

ENVIRONMENTAL LAW
Winter 2011

I (150 min.).

procedural issues:

- (1) standing:
 - (A) APA §10 - persons “adversely affected or aggrieved” by a federal government actions have standing to seek judicial review. *Sierra Club v. Morton*.
Nexus in person, space & time:
 - the injury can be to economic or noneconomic interests. *SCRAP*.
 - the injury must affect the specific area used by the person[s] or its immediate neighborhood. *Lujan v. NWF*.
 - environmental membership organizations do not have standing in their own right because of their environmental interests; only adversely affected members can sue. *Sierra Club v. Morton; SCRAP; Laidlaw*.
 - ecosystem or animal nexus doesn’t create standing. *Lujan v. DOW*.
 - injury to the environment doesn’t create standing. *Laidlaw*.
 - the injury must be ongoing or imminent at the time suit is filed. *Laidlaw*.*Standard of review:*
 - courts review the decision under the “arbitrary and capricious” test. § 10.
 - courts will overturn agency decisions not based on adequate evidence.
 - an agency decision must not be “crazy” or “absurd” [my words].
 - a court ordinarily will not substitute its judgment for that of the agency and its expertise. *Overton Park*.
 - but, it will not blindly defer to administrative expertise. *Overton Park*.
 - the courts have applied this test in many environmental contexts, including NEPA, and various federal regulatory decisions.*Application of these standing rules:*
 - here, the sinkhole watershed landowners clearly have standing.
 - any person using the cave has standing, because the enjoyment of the cave allegedly would be impaired.
 - *note:* appropriateness of substantive agency actions will be discussed below.
- (2) citizen suits:
 - (A) many federal statutes have citizen suit provisions.
 - (B) these citizen provisions empower any “person” to bring suit against any “person” to enforce the respective statutes.

- available to any “person” who has an interest which is adversely affected by violation of the act.

- this group is not limited to those with APA § 10 standing.

- thus, all members of *Save the Cave*, as well as all other persons have standing.

- *bonus*: requires 60 days notice to agency and violators before citizen suit is filed.

- *bonus*: suit barred if agency initiates enforcement suit before expiration of 60-day notice period.

(C) statutes with citizen suit provisions:

- Endangered Species Act § 11(g).

- Clean Water Act § 505(g).

- SWDA/RCRA § 7002.

- CERCLA § 310.

- NEPA does not have a citizen suit provision.

substantive issues:

(1) Endangered Species Act

(A) are the bats, and pink planarians endangered or threatened species? – yes.

(B) do Stone’s ag chemicals threaten injury to endangered or threatened species in the cave or their habitat?

- yes. They are toxic to the pink planarian, which lives in the underground stream.

- *bonus*: the bats don’t drink the water and live above it – they might be adversely affected by any volatiles in the water escaping into the cave’s atmosphere.

(C) would Stone violate § 9 by allowing ag chemicals to drain into the cave system?

- yes. § 9 prohibits any “person” from harming an endangered or threatened species.

- “harm” means “killing, injuring, etc.” any individual of the species.

- the definition also includes destruction or significant modification of its habitat. *Babbitt v. Sweet Home*.

- “harm” includes indirect, as well as direct, actions, and negligent acts and omissions. *Babbitt v. Sweet Home*.

- failing to contain a toxic materials and allowing it to escape into environment, thereby causing “harm”, etc., would violate § 9 as an indirect act or negligent act or omission..

- Stone is a “person” for purposes of § 9.

- therefore, he can be enjoined from allowing the leaks and spills to wash into the cave..

- but here, we are looking at future activity. A court would assume that leaks can be prevented with proper precautions. So, it probably would not enjoin Stone prospectively.

- (D) if a § 402 or § 404 permit is required under SWDA, would the federal government violate ESA § 7 if it grants a permit to Stone?
- yes. § 7 requires the federal government to “insure that any action ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species”.
 - this applies only to discretionary actions. *Home Builders*.
 - permit issuances are discretionary actions.
 - if there is a likely threat to an endangered or threatened species, or its critical habitat, the government can be enjoined from issuing a permit.
 - since the cave is the only known habitat for the pink planarian, it is a critical habitat.
 - before taking such action, the government must have FWS prepare a Biological Opinion.
 - thus, the government could be required to delay permit issuance pending preparation of a Biological Opinion.
 - if, as likely, the Biological Opinion finds that the pink planarian and its habitat would be adversely affected or destroyed, the government could be enjoined under § 7 from issuing any permit which authorizes or allows discharges of toxics into the cave..
 - but here, we are looking at future activity. A court would assume that leaks can be prevented with proper conditions placed in the permit. So, it probably would not enjoin the government prospectively.
- (E) if MoDNR is the permit issuing authority, would it violate either § 7 or § 9 if it grants a permit to Stone?
- MoDNR is the issuing authority under CWA § 402, but not under § 404.
 - § 7 applies only to the federal government.
 - but § 9 applies to states, as well as other “persons”.
 - however, the 11th Amendment may forbid ESA suits against states in federal courts. *See Seminole Tribe v. US*. [This was discussed in connection with CERCLA.]

(2) Clean Water Act § 402 (EPA)

- (A) requires permits for “discharges” from “point sources” into jurisdictional waters.
- (B) jurisdictional water: underground water is not mentioned by CWA
- jurisdictional waters are “navigable waters”, which the Act defines as “waters of the United States” not the “navigable water of the United States” under the navigation power CWA § 502(7)..
 - legislative history indicates that this includes all “waters in the United States” in the geographical sense. [*US v. Ashland Oil*]; *Riverside Bayview*; *SWANCC*.
 - this definition includes “nonnavigable tributary waters” connected to “navigable waters”. *Riverside Bayview*.
 - however, that definition does not include underground waters.

Rapanos.

- is the underground stream nonetheless a jurisdictional water because it flows through a solution channel and is tributary to a jurisdictional water?
- this is an open question.

- the plurality in *Rapanos* would exclude any underground hydrological connection.

(C) “point source”:

- “point source” means “any discernable, confined and discrete conveyance, including ... any pipe, ditch, channel, tunnel, conduit, well, discrete fissure ... from which pollutants are or may be discharged.”
CWA § 502(14).

- are sinkholes and the cave “conduits”, “wells” or “discrete fissures” to a jurisdictional water?

- they all discharge into the stream in the cave; that stream flows through a solution channel in the limestone; all are confined.

- “drains” include drainage pipes underground.

- is a natural solution channel through limestone any different than a drainage pipe? – both are confined.

- decide.

(D) “discharge”:

- means any addition of any pollutant from any point source. CWA § 502(6).

- includes all continuous and periodic discharges, but not random occasional nonstructural deposits. [*US v. Plaza Health*].

- are the leaks and spills merely random, or because of their link to all ag chemical transfers and collection in the drainage pond, are they periodic?

- decide.

(D) does EPA or MoDNR have jurisdiction under § 402 in Missouri? - - MoDNR. Missouri has a federally approved point source discharge regulatory program.

- all the definitions applying to the federal program also apply to the state program, because that is a condition for federal approval.

(3) Clean Water Act § 404 (Corps)

(A) requires a permits for any deposit in a wetland.

- *bonus*: does not include dredging in a wetland. [*Nat’l Mining* overruling the “incidental fallback” rule]

- permit can be denied where degradation of an environmentally sensitive or important wetland will occur.

(B) a wetland is an area which is “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions”. Corps & EPA regulations.

- includes swamps, marshes, bogs, and similar areas.
 - (C) wetlands “adjacent” to a jurisdictional water also are subject to § 404 regulation.
 - wetlands are “adjacent” to a “navigable water” or its “tributary” if water from the wetland flows into the latter. *Riverside Bayview*.
 - the wetland can be some distance from the jurisdictional water. *Riverside Bayview*.
 - must the hydrologic connection between the wetland and the jurisdictional water be on the surface?
 - *Riverside Bayview* does not discuss this question.
 - this was the question addressed in *Rapanos* (a 4-1-4 decision).
 - the plurality requires the existence of a continuous connection on the surface, rejecting the Corps regulations which recognized underground hydrologic connections in its “adjacency” definition.
 - the concurrence considers that a “substantial nexus” between the wetland and the jurisdictional water to be sufficient.
 - dissent would sustain the Corps regulation which incorporates underground hydrologic connections.
 - some later federal decisions recognize underground hydrologic connections under the test in *Marks v. US* that follows the narrow ground in which a majority of justices concurred.
 - other federal decisions follow the plurality, stating that combining the concurrence and dissent would subvert the plurality opinion.
 - decide.
 - (D) are the watershed and sinkholes “adjacent” to a jurisdictional water?
 - decide.
 - (E) does Corps or MoDNR have jurisdiction under § 404 in Missouri?
 - Corps. Missouri elected not to establish a state wetlands regulatory program.
- (4) Solid Waste Disposal Act/RCRA
- (A) regulates the disposal of any solid waste that may “pose a substantial present or potential hazard to human health or the environment when improperly handled”. § 1004.
 - (B) are leaking agricultural chemicals “hazardous materials” subject to regulation under SWDA/RCRA?
 - yes.
 - since these materials are subject to regulation under FIFRA, they are considered “hazardous” under SWDA/RCRA and CERCLA. § 1004.
 - also, disposal of noncontainerized liquid hazardous wastes is prohibited. § 3004.
 - these wastes must be transported to a licensed hazardous waste disposal facility.
 - (C) would Stone’s facility be a “disposal facility” under SWDA?
 - yes – it is causing hazardous wastes to enter the environment as an

- uncontrolled waste product.
- (D) must Stone obtain a permit for these occasional leaks and spills?
 - probably not – it is not in the business of intentionally disposing of hazardous wastes.
 - (E) would Stone have to remediate any spills and leaks?
 - yes, under both SWDA “imminent hazard” provision [§ 7003] and CERCLA (*see* below).
 - SWDA § 7003 provides for immediate cleanup of spills which present an “imminent and substantial endangerment” to public health or the environment by those contributing to the spill.
- (5) Comprehensive Environmental Response Compensation and Liability Act [CERCLA]
- (A) applies to pre-1976 abandoned and post-1976 unlicensed hazardous waste disposal sites.
 - hazardous wastes are those so designated under other federal acts, including SWDA, CWA, TSCA, and any other “pollutant or contaminant which may present an imminent and substantial endangerment to public health or welfare”. § 104.
 - but does not apply to application of pesticides, etc., registered under FIFRA.
 - however, FIFRA-registered pesticides disposed of in any other way are not exempted.
 - (B) would the leaks and spills subject to cleanup liability under CERCLA?
 - yes.
 - they are “hazardous materials” (see above), and
 - their disposal into the environment is not regulated under SWDA/RCRA.
 - (C) who is liability for cleanup costs?
 - “potentially responsible parties” [PRPs] who are responsible for a “release”
 - a “release” means “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment”. § 101(22).
 - PRPs include generators, transporters, and owners/operators (past & current) of disposal “facilities”
 - a “facility” is “any site or area where a hazardous substance has ben deposited, stored, disposed of, or placed, or otherwise come to be located”. § 101(9)..
 - Stone would be an “owner/operator” of a disposal “facility..
 - PRPs are jointly & strictly liable for “disposals” regardless of causation. § 107(a)(1)..
 - these include uncontrolled leaks and spills..
 - but CERCLA liability is not prospective.
 - while Stone is not liable now, since there has yet been no spill/leak, he would face the entire expense of cleanup if he allows the leaks/spills to

occur.

- (6) National Environmental Policy Act
- (A) a federal agency must prepare an Environmental Impact Statement [EIS] for any “major federal action” “which will have “a significant effect” the human environment. NEPA §§ 101-02.
- applies only to federal actions, not state, local government, or private actions.
 - unless they require a federal permit.
 - a “major action” and “significant effect” are ones which trigger controversy about environmental effects or would cause environmental effects greater than existing uses. *Hanly I & II*.
 - includes “small handle” federal decisions enabling major nonfederal actions. *Sierra Club v. Morton*.
 - a permit issuance routinely requires an EIS.
 - the EIS must include analysis of adverse effects on the environment, irreversible commitments of resources, “reasonable” alternatives to the proposed action (including mitigation measures and no action), including identification of endangered or threatened species and their critical habitat. *See CEQ Guidelines; Vermont Yankee*.
 - the EIS must be prepared before the federal agency considers whether to proceed with the action. *Kleppe*.
 - NEPA does not require any substantive decision by an agency once a proper EIS has been prepared. [*Strycker’s Bay*].
 - the adequacy of an EIS is judicially reviewable. [By case decision; no review provision in statute.]
 - federal action can be enjoined pending completion of any adequate EIS.
- (B) if the federal government is the issuing authority under CWA § 402 or § 404, must it prepare an Environmental Impact Statement before considering permit issuance?
- (I) CWA § 402 (EPA) – yes.
 - (II) CWA § 404 (Corps) – yes.
- (C) if MoDNR is the issuing authority, must it prepare an Environmental Impact Statement before considering permit issuance?
- (I) CWA § 402 – no. NEPA does not apply to state activity.
 - (II) CWA § 404 – MoDNR has not asserted jurisdiction over wetlands.
- (7) *Note:* there are no factual issues about the toxicity of the agricultural chemicals or the movement of rainwater into the cave.

II (30 min.)

Briefly identify and define the following:

- (1) effluent limitations – CWA: specification of maximum concentrations of specified pollutants in point source discharges.
- (2) PSD area – CAA: high air quality region which has better quality than NAAQS requires; nondegradation policy imposed; preconstruction permits required.
- (3) public nuisance – unreasonable interference with public health and safety.
- (4) cost-benefit analysis – comparison of economic costs of a project with economic values of benefits to be achieved; in environmental cases, transmuted into comparison of nonmonetary costs with nonmonetary benefits.
- (5) state implementation plan – CAA: state-prepared plan to achieve NAAQS;; prepared for each air quality region in state..
- (6) dormant commerce clause – bans states from creating economic barriers to interstate commerce. *Clover Leaf*.
- (7) public trust doctrine – obligation of the states to protect public waters for public navigation and fishing; forbids transfer of state-owned beds of such waters to private interests free of the public trust. *Illinois Central*.
- (8) TMDL – Total Mean Daily Load – CWA: specifies the maximum concentration of each pollutant that may exist in a receiving water from all sources (point and nonpoint).
- (9) NAAQS – National Ambient Air Quality Standards – CAA: maximum concentrations of regulated pollutants [NO_x, CO, SO₂, O₃, TSP, HC, Pb, CFCs]
- (10) National Contingency Plan – CERCLA: an organizational plan for responding to discharges and releases of hazardous substances. Incorporates the National Hazardous Substance Response Plan and National Priority List. All cleanup response activities must comply with the NCP.