

I. (45 min.)

A. (15 min.) Corps had to prepare an Environmental Impact Statement [under NEPA § 102(c)].

- 5 elements which must be discussed
- a full EIS by Corps is required
 - a reservoir is a categorical type of project requiring an EIS
- Biological Assessment by FWS; if any endangered/threatened species or their habitats are found, a Biological Opinion by FWS, as part of EIS process and report(s)
- notice & comment following the draft EIS; explanations accompanying the final EIS

B. (15 min.) An EIS can be challenged by a suit to require evaluation of study's covering of all relevant environmental matters.

- suit must be brought by an "affected" individual or entity [under APA § 10]
 - that is a person or entity actually using the area to be affected by the project (here, spelunkers, fishermen, recreational boaters, biologists studying the ecology of the area) [*Sierra Club v. Morton, SCRAP*]
 - they need not have an economic or occupational interest
- suit must be brought in federal district court
 - federal agency involved [Corps]; federal statute involved [NEPA]
- environmental group can be added as derivative plaintiffs

C. (15 min.) Endangered Species Act becomes involved.

- federal government is forbidden from taking actions which will harm an endangered or threatened species or its habitat
 - def. of "endangered species", "threatened species", and "habitat"
 - statutory protection is not limited to listed endangered/threatened species
- [check]**
- "harm" means **[insert def.]**
- protection alternatives:
 - Corps can choose to abandon project
 - if studies show that species can be moved or that it exists elsewhere in adequate numbers, Corps could move species and/or build project
 - citizen can bring suit to enjoin construction [under citizen suit provision of ESA]
 - subject to 60-days notice to Corps
 - any citizen can bring suit [unlike under citizen suit provisions in other federal environmental regulatory statutes]
 - citizen can petition Endangered Species Committee (and later, if necessary, sue) to have the dinosaur species added to the endangered/threatened species list

II (60 min.)

CWA §401 (NPDES permits):

- discharges of pollutants into "navigable waters" are prohibited, unless EPA/state issues a permit

- pollutants include suspended solids; this would include the suspended rock dust
- "navigable waters" are "waters of the United States"; meaning waters in the U.S. in the

geographical sense; this would include Slow Creek

- wetlands near such waters are included if they are “adjacent”; a wetland hydrologically connected, but separated by a 20-foot wide berm, would be “adjacent and subject to CWA jurisdiction
- the facts do not indicate that Tiger has an NPDES permit
 - in Missouri, the state administers the NPDES permit system

CWA §404:

- discharges include wetlands are prohibited, unless the Corps/state grants a permit
 - suspended solids causing an accumulation in a wetland would be a “discharge”
 - same jurisdictional issue and conclusion applies to both §401 and §404
- the facts do not indicate that Tiger has a §404 permit
 - in Missouri, the Corps administers the §404 permit system

Standing:

- any citizen can bring a suit to enforce CWA requirements against violator, EPA, Corps, and state agency to enforce the act, regulations, standards, and permit requirements.
 - citizen must have standing – must be “adversely affected” [CWA §505(g)]
 - there must be an injury or imminent threat of injury to the specific individual at the time of suit
 - the injury does not have to be economic
 - if the state, EPA, or the Corps initiate an enforcement lawsuit within 60 days, the citizen suit is put in abeyance pending the outcome of the enforcement suit
 - remedy is injunction to comply with act; no economic damages can be recovered

Private Nuisance:

- injury or imminent threat of injury to plaintiff’s enjoyment of land
 - causation must be proved
 - remedy is injunction against future injury and damages for past injury
 - only injury to downstream landowners’ properties can be basis for nuisance suit; not available for personal injury (none exists here)

Public Nuisance:

- injury or imminent threat of injury to public health, safety, and/or welfare
 - causation must be proved
 - remedy is injunction against future injury
 - suit must be brought by public official, not by private plaintiffs
 - unless private plaintiff(s) can show special damage – injury different in kind
 - facts do not show special damage here
 - thus, suit cannot be brought by described persons
 - but they may be able to persuade public official to bring suit

Trespass:

- is physical intrusion onto the land of another
 - deposit of particles constitutes a trespass
 - causation must be proved
 - remedy is injunction against future trespass and damages for past trespass
 - here, plaintiff downstream landowner(s) must prove sediments deposited on their properties came from quarry

RCRA

- open dumps for solid and hazardous wastes are prohibited
- a permit must be acquired under RCRA to operate both solid waste and hazardous waste landfills
 - the design requirements for hazardous waste landfills are more stringent than for solid waste landfills
 - *bonus*: they include double liners, liquid leachate collection systems, daily soil cover, monitoring, post-closure revegetation, etc.
 - most of the items described constitute solid waste under RCRA
 - but the acid containers, and some of the 55-gallon barrels constitute hazardous wastes
 - deposit of acids is prohibited in a solid waste landfill
 - hazardous wastes are characterized by toxicity, persistence, flammability, corrosiveness, and reactivity – acids are corrosive
 - hazardous wastes mixed with solid wastes are treated as hazardous
 - land disposal of liquid hazardous wastes is prohibited
 - the remedies for an unlicensed landfill is an injunction against unlicensed dumping and an order to apply for a permit
 - in Missouri, the state administers the solid and hazardous waste disposal permit programs
- “imminent hazards” can be enjoined immediately under RCRA and the owner/operator be required to clean up
 - here, the farm owner, and, if they can be found, the dumpers are responsible for cleaning up
- RCRA has a citizen suit provision
 - the violators, the state, and EPA can be sued
 - if the state, EPA, or the Corps initiate an enforcement lawsuit within 60 days, the citizen suit is put in abeyance pending the outcome of the enforcement suit

CERCLA:

- since there are abandoned hazardous wastes in the dump, there would be CERCLA liability for cleanup
 - RCRA hazardous wastes also are CERCLA hazardous wastes
 - “dumping” is a “release” imposing liability
 - an open dump is a disposal “facility”
 - liability for cleanup costs is strict and is jointly & severally imposed on owner/operator(s), transporters, and generators
 - here they are the farm owner and, if they can be found, the dumpers
 - there might also be some transporters (but they would be hard to identify)
 - abandoned hazardous wastes must be cleaned
 - CERCLA has a citizen suit provision
 - the violators, the state, and EPA can be sued
 - if the state, EPA, or the Corps initiate an enforcement lawsuit within 60 days, the citizen suit is put in abeyance pending the outcome of the enforcement suit
- IV. (30 min.)

Definitions:

- (1) effluent limitation – 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
- (2) Prevention of Significant Deterioration – special permit program for clean air areas which imposes more stringent emission limitations than the regular program
- (3) cooperative federalism – relationship between federal and state governments such that the federal government determines the basic minimum environmental standards and the states can agree to implement them; states are free to impose more stringent standards
- (4) Total Maximum Daily Load – cumulative loads for various pollutants allowed in a receiving water; is allocated between licensed dischargers and natural sources
- (5) State Implementation Plan – air quality improvement plan developed by state under Clean Air Act for improving quality of air in an air quality region.
- (6) point source – a single water pollutant source (pipe, drain, etc.)
- (7) National Contingency Plan – overall substantive and procedural plan for cleaning up CERCLA hazardous waste sites
- (8) NAAQS – National Ambient Air Quality Standards – cumulative amount of air pollutants allowed in atmosphere in airshed
- (9) Potentially Responsible Parties – generators, transporters, and owner/operators of disposal facilities where hazardous waste were improperly disposed of (CERCLA).
- (10) FIFRA – Federal Insecticide, Fungicide & Rodenticide Act