

ENVIRONMENTAL LAW
Fall 2001.

I. (30 min.)

Endangered Species Act:

take, harm:

- section 9(a)(1) prohibits any person from taking, harming, or having possession of an endangered species of fish or wildlife.
- section 3(8) defines "fish or wildlife" as including any part thereof. Feathers are parts.
- section 3(6) defines "endangered species" as any species in danger of extinction throughout all or a significant part of its range
- section 4 provides means for the Fish & Wildlife Service to place species on the Endangered Species List. This listing is presumed in the question.
- *result*: possession of feathers is unlawful under the Act.

citizen suit -- standing:

- any "person" may bring an ESA citizen suit against any person violating the Act under section 11(f)(1)(A).
- it does not specify standing rules.
- section 11(f)(2) provides that citizen suit can be filed only 60 days after notice is given to FWS and FWS does not initiate an enforcement lawsuit. Facts indicate notice was given, but not how many days before the citizen suit was filed. Facts indicate that FWS did not initiate an enforcement lawsuit or issue an administrative order.
- citizen must show that violator has affected citizen's economic or noneconomic interest in the particular endangered species's existence or habitat.
- here, Birdwatcher has nothing to do with the particular eagles or their aerie.
- thus, is membership in National Audubon Society and personal birdwatching activity elsewhere sufficient to confer standing? Discuss.

II. (60 min.)

- towers will be located in swamp, arguably within a CWA jurisdictional water.
- if so, an EIS would be required because issuance of a federal permit is a "major action," provided the tower bases would "significantly affect the environment."
- there is no Endangered Species Act habitat problem, because no endangered species use the swamp.

section 404 permit:

- § 404 gives the Corps authority to regulate the "discharge of dredged and fill materials" into wetlands.

waters of the United States:

- CWA defines "navigable waters" as "waters of the United States."
- this has been interpreted by the cases as all waters in the United States in the geographical sense.
- that interpretation includes swamps.
- this is a much broader definition than that for waters subject to the federal navigation power: waters currently, historically or potentially used in a line of waterborne interstate commerce.
- swamps are treated as "waters of the United States"

Tullock Rule:

- as a result of litigation in the early 1990s, Corps enlarged scope of activities requiring a permit to include all movement of dredged materials within a wetland, including “incidental fallback.”
 - construction of tower bases with dredged materials deliberately piled up would be much more than “incidental fallback” and would be subject to § 404 permitting.
- but, in *National Mining Congress*, “incidental fallback” was interpreted as not constituting an addition to the swamp (thus, not a “deposit” or “discharge” into the swamp), but mere shifting of material already there, and, thus, not subject to § 404 permitting.
 - thus, dredging with incidental fallback is not subject to permitting.
 - here, there is major shifting of material, but no outside material deposited in the swamp.
 - is that subject to permitting even though no additions are involved? The tone of *National Mining Congress* suggests that it might be.

jurisdiction over isolated wetlands:

- *Riverside Bayview* requires that there be a hydrologic connection between the wetland and an open “water of the United States” in order to have the necessary adjacency.
- but, *SWANCC* held in 2001 that isolated wetlands are not jurisdictional wetlands because they do not have a hydrologic connection with a “water of the United States”; the facts that migratory birds use an isolated wetland and that hunters and birdwatchers spend money in the interstate economy to hunt and watch the birds is not sufficient to confer jurisdiction under the Commerce Clause.
 - thus, the facts that migratory birds use the swamp and that hunters & birdwatchers come there do not alone confer jurisdiction.
- discuss whether drainage through an intermittent stream constitutes a sufficient hydrologic connection to confer jurisdiction.

EIS:

- National Environmental Policy Act requires preparation of the Environmental Impact Statement for every major federal action which will significantly affect the human environment.
- draft EISs must be prepared initially by federal permit applicants; ultimately the permit agency must prepare and approve the final wording of the EIS.

major federal action significantly affecting the environment:

- issuing a federal permit is a “major” action.
- issue here is whether putting ten transmission tower foundation pads in a swamp will significantly affect the environment.
- certainly, it will reduce the area of swamp habitat. The towers and transmission lines may act as obstacles to flying birds, particularly those landing and taking off in the open water of the swamp.
- they will adversely affect the visual appearance of the swamp.
- so, it is likely that issuing the permit will significantly affect the environment, and EIS must be prepared.

III. (60 min.)

Private actions:

private nuisance:

- available for any unreasonable interference with use & enjoyment of land.
 - well contamination is a well recognized type of private nuisance.
- remedies are injunction against future contamination and damages for past contamination.

public nuisance:

- available for any unreasonable interference with public health, safety & welfare.
 - contamination of public water supply is a well recognized type of public nuisance.
 - suit is brought by a public official.
 - suit may be brought by a private individual who is specially damaged
 - damage different in kind from damages to public at large.

here, only one individual's well is contaminated. No interference with public health or safety.

- unless long-term contamination of groundwater alone is a public nuisance.
 - some cases have so held.

Result: here, only a private nuisance suit is available.

Regulatory actions:

- since State of Jefferson has no relevant regulatory statutes, any regulatory enforcement actions must be brought by EPA.

RCRA:

- Resource Conservation & Recovery Act applies to any "disposal", which is defined as the "deposit, ... dumping, spilling, leaking, or placing of any solid waste or hazardous waste into ... land or water so that [it] may enter the environment or be ... discharged into any waters, including ground waters." SWDA § 1004(3).
- "hazardous wastes" are substances that are ... corrosive... and otherwise pose a "substantial present or potential hazard to human health or the environment when improperly ... disposed of". SWDA §§ 1004(5)(B), 3001.
- generators are "persons" who creates wastes.
- RCRA forbids depositing of hazardous wastes anywhere except in a licensed disposal facility. SWDA § 3005(a). (Transport to that facility must be licensed transporters.)
 - RCRA applies to all disposal activities occurring since enactment in 1976. *Id.*
 - Omega's and Acme's disposal activities occurred in part since that date.
 - here, the generator is also the operator of the disposal facility. There is no transport, because on-site disposal is involved.
- disposal must be by an approved practice. *See* SWDA § 3004.
 - approved practice requires double-liners in landfills, leachate collection systems, and groundwater monitoring.
 - ban on noncontainerized disposal of liquids in landfills
 - ban on open pit dumping
- but there is no backup federal regulatory program to use in states without federally-approved state programs.
- but, EPA can bring suit to enjoin and clean up sites posing an imminent hazard to public health. This section applies to past & current generators and past & current owner/operators of disposal facilities. SWDA § 7003.
- compliance orders may be issued by EPA. This section applies to past and current violators. SWDA § 3008.

- also, affected citizen can bring citizen to for same remedies. SWDA § 7002(a). Subject to preemption by government enforcement lawsuit. *Id.* § 7002(b).
- Act does not preempt any other federal, state or common law obligations & remedies. *Id.* § 7002(f).

CERCLA:

- CERCLA applies to pre-1976 disposal sites and to abandoned post-1976 sites.
- applies to “releases”, meaning any “spilling, leaking, ... dumping, or disposing into the environment (including the abandonment or discarding of ... containers, and other closed receptacles containing any hazardous substance ...”. CERCLA § 101(22).
- EPA may bring an action against a PRP to enjoin and clean up any actual or threatened release posing an imminent & substantial endangerment to the public health & safety. CERCLA § 106(a).
 - PRPs include past & present owner/operators of disposal facilities. CERCLA § 107(a).
 - liable for all cleanup & response costs, costs of remedial actions, and damages for injury to natural resources. *Id.*
 - in addition, there can be civil penalties. CERCLA § 109(a).
- in addition, an affected citizen can bring a citizen suit against a violator to enforce the Act. CERCLA § 310(a). Subject to preemption by government enforcement lawsuit. *Id.* § 310(d)(1).
 - CERCLA does not preempt any other federal, state or common law obligations or liabilities. CERCLA § 302(d).

CWA:

- Clean Water Act does not apply to groundwater contamination. Thus, EPA has no CWA jurisdiction. [deduction for concluding otherwise]

result:

- RCRA and CERCLA enforcement actions are available.
 - both appear to be coextensive in scope of liability and remedies available.
 - citizen suits are available only if EPA enforcement actions are not brought.

IV. (30 min.)

1. *Public nuisance* – unreasonable interference with public health & safety.
 2. *BACT* – “best available control technology” – waste treatment standard under Clean Water Act: state-of-the-art technology that is economically feasible (*i.e.*, not outrageously expensive for benefits received)
 3. *Nonpoint source* – opposite of “point source” in Clean Water Act: a diffused source of pollution.
 4. *SIP* – “state implementation plan” – air quality improvement plan developed by state under Clean Air Act for improving quality of air in an air quality region.
 5. *PRP* – “potentially responsible party” – generators, transporters, and owner/operators of disposal facilities where hazardous waste were improperly disposed of (CERCLA).
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1. *NAAQS* – “national ambient air quality standards – maximum levels for each specified pollutant under Clean Air Act.
 2. *Water quality standards* – maximum levels for each specified water quality parameter for various receiving water purposes (Clean Water Act).
 3. *National priority list* – list of hazardous waste sites eligible for Superfund cleanup under Comprehensive Environmental Response, Compensation & Liability Act (CERCLA).

4. *Generator* – person who decides to dispose of hazardous material (both RCRA & CERCLA).
5. *Balancing of the equities* – common law doctrine which denies injunctive relief when the social & economic benefits of a polluting activity outweighs its detriments to plaintiff; damages still payable.