

SYLLABUS AND COURSE INFORMATION SHEET

COASTAL, NAVIGATION, AND WETLANDS RESOURCES LAW (LAW 437)

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Basis of Grading: Closed book exam.

Other course requirements: No textbook is used for the course, but copies of the course handout materials are available on line or at no charge from the copy center.

Participation points policy: A student's grade may be raised one level (e.g., from B+ to A-) for excellent class participation, as authorized by law school rules.

Course description: See the description of the course in the law school's Bulletin.

SYLLABUS

I. Federal Control Over and Involvement in the Traditional "Navigable Waters of the United States".

A. Federal Powers Generally

B. History of Federal Involvement in Water Resources

C. Evolution and Application of the Concept "The Navigable Waters of the United States".

1. Gibbons v. Ogden, 22 U.S. 1 (1824) (Lecture): The Federal Commerce Power includes the control of navigation.
2. The Steamer Daniel Ball v. the United States (Handout) 77 U.S. 557 (1871)
The navigability-in-fact test, plus the doubtful second test, i.e., continuous highway for the transportation by water of interstate commerce.
3. The United States v. the Steamer Montello, (Handout) 87 U.S. 430 (1874)
The historic test; the nature of water-borne commerce.

4. The Rivers and Harbors Act of 1899; see esp. 33 U.S.C. Sections 401, 403, 407, 413 (Handout)
5. Jurisdictional scope of Section 9 versus Section 10 of the Rivers and Harbors Act of 1899, based on an activity's potential effects on the (traditional) navigable waters of the United States.
 - a. Citizens Committee for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y., 1969), aff'd. 425 F.2d 97 (2nd Cir. 1970) (Lecture)
 - b. Hart and Miller Islands Area Environmental Group v. Corps of Engineers, 621 F.2d. 1281 (4th Cir. 1980) (Lecture)
6. Economy Light and Power Co. v. United States, 256 U.S. 113 (1921). Doctrine of Indelible Navigability (Handout). Also see Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978).
7. Statutory (Congressional) abandonment of regulatory authority and/or navigation servitude control over navigable waters of the United States. (Lecture)
8. United States v. Utah, 283 U.S. 64 (1931); and Appalachian Electric Power Co., 311 U.S. 377 (1940). A water body's susceptibility to use in interstate commerce, with or without reasonable improvements. (Handout for the second case only)
9. Nature of Interstate or Foreign Commerce: Type, Means, Extent of Use; Recreational Craft (Lecture)
10. The "Ebb and Flow of the Tide" Test
 - a. Background (Lecture)
 - b. United States v. Stoeco Homes, Inc., 498 F.2d 597 (3rd Cir. 1974) (Handout)
 - c. United States as trustee of the Lummi Indian Nation v. Milner, 358 F.3d 1174 (9th Cir. 2009) (Handout)
11. Artificial (Man-Made) or Man-Improved Water Bodies
 - a. Kaiser Aetna et al. v. United States, 444 U.S. 164, 100 S. Ct. 383 (1979) (Handout)
 - b. Vaughn v. Vermillion Corp., 444 U.S. 206, 100 S. Ct. 399 (1979) (Handout)

Coastal, Navigation, and Wetlands Resources Law (continued)

- c. Boone v. United States, 944 F.2d 1489 (9th Cir. 1991) (Lecture)
12. Surrender by Estoppel of Federal Jurisdiction and/or the Federal Navigation Servitude. See cases cited in two preceding subsections. Also see Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir., 1978) (Lecture)
13. Landlocked Lakes and the "Continuous Water Highway for Interstate Commerce" test from the Daniel Ball case. (Lecture)
 - a. United States v. Utah, 403 U.S. 9 (1971). (Lecture)
 - b. Hardy Salt Co. v. Southern Pacific Transportation Co. 501 F.2d 1156 (10th Cir., 1974) (The Great Salt Lake, Utah). (Lecture)
 - c. Minnehaha Creek Watershed District v. Hoffman, 597 F.2d 617 (8th Cir., 1979) (Lake Minnetonka, MN) (Lecture)
 - d. National Wildlife Federation v. Alexander, 613 F.2d 1054 (D.C. Cir., 1979) (Devils Lake, N.D.) (Lecture)
14. The Ordinary High Water Mark; the Mean High Tide Line; the Head of Navigation (Lecture)
15. Activities Outside of but Affecting the Navigable Waters of the United States
 - a. United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899) (Lecture)
16. Corps of Engineers Regulations (Lecture) 33 CFR Parts 329, 320, 321, 322

D. "The Federal Navigation Servitude"

1. Lewis Blue Point Oyster Cultivation Company v. Briggs, 229 U.S. 82 (1913) (lecture)
2. United States v. Rands, 389 U.S. 121 (1967) (Handout)
3. United States v. Grand River Dam Authority, 363 U.S. 229 (1960) (Lecture)
4. United States v. Cress, 243 U.S. 316 (1917) (Lecture)

Coastal, Navigation, and Wetlands Resources Law (continued)

5. United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (Lecture)
6. Kaiser Aetna v. United States, supra. (Handout)
7. United States v. Cherokee Nation of Oklahoma, 107 S. Ct. 1487 (1987) (Handout)

E. Authorization and Funding of Federal Water Resource Developments Projects

EDF v. Alexander, 467 F. Supp. 885 (N.D. Miss., 1979) (affirmed, EDF v. Alexander, 614 F.2d 474 (5th Cir., 1980)) (Lecture)

F. Federal Water Resources Development Projects, as they relate to the Federal environmental laws (e.g., National Environmental Policy Act; Endangered Species Act; Wild and Scenic Rivers Act; National Historic Preservation Act; etc.)

1. EDF v. Marsh, 651 F.2d 983 (5th Cir. 1981) (Handout)
2. Friends of Fiery Gizzard v. Farmers Home Administration, 61 F.3d 501 (6th Cir. 1995) (Lecture)
3. Enos v. Marsh, 769 F.2d 1363 (9th Cir. 1985) (Handout)
4. Cost-sharing, and the Water Resources Development Act of 1986. (Lecture)

II. The Federal Coastal Zone Management Act (16 U.S.C. 1451 et seq.); Special Area Management Plans; Marine Sanctuaries. (Guest lecture if feasible, with handouts.)

III. Ownership Rights and Rights to Use Water Bodies

A. Ownership of Beds of Water Bodies

1. Hughes v. Washington, 389 U.S. 290, 88 S. Ct. 438 (1967). (Lecture)
2. Phillips Petroleum Company v. Mississippi, 108 S. Ct. 791 (1988) (Handout)
3. United States as trustee of the Lummi Indian Nation v. Milner, 358 F.3d 1174 (9th Cir. 2009) (Handout)

Coastal, Navigation, and Wetlands Resources Law (continued)

- B. Limits on Private Rights in Submerged Lands
- C. Submerged Lands Act (selected sections), 43 U.S.C. 1301, 1302, 1311-1315 (Handout)
- D. Outer Continental Shelf Lands Act (selected sections), 43 U.S.C. 1331-1333 (Handout)
- E. Public Right of Navigation and Other Surface Uses of Water

IV. Ocean Dumping and Contaminated Sediment Issues

- A. Marine Protection, Research, and Sanctuaries Act (MPRSA, i.e., "Ocean Dumping Act") 33 U.S.C. Section 1411, 1412, 1412a, 1413, 1414, 1415, 1416 (Handout)
- B. National Wildlife Federation v. Costle, 629 F.2d 118 (D.C. Cir. 1980) (Lecture)
- C. Half Moon Bay Fishermans' Marketing Assoc. v. Carlucci, 847 F.2d 1389, 27 ERC 1913 (9th Cir., May 27, 1988, as amended June 3, 1988) (Handout)
- D. International Convention of the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (i.e., London Dumping Convention) (Handout)

V. Federal regulation and protection of "the waters of the United States, including wetlands".

- A. Background and development of the existing Federal regulatory regime. (Lecture)

1. Innovative uses of the Rivers and Harbors Act of 1899 regulatory provisions in the 1960's and 1970's.

2. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). (lecture)

3. California v. Sierra Club, 451 U.S. 287 (1981) (No implied private right of action for persons injured under, and no private enforcement of, Section 10 of the Rivers and Harbors Act of 1899.) (lecture)

4. The Federal Water Pollution Control Act Amendments of 1972, and the Clean Water Act (CWA) of 1977: Federal Regulation of Activities involving Discharges of Dredged or Fill Material in any "water of the United States".

Coastal, Navigation, and Wetlands Resources Law (continued)

5. Clean Water Act, Sections:

502 (33 U.S.C. 1362); 301 (33 U.S.C. 1311); 404 (33 U.S.C. 1344); 401 (33 U.S.C. 1341; (State Water Quality Certification); 309 (33 U.S.C. 1319; 313 (33 U.S.C. 1323); 505 (33 U.S.C. 1365) (Handout)

B. Geographic Jurisdictional Questions under CWA Section 404.

1. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975). (Handout) (Decision dated March 27, 1975)
2. United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979). (handout)
3. Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir., 1983) (Handout)
4. United States v. Riverside Bayview Homes, Inc. 474 U.S. 121 (1985), 106 S. Ct. 455 (1985) (Handout).
5. The Federal Wetlands Delineation Manual: The Corps Manual of 1987, the Joint (a.k.a. the EPA) Manual of 1989, and the EPA's Proposed Manual of 1991. The Manuals have been held to be "interpretative" rather than "substantive" rules, thus not subject to "notice and comment" rulemaking under the Administrative Procedures Act (APA). See Hobbs v. United States, 34 Env't Rep. Cases. (BNA) 1642 (4th Cir. 1991), cert. denied, 112 U.S. 2274 (1992). (lecture)
6. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) ("man-made" and "artificial" wetlands) (lecture)
7. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), commonly referred to as the SWANCC decision. (Handout)
8. Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir., 2001) (lecture)
9. Rice v. Harken, 250 F.3d 264 (5th Cir., 2001) (lecture)
10. United States v. Deaton, 332 F. 3d 698 (4th Cir. 2003) (lecture)
11. United States v. Newdunn Associates, 344 F.3d 407 (4th Cir., 2003) (lecture)
12. In Re Needham, 354 F.3d 340 (5th Cir., 2003) (lecture)

Coastal, Navigation. and Wetlands Resources Law (continued)

13. United States v. Rapanos, United States v. Carabell (consolidated decision), 547 U.S. 715, 126 S. Ct. 2208 (2006) (handout)

14. “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States and Carabell v. United States”, December 2, 2008, (handout).

15. United States v. Gerke, 464 F.3d 723 (7th Cir. 2006). (lecture)

16. United States v. Johnson, 467 F.3d 56 (1st Cir. 2006), cert denied, 128 S.Ct.375 (2007) (lecture)

17. Northern California River Watch v. City of Healdsburg, 457 F.3d 993 (9th Cir. 2007), petition for cert. filed, 76 U.S.L.W. 3260 (Nov. 5, 2007) (No. 07-625) (lecture)

18. United States v. Moses, 496 F.3d 984 (9th Cir. 2007), reh’g denied. (handout)

19. United States v. Robison and McWane, Inc., 505 F.3d 1208 (11th Cir. 2007), petition for rehearing en banc filed, December 14, 2007. (lecture)

20. United States v. Robison, 505 F.3d 1208 (2007), cert. denied 129 S. Ct. 627; 129 S. Ct. 630 (2008) (lecture).

C. "Constitutional" jurisdictional questions (the nexus to interstate commerce) (Lecture)

1. Tabb Lakes, Ltd, a Virginia Corporation v. United States, 715 F. Supp. 726 (E.D. Va. 1988), aff’d 885 F.2d 866 (4th Cir. 1989) (Lecture).

2. Hoffman Homes, Inc. v. Environmental Protection Agency, 999 F.2d 256 (7th Cir. 1993). (Lecture)

3. Leslie Salt Co. v. United States, 55 F. 3d 1388 (9th Cir. 1995), cert. denied sub. nom. Cargill, Inc. v. United States, 116 S.Ct. 407 (1995). See dissent of Mr. Justice Thomas, citing United States v. Lopez, 514 U.S. 549 (1995), 115 S.Ct. 1624 (1995). (Lecture)

4. United States v. James J. Wilson and the Interstate General Company, 133 F. 3d 251 (4th Cir. 1997). (Lecture)

5. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, supra.

Coastal, Navigation, and Wetlands Resources Law (continued)

D. "Activities" Jurisdictional Questions Under CWA Section 404

1. Avoyelles Sportsmen's League v. Marsh (supra; handout)
2. Save Our Community v. EPA, 971 F.2d 1155 (5th Cir. 1992): some discharge of a pollutant (i.e., dredged or fill material) is required to trigger jurisdiction of CWA Section 404. (Lecture)
3. The Final Rule of August 25, 1993, a.k.a. the "Excavation Rule". (Handout)
4. United States v. M.C.C. of Florida, Inc., 772 F. 2d 1501 (11th Cir. 1985) ("Propeller dredging" constitutes discharge of dredged material under Section 404.) (Lecture)
5. Rybachek v. EPA, 904 F. 2d 1276 (9th Cir. 1990) (Gold mining activities in streams trigger Section 404.) (Lecture)
6. National Mining Association v. Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998). (Lecture)
7. United States v. Deaton, 209 F. 3d 331 (4th Cir. 2000). (Compare this Fourth Circuit decision concerning CWA Section 404 jurisdiction over "sidecasting" with the discussion on that same subject in the Fourth Circuit's decision in United States v. James J. Wilson, supra.)
8. Borden Ranch Partnership v. U.S. Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001); affirmed, 537 U.S. 99 (2002).
9. Resource Investment, Inc. v. U.S. Army Corps of Engineers, 151 F.3d 1162 (9th Cir. 1998). (Lecture only).
10. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", Federal Register May 9, 2002, pages 31129 to 31143 (Handout).
11. Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) (lecture only)
12. National Association of Homebuilders v. U.S. Army Corps of Engineers, (unreported decision of the U.S. District Court for the District of Columbia, Civil Action No. 01-0274 (JR), Jan. 30, 2007)) (lecture)

Coastal, Navigation, and Wetlands Resources Law (continued)

13. Coeur Alaska, Inc., v. Southeast Alaska Conservation Council, 129 S. Ct. 2458 (2009) (handout)

14. Ohio Valley Environmental Coalition v. Aracoma Coal Company, 556 F.3d 177 (4th Cir. 2009) (lecture)

E. Relationship of CWA Section 404 to the Federal Power Act (Monongahela Power Co. v. Marsh, 809 F.2d 41 (D.C. Cir. 1987)); and to other parts of the CWA (e.g., Section 402) (lecture)

F. Statutory Exemptions from CWA Section 404 Regulation (Section 404(f)).

1. United States v. Akers, 785 F.2d 814 (9th Cir. 1986), cert. denied 107 S. Ct. 107 (1986). (Handout)

2. United States v. Cumberland Farms of Connecticut, 826 F. 2d 1151 (1st Cir. 1987). (Handout)

G. General Permits.

1. See the Handout, excerpts from the Nationwide General Permits published in the Federal Register.

2. Programmatic General Permits. (lecture)

3. The discretionary authority to impose conditions on authorization under a general permit, or to suspend authorization under a general permit and to require application for a standard individual permit. (lecture)

4. Ohio Valley Environmental Coalition v. Bulen, 429 F.3d 493 (4th Cir. 2005) (lecture)

5. Sierra Club v. U.S. Army Corps of Engineers, et al., 508 F.3d 1332 (No. 06-16505, 11th Cir. 2007) (lecture)

H. State Assumption of the CWA Section 404 Program. (CWA Sec. 404(g) through (l))

See Letter to the EPA Regional Administrator, Region V, from the Michigan Environmental Council, February 4, 1997. (Handout)

Coastal, Navigation, and Wetlands Resources Law (continued)

I. "Direct, indirect, and secondary effects" of actions receiving Corps permits; versus the "scope of analysis" approach to limit the scope of CWA Section 404 regulation. (See Handout, Appendix B of Corps Civil Works NEPA regulations.)

1. Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985). (Lecture)
2. Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980). (Lecture)
3. Save the Bay v. Corps of Engineers, 610 F.2d 322 (5th Cir. 1980). (Lecture)
4. Corps of Engineers NEPA Regulations, Appendix B. (Handout).
5. Sylvester v. U.S. Army Corps of Engineers, 871 F.2d 817 (9th Cir. 1989). (Handout)
6. Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105 (9th Cir. 2000). (Lecture)
7. Save Our Sonoran v. Lt. Gen. Robert B. Flowers, 408 F.3d 1113 (9th Cir. 2005). (Lecture)
8. Compare: Department of Transportation v. Public Citizen, 541 U.S. 752; 124 S. Ct. 2204 (June 7, 2004) (Lecture)
9. Mall Properties, Inc. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987). (Handout)

J. The substantive decision process and criteria for Corps individual standard permits.

1. Corps Regulations (Handout) 33 CFR, Parts 328, 323, 325 (including Appendices A & B), 326, 330.
2. Clean Water Act Section 404(b)(1) Guidelines, 40 CFR Part 230 (Handout)
3. Louisiana Wildlife Federation v. York, 761 F. 2d 1044 (5th Cir. 1985). (Lecture)
4. Decision Document: Plantation Landing Resort, Inc. (21 April 1989) (Handout).
5. Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986). (Handout)
6. Sylvester v. U.S. Army Corps of Engineers, 882 F.2d 407 (9th Cir. 1989) (i.e., "Sylvester II"). (Lecture)

Coastal, Navigation, and Wetlands Resources Law (continued)

7. John A. Bersani et al. v. Robichaud, 850 F.2d 36 (2nd Cir., June 8, 1988) (Handout). (At what point in time are "practicable alternatives" evaluated under the Section 404(b)(1) Guidelines: Time of "Market entry" versus time of permit application versus time of permit decision.)

8. Corps of Engineers - EPA Memorandum of Agreement of February 6, 1990. (Handout)

K. The EPA "veto" authority under CWA Section 404(c).

1. James City County, Virginia, v. USEPA, 955 F.2d 254 (4th Cir. 1992). (Lecture)

2. James City County, Virginia v. USEPA, 12 F.3d 1330 (4th Cir.1994), cert. denied, 115 S.Ct.87 (1994). (Lecture)

L. The Fifth Amendment "Regulatory Taking" Question.

1. Sections 9 and 10 of the Rivers and Harbors Act of 1899, and the effect of the Federal navigation servitude. Wetlands regulation under Section 10 from 1968 to 1976. (lecture)

2. Section 404 of the Federal Water Pollution Control Act Amendments of 1972. The takings issue as contemplated by the architects of the Section 404 program in the period of 1972 to 1985. (lecture)

3. Penn Central Transportation Co., et al. v. New York City, et al., 438 U.S. 104 (1978). (Handout)

4. Kaiser Aetna et al. v. United States, 444 U.S. 164 (1979). (Handout, supra)

4. Deltona Corporation v. United States, 657 F. 2d 1184 (U.S. Court of Claims, 1981). (Lecture)

5. The rise of "property rights activism" in the Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, the U.S. Supreme Court, and the Executive Branch.

a. Executive Order 12630 (1988), and its judicial antecedents. (Lecture)

b. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987). (Handout)

Coastal, Navigation. and Wetlands Resources Law (continued)

c. Florida Rock Industries v. United States, 21 Cl. Ct. 161 (1990), 18 F.3d 1560 (Fed. Cir., 1994). (Lecture)

c. Loveladies Harbor v. United States, 21 Cl. Ct. 153 (1990), 28 F. 3d 1171 (Fed. Cir., 1994).

d. Ciampitti v. United States, 22 Cl. Ct. 310 (1991). (Handout)

e. Lucas v. South Carolina Coastal Council, 505 U.S. 1003; 112 S. Ct. 2886 (1992). (Handout)

f. Dolan v. City of Tigard, 512 U.S. 374; 114 S.Ct. 2309 (1994). (Handout)

6. The "property rights" issue in the Congress.

a. H.R. 925, the "Private Property Protection Act of 1995".

b. S. 605, the "Omnibus Property Rights Act of 1995".

M. Enforcement of CWA Section 404.

1. See United States v. James J. Wilson (supra;lecture)

2. United States v. Mango, 997 F. Supp. 264 (N.D.N.Y, 1998), 199 F.3d. 85 (2d Cir. 1999); (Lecture)

N. If you wish, you may choose to go on a self-guided field trip to a large wetlands system (Huntley Meadows Park, Fairfax County, Virginia). Huntley Meadows Park is located about a mile west of U.S. Route 1, on Lockheed Boulevard. From the Beltway (Interstate 95), take the exit for Route 1 South, heading toward Fort Belvoir. About a mile south of the Beacon Mall Shopping Center, turn (from Rt.1) west (i.e., a right turn from Rt. 1) onto Lockheed Blvd. Where Lockheed Blvd. takes a 90-degree turn to the right, the entrance to Huntley Meadows Park is on the left.