversely affects an endangered species habitat.

public trust doctrine

under the equal footing doctrine, states own the beds of navigable waters.

- these are traditional navigable waters under the present/historic/susceptible waters navigable in fact.
- states may enlarge the scope of navigable waters under state law.
- in Missouri, waters floatable by a canoe are public waters.
- and, therefore, subject to the public trust.
- the public trust doctrine provides that private titles are subject to a dominant easement in favor of members of the public for navigation and fishery.
- here, Cattail Lake is floatable by a canoe, and so used by hunters.
- thus, it is subject to the public trust.
- lake bed owners cannot fill in the lake in derogation of the public trust.
- the public trust is enforceable by the State as public trustee.
- or by beneficiaries of the trust, members of the public.
- thus, the hunters group, as public users of the lake, can seek to enforce the public trust in their suit.

takings

- when the government acquires or denies access to land, it must pay compensation.
- there are four categories of “takings”.
 - government acquisition of or denial of access to private land.
 - too great a reduction in market value. (*Mahon*, discussed in class.)
 - denial of all lawful uses of land. *Lucas*.
 - denial of a fundamental attribute of land ownership. (*Kaiser-Aetna*, discussed in class).
- permit denials may constitute “regulatory takings.”
 - Kusler’s research indicates that the value of land must be reduced by 63 to 85% to constitute a regulatory taking. (Discussed in class.)
- the “whole parcel” rule applies valuations of partially “taken” land.
- while there is a substantial reduction in the value of Brown’s portion of the lake bed, it does not reduce the value of Brown’s whole farm too much.
 - the value reduction is about 20% (\$200,000 out of \$1,000,000).
- thus, there is no regulatory taking.
 - also, there is no denial of all economic use of Brown’s farm, even though he cannot fill in the lake bed.

II. (40 min.)

private nuisance

- private nuisance is an unreasonable interference with the use and enjoyment of land.
- generation of annoying sound can be considered a private nuisance.
- if occupants of land are made sick by annoying sound, the value of the land probably is reduced because it will be more difficult to sell – that is actionable.
 - but, damages for personal injuries or annoyances alone are not recoverable.
 - that others may be similarly injured is irrelevant.
- thus, Green has a cause of action in private nuisance.
 - she can recover damages for loss of market value of her land.
 - assuming she can prove land value has declined.

public nuisance

- public nuisance is an unreasonable interference with public health, safety and welfare.
 - multiple members of the public must be adversely affected.
 - e.g., odors can be actionable.
 - so, annoying sound is a proper subject of a public nuisance suit.
 - remedy is an injunction.
- ordinarily, public nuisance suits can be brought only by a public officials; private individuals cannot bring public nuisance suits.
- but, if a private individual is injured differently in kind (and degree), the private individual can bring a public nuisance suit.
 - remedy is both an injunction and damages for past special injuries.
- here, Green is injured by the annoying sound.
- but, is she injured more and differently than other residents near the wind turbine field?
 - probably not.

thus, Green cannot bring a public nuisance suit.

comparative convenience doctrine

- the doctrine theoretically applies only to the injunction remedy.
- the doctrine balances the equities of granting and denying an injunction. *Boomer*.
 - on one hand, the injuries to P, the social equities of not being interfered with and the value of freedom from being interfered with are balanced.
 - on the other hand, the cost to D and to the local community/economy are balanced.
 - the doctrine provides that if the equities of denying the injunction exceed the equities of granting it, the injunction should be denied and P should be left with damages.
- here, the court would balance the value of wind-generated electricity (and cost of investment loss) would be balanced against the value of freedom from noise for the residents near the wind turbine field.
 - some courts emphasize the rights of individuals to be free from interferences by annoyances created by large corporations. (*Whalen* discussed in class.)
 - other courts emphasize the value of large-scale economic development. (*Sanderson* discussed in class.)
- DECIDE whether a court would balance the equities in favor of P or D.
- only some states have accepted the doctrine.
 - MO has not ruled on this question; it would be a case of first impression.
- RESULT.

III. (30 min.)

- NEPA requires preparation of an EIS for any “major federal action which significantly affects the human environment.” § 102; *Hanly I & II*.
 - it does not apply to state or private projects.
- major federal actions include federal permissions for private projects.
 - even though no federal funds or construction is involved.
- a transportation corridor is a major project and is presumed to significantly affect the environment.
 - a highway/railroad is a categorical project always requiring an EIS.
- the EIS must contain:
 - environmental impact
 - adverse environmental effects
 - alternative actions (including the no action alternative)
 - environmental cost-benefits
 - irretrievable commitments of resources.
- here, the EIS must identify and analyze the effect on:
 - any endangered or threatened species habitat or individual members of those species
 - loss of wildlife habitat and individual members of animal/bird/fish species
 - loss of farmland and their farm products
 - loss of residences and business buildings, and relocation of them
 - alteration of streams, swamps, wetlands
 - changes in floodplains and potential flooding
 - air pollution from increased traffic and secondary development
 - water pollution from drainage
 - pipeline construction & operation
 - visual alterations (including power lines)
- the EIS must be prepared before the federal agencies make their permit decisions.

IV. (30 min.)

Definitions:

- (1) PRP – Potentially Responsible Parties – generators, transporters, and owner/operators of disposal facilities where hazardous waste were improperly disposed of. [CERCLA]
- (2) nonattainment area – airshed where one or more regulated pollutants exceeds the NAAQS parameters. [CAA]
- (3) discharge – addition of a pollutant into a receiving water from a defined conduit. [CWA]
- (4) EIS – Environmental Impact Statement – an analysis of potential environmental impacts of any proposed major federal action which could significantly affect the human environment. [NEPA]
- (5) CERCLA – Comprehensive Environmental Response, Compensation and Liability Act – requires and regulates the cleanup of abandoned hazardous waste disposal sites.
- (6) release – leak, spill, etc., of a hazardous pollutant into the environment. [RCRA/SWDA]
- (7) Best Available Control Technology – [BACT] -- waste treatment standard under Clean Water Act: state-of-the-art technology that is economically feasible (*i.e.*, not outrageously

- expensive for benefits received)
- (8) NAAQS – National Ambient Air Quality Standards – cumulative amount of air pollutants allowed in atmosphere in airshed. [CAA]
 - (9) effluent limitations – amount of various water pollutants that can be discharged by a licensed dischargers; they are put in the discharge permit and must incorporate BACT performance standards. [CWA]
 - ~~(10) nonattainment area -- DUPLICATE.~~