ENVIRONMENTAL LAW – Winter 2008 – P.N. Davis

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 6\% 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\% ($200,000out 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.
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 parameter. [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
(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.