

Lecture 1 - August 31

environmental law - definition

Overview of course:

1970s started the environmental laws

intro to court system

federal statutes - clean air, water, endangered species

enforcement - criminal, citizens role in bringing law suits

case studies - laws and policies to analyze Chesapeake Bay and West Coast Oregon.

BOOK:

focus on cases in the book

skim questions

good dictionary for law terms: Black's dictionary - KF156.B53 2004

How many branches of fed govt:

3 - executive, leg, judicial

legislative- draft policy, pass laws, enact legislations, statute (law)

they are allowed to pass laws by constitution

commerce clause - allows leg branch to regulate commerce between states, many uses! regulate life - business between private companies, goods, businesses but mostly pollution - Federal issue because it is trans-boundary. almost everything we see in world can be regulated by fed - article 1 section 8

how does a bill become a law:

- house/senate member introduces it, pass it, reconciliation, goes through senate-house, president reads and signs it (can veto it).

laws published in US code: when citing a law it looks like this:

42U.S.C.4331

executive branch:

president

cabinet members

all federal agencies - EPA, interior department (park system, FWS, etc), dep of agriculture (forest service,

registration of pesticides hand and hand with EPA), army corp of engineers - clean water)

enforce law and carry it out. going after polluters and statutes passed by law, regulation is drafted and written by executive branch which expands on statute.

ie:

congress

under clean air act statute

under regulations (passed by EPA or someone like that)

(code of regulation looks like 42CFR1500)

notice and comment period - regulation has to go through this

judicial - federal judicial does authority to interpret const and determine whether law is good, must be a case or controversy to determine pronouncement (lawsuit)

-should make decision after looked facts of case - elected and

- or expertise in executive branches should look at the case?
- or voice of people (legislative) branch should make the law/become involved.

heirarchical court system:

US supreme court is highest court in land - 9 justices (soda mayor - just appointed as a new one (first hispanic, 3rd woman), chief justice and 8 associates, under hear cases from circate courts of appeal (II) (US courts of appeal), under federal district courts (district of maryland).

loose in fed district courts - you can appeal

us courts of appeal can not automatically appeal to supreme court - have to submit a "writ of certiorari" - (Kleppe v. Sierra Club - prosecutor v. defendor)

- SC will take a case when broad implication to country, novel/new issue to SC, determine constitutionality of a law is at issue, when circuit split (2 courts of appeal disagree) then SC will take it.

state govt also plays a role in environmental law: it controls

- environmentally in state and not trans-boundary - usually land use (private property rights - land use and zoning rules - federal laws cannot tell you how to use your land - chesapeake ciritcal area law regulates the land use around the bay ie)
- but very few things not federal issue
- state level issues method: courts of appeals, under court of special appeals, under circuit courts
- sometimes state laws can be stronger than fed law (california emission standards law stronger than federal) but have to at lease abide by the federal law

Common law v. Statutory law

statutory - law passed by congress

common law - judicial branch - judge made law - before 1970s - nuisance law were passed, body of law put together by judges over time which were used and made before.

precedent- using prior knowledge of case studies to determine the outcome of another case

abiding by principle: stare decisis - adhere to a settled point, to follow a precedent (but you don't have to if it isn't in your jurisdiction)

this is how common law is formed for a nuisance

- became inadequate because of cross state borders, and became difficult to determine the culpate

how to read a case:

Chevron v. USA

1. determine plaintiff (chevron) and defendant (USA) - appellee and appellant
2. procedural history:
3. issue or question: one liner
4. analysis: a couple bullet points of what court decided
5. holding: what the court decided - court found that methane gas can be regulated under the clean air act ie

5 biggest environmental problems facing the USA:

BOOK NOTES 9/2/09:

goal between healthy environment and prosperous economy - path for achieving this goal: "sustainable development"

environmental law sprang up from 1960s initial concern

trans-boundary issue

roots in many traditional fields of law- tort, property, constitutional

many argue that it is not changing quickly enough
 too burdensome and restrictive - proposals to reform present structure:
 -devolving substantial authority away from the fed govt to states and localities
 -rethinking basic approaches to preserving biodiversity and protecting wilderness and habitat

-suspending further regulatory action until science answers more of our questions about impact of human action on environment
 -increasing protections for private property by requiring govt to compensate for reductions in property values caused by env reg
 -subjecting all proposed regulatory action to a rigorous cost-benefit test
 -replacing traditional regulation with markets in which polluters can trade rights to emit pollutants, as well as with other new generation forms of reg that emphasize making environmental law more flexible, more cost effective, more reliant on voluntary behavior.

too weak and too slow - swifter implementation and more vigorous enforcement of existing laws are often demanded, but it is also recognized that existing laws can also be improved and must be so that further env progress is to be made.

-crucial issue: design of regulatory instruments that achieve greater env quality protection and improvement.
 -but most calls from polluters for env regulatory reform are actually efforts to obtain regulatory relief

A. environmental problems and progress

-domain: any place where earth is modified by human action
 -old, new, old consequences --> new environmental problems
 -John Holdren and Paul Ehrlich --> I=PAT (impact that human behavior has on the environment results from combined effect of pop size, level of affluence, and type of technologies that enhance our abilities to consume resources)

- gave rise to env issues
- ^ pop ^ adverse health issues
- tech like automobiles pollute!!!
- ^ affluence ^ ecological footprint (measure of human pressures on global ecosystems)
- international level agreements programs aim at reducing adverse environ impacts that human activities have proliferated
- UN Conference on the Human Environment - once a decade environmental summets beginning in 1972
- national and local env efforts as well (agencies as EPA set up in 70s) (\$200 billion a year)
- air + life expectancy ^ since 1972
- per capita footprint now growing at slower rate than pop growth - 1.6 vs 1.8
- WWF believes overshooting our maximum footprint and this leads to depletion of earth's capital stock. US footprint huge and China/India growing!
- late 1980s EPA wrote the Agenda of "Unfinished business" - areas of environmental concern that still require significant attention. --> basically a checklist for policy makers (pg 7)
 - involve catastrophic and irreversible adverse effects across large areas, pops, timeperiods where collective action is necessary to solve them
 - but resistance is often because economic costs are expensive or lifestyle change
 - cause and effect
 - environmental progress will be increasingly difficult as easy problems like rivers on fire from oil are solved

-environmental policy has become much more partisan political issue than in 1970s when passed with wide bipartisan support.

- republians are less likely in congress to support environmental initiatives than dems (esp 1994)
- public opinion surveys in favor of restoring environment to good condition
- environmental quality important goal but disagreements arise from: effective initiatives? too high cost to other values (property rights, econ growth, indiv freedom)?
- costs and benefits fall on 2 diff groups: winners losers: producers downstream
- environmental improvement more and more costly --> diff decision making

B. American environmentalism: sources and values

-Samuel Hays argued that changes in env values are part of a still larger complex of changes in social attitudes and values (disagreement of values the cause for environmental management different opinions)
 -vocabulary used may cause different opinions - env impacts v. problems ie

- american environmentalism comprises a mix of value systems, believes, perspectives, draws on a complex of historical, philosophical, religious traditions
- consensus among environmentalists often falls apart over the question of remedy --> remedial questions often expose underlying value disagreements bc they press advocates to articulate their vision of a properly functioning econ or society. (diff solutions to diff problems)
- environmental values distinguished in diff ways:
 - anthropocentric - human centered, economics generally supports this, ethics and morality seriously insufficient!
 - bio-centered - based on ecology science - now popular
 - eco-centered - based on ecology science - now popular
- Leopold - nothing can function on its own (neither be economically single), the scale of man's actions constitutes its most destructive quality (less violent a man --> less neg effects on enviro)
 - land ethic - diversity and resilience of local ecosystems - started ethical behavior that is not centered on humans
- enviro is ecologically intertwining system
- religion - god as creator "use the land/control it" "domination over creation subdue it"
 - but recently christians have adopted mission to protect the earth --> Evangelical Climate Initiative - against the dying of the poorest global neighbors
- preservationists may emphasize historical continuity, within our culture, our traditions, and our relationships with the enviro
- Emerson, Thoreau, other Transcendentalists/preservationists firmly graft into american literary history the connection bw spiritual renewal and nature so that conception of ourselves will be enhanced - appreciate nature and live in harmony with it
- Muir - creatures over man
- these internal disagreement among eco-bio-anthropocentric addresses an ethic OF THE environment not USE OF the environment - a manageable ethic.
- prominent characteristic of many enviro issues is that they impose costs or risks on indivs that are not of those indivs choosing. (global warming, love canal ie)
 - they may be autonomy not efficiency
- environmental justice movement- challenges current environmental policy to shift to a new paradigm that would emphasize preventing vulnerable pops from being exposed to enviro risks, rather than just managing regulating and dispersing risks - started to address enviro racism just in 1980s
 - disproportionate number of poor bear the burden of the environmental risk distribution - legislation has not been applied fairly across all segments of the pop
 - less access to health care, inappropriate assumptions of vulnerable ethnic and racial groups, live more in "hot spots" - emissions levels higher bc of trading credits
- enforcement is another area in which people of color and the poor fare worse than the general pop --> because of states
- clean up also not fair bc have to compete with rich areas for waste clean up - combatted by brownfields (not very strong)
- public participation by such groups lack resources to participate as effectively in such a highly technical area producing bad decisions that harm public health

LECTURE 2

civil case - private rights and remedies between parties (govt can be a party in civil case), private rights, enforce, judicial review - allows challenging regulation. cited: *Smith v. Jones*. *Sierra Club v. EPA*. *ABC Corp. v. EPA*. *Timber Corp v. DOI*. *EPA (US) v. Smith*.

injunction (shut plant down until come into regulation) or financial cost (monetary penalty) to person/corp ie: exceeding emissions trading limits by company (accidentally)

criminal case - suing you for crime your committed, plaintiff is always government, extremely greivous act that constitutes a crime. cited: *U.S. or State v. Last Name or ABC corp*

penalties involved

What are environmental problems?

- Carbon Emissions- International
- Waste disposal/management - Throw Away
- Loss of biodiversity
- clean water
- water availability
- estuary management
- deforestation
- mountaintop removal- blasting - pollution
- overpopulation - natural resources, pollution
- clean air - p
- coal ash (waste) - p
- soil erosion/quality
- food availability
- renewable energy
- -brownfield(superfund) - pollution
- pharmasytacles/toxology (clean water)
- miseducation
- depletion of global fish stocks - N
- ocean waste - p
- pesticides/toxic chem- p

2 envr needs:

already addressed low hanging fruit - but big massive problems is facing us now
1970s easily supported envr issues because people were scared
now what tools to use more controversial

things that are at stake:

- companies' profit
- farmers and fishermen
- forcing people to change lifestyles
- elected officials
- environmental groups
- property owners
 - different stakes and views on how to address these issues

I = PAT

several characteristics that define environmental problem:

- env probs can be catastrophic damage
- time constraints distance in time and space
- increasingly difficult problems
- transboundary nature of environmental probs - far away people affected
 - where is the source of problem
- uncertainty
- cost benefit analysis - non-human eco POV
- causation
- hard to quantify - hard yes or no answer

Envr values-

anthropocentric- economists views, reducing emissions to keep people from harm instead of just eliminating - efficient outcome that doesn't require any more of tech that is needed, cost benefit analysis
ecocentric - looking at whole ecosystem - seen in NEPA and Endangered species act
biocentric - all living things

preservationists - keep things as are, preserve for intrinsic value, human centered approach ??, started by John Muir
conservationists- teddy rosevelt, pincho - conserve so that have more to use in future, wise use of resources

deep ecology- well being of human and non human life on earth have value in themselves, decreases in human pop, at other end of economic perspective

-thorough and transcendentalists- closer to god when closer to nature

Environmental justice - about social values

- 1978 - 64% of native americans/african americans pop were in area where wastes taken - started this
- in low income areas seen more: mercury, lead contaminants (old paint in houses), risk avoidance: stop eating fish (yet these minorities eat major food source - fish, so difficult to ask this), industrial waste and air pollution more common in these areas (Hot Spots) - instead of retrofitting companies buy more emissions credits. eat cheaper food - lot less healthy

mercury - emitted by coal fire plants - settles onto water - ingested by fish - bioaccumulates
- water quality standards need to be set

Problem exercise: mercury contamination

Q1: yes raises EJ concerns, epa should set up legislation to prevent not treat the problem
it should be based on much higher levels of consumption to encompass everyone

Q2: yes it raises ej concerns because it is discrimination
including everyone

aquaculture

fed programs to provide food

target specific areas

water quality

disproportionate levels across country - hotspots - addressed by having diff local levels of standards in diff areas
widespread - global mercury cycle

air and water - different offices ie in EPA

Lecture 3 - September 9

two themes: general framework : court system, precedent of "stare decisis" - adhering to a specific point following precedent
legislature

environmental law:

uncertainty, risk, space and time removal, value structures influence

Common roots of environmental law: today

-one human's actions interfere with rights of others.

-no law on the books

+so looked to common law - nuisance law and trespass

-important to read old cases is because it is foundation of law and the inadequacies of this law.... develop statutes, if something is not covered - common law can still come in to cover it

- unreasonable interference of someone's use and enjoyment of thier property - nuisance

common law

-distinguished from statutory law of leg created by enactment of congress

-common law is ...

private nuisance

- unreasonable interference with the use and enjoyment of land
- no physical invasion necessary
- must show significant or substantial harm
- side note -tort - civil wrong?
- harder to show this than trespass

trespass

- intentional physical invasion of another's property (intent distinct from knowledge)
- need not show harm or actual damage

how do you decide what is significant harm?

- became inadequacy of common law

- nuisance cases started out strict liability but overtime courts started to balance harm to plaintiff to value of the business as industrialization progressed
 - harder and harder to find the nuisance significant enough

- economic prospective - balance
- strict liability - eco-centered
- moral outrage - strict liability
- cool analysis - balancing

- remedy in these law suits - seeking money damages or an injunction (stopping the behavior)

Aldrids Case - pig sty - first case that showed that air pollution could be a case of nuisance

- nuisance law - preformed a zoning function , created an environmental justice issue (rich can buy lawyers and be far from these bad areas)

First case: private nuisance

plaintiff: people in surrounding areas

defendent: company cooper smiter

facts: pollution from smelters made surrounding area unlivable and nusance law

- money damages yes for people
- court said yes significant harm - but value of company more
- balance - put dollar value on company v land worth 1000 dollars
- crops dying, timber affected
- if stop = worthless state
- court awarded money damages - but they did not accept
- this is like eminent domain
- causation- (one factory and being harmed - not really discussed) and significant harm discussed

Boomer v. - tried to stop pollution as best as can

- economic - conditional injunction - enjoin plan until pay permanent damages and once do this can continue
- retrofit facilities vs. pay damages (hopefully retrofit facility)

public nuisance

- an unreasonable interference with a right common to the public
- brought by govt agencies

+Missouri v. Illinois - suiage into mississippi - chicago raw suiage to mississippi river
Missouri sued for harm (typhoid fever increase)

-Illinois won bc couldn't prove that chicago's suiage was cause to typhoid fever.
(reporting bias, unclean hands - didn't have better water standards and dumping the suage too into river so it may be theirs, and below states then can sue illinois.

- causation - cause is there? didn't even go to balancing
- significant harm - couldn't see any visible pollution in the water

- original jurisdiction starts in this - goes straight to supreme court
- couldn't show bacteria travel that far
- no causation or significant harm
- are judges able to make these decisions on their own - "special master" helpful vehicle for the court - neutral
 - + Georgia v. Tennacy Copper
 - + our citizens of our state being hurt
 - + high smoke stacks
 - + goes into Georgia
 - + court found that fact that plaintiff state was significant and injunction necessary
 - + the harming of significant portion of pop and land - was too costly to provide money damages
 - + injunction issued to Tennacy Copper and stop pollution
 - + court set emissions limits instead of shutting down plant

2 public nuisance cases compared:

- causation and harm in 2 v. 1 (not)
- unclean hands - not Georgia unlike case 1.

- scale - more people harmed in public nuisance v. private, widespread

- + is this right?
- + readdress
- + EJ rights at issue
- + not cut and dry with payments to people for harm

- during last year has brought 2 public nuisance actions brought over CO2 emissions and not brought clean air act (doesn't cover CO2 emissions)

- + automobiles
- + emissions companies

--> problem: pollution out but then jobs out, cars are in state and out of state (causation issue), significant harm - urban areas have more harm (place where harm is most), want to see visible devastation (but scale is long time for this issue).

> both cases dismissed b/c: case can't come before court (art 3) without standing in case, political question doctoring meant to executive or leg branch.

> cases brought to SHOW it is imp issue not get a solution right away

inadequacies of nuisance law

- industrialization favored a lot of times
- money to paid to people or shut down co
- env harm is decades later, preventing (anticipatory nuisance)
- if you own a piece of property and have pollution on it - you are responsible for it - superfund
 - what level or risk should be regulated?

Lecture 4 September 14

common law - roots

- nuisance laws/trespass

six stages

- 1
- state and local law
- using commerce law-
- promoting development out west
- promote commerce not health (no dumping in river because of boat blockage not people)
- 2
- fed assistance for state and local env problems

- states control sewage (fed gave \$) because down stream states helped (states didn't want to benefit anyone but themselves)
- fed involved more b/c transboundary nature pollution, "race to the bottom" - try to get less and less control of pollution where laws restrict business activities (institute leg)
- 3
- rise of env movement - respond to concerns of DDT
- silent spring - rachel carson
- EDF formed
- env groups driving law (fed govt not really involved)
- nat historical preservation act
- 4
- "environmental decade"
- nixon president
- public outpour for env issues
- all fed legislation enacted
- opening up of courts to judicial review and citizen suits - challenge agency behavior or indiv polluters
- draconian application bc such strong public support
- NEPA - envir impact statements, fed agencies have to submit them, procedural vehicle
- RCRA- disposal or hazardous wastes, regulation cradle to grave of always current disposal. transport, storage, lining of landfills.
- (past disposal - SERCLA - to clean waste sites, enables law suits after this to the culprits)
- CAA - NAACT, CWA - technology based standard, national standards but states tasked with carrying them out
- Endangered Species Act- prohibits "take" - applied fed govt to make sure not endangering species and work with FWS for example.
- FWA
- toxic substances control act - chemicals banned but extremely high levels set so not so effectual
- dep interior/ agriculture
- 5
- reauthorizing statues
- strengthening
- penalties higher for violations of law
- emissions trading (with SO2) - acid rain
- TRI - information about toxins etc, getting data out in general - as a tool for making decisions where to live/work and for action force
- 6
- republicans congress take over congress and made hard to pass more env laws
- strucutre being challenged
- reps put things on appropriatios riders (hide things)
- making things harder through requirements through regulatory agencies
- clinton tried to come up with diff ways to make things more accessable
- bush regression
- obama - going farther but health care is going front seat over climate change

overlap bw statutes - pg 95 diagram
is this the best way ? or leads to confusion?

2 kinds of suits that standing will become an issue in?

- judicial review actions - someone wants to challenge some decision of industry
- citizen suits - citizen v citizen, citizen v agency
 - authorize actions by groups against fed govt for failiing to do a non discretionary duty
 - env group brings suit against a polluter

judicial review

- actions for judicial review
 - actions filed to challenge agency ation ei a challenge to an agency decision to go forward with a project, or the agency's issurance of a regulation

- something

citizen suits

- the environmental laws authorize citizen suits against:
 - govt agencies that fail to implement the laws or perform their duties ie set a standard by a certain date
 - govt agencies and private parties who violate the laws (discharging pollutants without a permit)
- case or controversy that comes before to file law suit
 - standing - refers to the case you are bringing and having interest in this/stake

sierra club v. morton

- ski resort wanted to be built and sierra club against this bc part of sequoia nat park
 - but didn't use it so had no standing - no threshold initial issue
 - injury: aesthetic value, recreation, environmental harm
 - can be non-economic
 - can be to a collective not individual
 - "injury in fact" requires that the party seeking review must be among the injured
 - must show that they have members that use the park and would be injured by the ski resort and highway
 - dissent - standing should be conferred on inanimate objects
 - standing must be for inanimate objects
- should have said to have standing: letters from members (affidavits - sworn statements) but didn't use this because tried to get a larger issue addressed - but then court said that could amend to include affidavits.
-can't be concerned about something that is far far away (diff case study)

4 part standing test

- actual or threatened injury from the challenged action/inaction
 - concrete and particularized
 - actual or imminent
- the injury is fairly traceable to the channeled action/inaction (a fairly traceable connection between the plaintiff's injury and the complained of conduct)
- injury is redressable by judicial action (that plaintiff will get some relief for the injury)
- injury within the zone of interests of the statute
(first 3 are in article 3)

- some members must have standing

Massachusetts v. EPA

- massachusetts sued epa bc no emissions standards from motor vehicles and the coast line will flood - global climate change
- epa says that not endanger public health (obama makes endangerment finding finally), can't show causation/addressability
- states are not normal litigants (like georgia v. Tennessee)
- the court says that injury is risk of harm (sea level rise and more to come - standing from threatening future issue)
- said about causation - argued that motor vehicles contributes insignificantly, but court said that it will help global warming in the end because one small step is good to following and solving a big problem
- dissent said that too remote problem - and every bit helped will not help at all (irrelevant)
- court ruled that EPA had resp to regulate this
- more about the personal opinions/values of the supreme court justices influenced 4-5 decision in favor of regulation of co2 and climate change (Scalia was swing vote)

- transfer private law of standing to public law standing over time
 - no one committed wrong against EPA but still could sue now
- standing was based on legal wrong test

Commerce Clause

- article 1 section 8 - in US constitution - defines powers of legislative branch
 - power to regulate interstate commerce (1 of the powers) - regulatory legislation derives from this clause
- judiciary branch article 3 - case or controversy requirement

- regulating consumption and regulation of wheat - enter marketplace and affect price of wheat in interstate commerce (even able to regulate small economic effects) Wickard v. Filburn

- each case upheld until spike down on statutes of commerce clause : LOPEZ
 - put together a gun free school zone - didn't have connection to commerce

three things that can be regulated under the commerce clause: (pg 125)

- channels of interstate commerce (rivers, roads)
- persons or things in commerce (instrumentalities)
- activities that have substantially affect interstate commerce

constitutional challenges to the envir laws

- article 1 section 8 - congress has the power to regulate interstate commerce

-3 categories:

- look up ^

- laws with land-use and species - all of a sudden became questionable
- federal statutes - ESA - prohibiting land-use (limiting development)
 - clean water act - waters of the US - regulates wetlands
 - in SWANK case it did not affect commerce - but...

- const challenge to highway to hospital - ESA used to defend fly - had enough connection to interstate commerce

- taking of red wolves

- cave bugs

- toads

+ rationals:

- + commercial value of species in question
- + commercial value of all species
- + the econ value of prohibited activity (if wolves hurt livestock/farming- people could shoot them)
- + value of tourism
- + scientific study
- + food chain (things eat bugs) ecosystem theory (take one species out of chain affect everything) - (stopping commercial development which also has connection with econ)
- + interstate migration

substantially affects?

- commercial effects of all species - can aggregate effects if economic in nature

- question remains about wheather you can aggregate non-economic effects

- different rationales for upholding ESA

- commercial value of species in question/all species
- commercial nature of prohibited activity (highway)
- effects of overall regulatory program on interstate commerce
 - comprehensive scheme to regulate ecosystems

-ESA of 1973

regulatory process:

law/statute: passed by congress (leg branch) overall goals/requirements that agency has to meet

regulation: agency under executive branch further define or make into policy to reach target area assigned by congress.

Rule making process:

regulation comes into affect by

- agencies had before judicatory hearings - formal rule making process - not very common
- informal rule making more common

steps:

-public notice

-opportunity for comment (about 60 days) (agencies look at comments and see how

affects their decision)

-publication of Final Rule in Federal Register with statement of basis and purpose

(this is when it can be challenged - judicial review)

when group challenges regulation

-have to have standing

-it has to be Final Rule

-exhaust administrative remedies (have to had filed a comment - want to see the concern and have seen suit possibilities)

-ripeness - have to be something happening right now, if it is judicable

-not committed to agency discretion by law - can't sue EPA bc didn't bring lawsuit, you would have to bring your own lawsuit.

diff bw judicial review- challenging agency action or inaction

citizen suit - brought by private parties against govt or private parties

-how much scrutany

-citizens to perservevs. Volpe (pg 173)

- hard look (at) doctrine - not trust all agency info - and that it comports with the law, make sure they consider alternatives, but cannot require to do more than what the statutes says

-Vermont v.

administrative procedure act

-courts are to over turn agency action only if it is arbitrary, capricious, an abuse of discretion, or otherwise no in accordance with the law

- a fairly deferential standard but still allows agency decisions to be overturned

Chevron USA v. Natural Resources defense council

-chevron intervened with original case -

-EPA was supposed to set up non attainment areas - had to define what stationary source - but was not defined in CAA

- was defined stationary source: bubble concept - one facility only need to be regulated

- court of appeals said it was not ok - leg not clear - congress not defined it - it will not improve air quality

- supreme court said that lower courts not job to define stationary source

- created two step analysis

- has congress directly spoken to the precise question at issue:?

- if yes and intent is unambiguous, court gives effect to intent of congress END

- if no, (statued is silent and ambiguous), court asks

-is the agency's interpretation of the statute reasonable and entitled to deference? END

-ambiguity is in eye of the beholder

Lecture

reading court opinion

culminated 15 year effort to control mercury from power plants
mercury is emitted by burning coal - heavy and goes into rivers
methyl mercury - mixed with micronutrients and taken up by environmental - bioaccumulates and gets into us by eating

44 states have fish advisories for mercury

why mercury is not yet regulated? 25 states imposed own requirements on mercury, but derailed policy making enterprise bc executive sabotage regulatory action.

-mercury's first victim of prominence - Alice and wonderland - author had made hats of mercury to make hard - got crazy

- emits in tiny droplets - 60% close by plant - taken up in human food chain - but global mercury cycle is much much worse - china has not taken steps to reduce as much as we have

- but we have not regulated power plants only
- one teaspoon of mercury will poison big lake

- it was a highly charged issue from beginning - EPA dumped it in lap of national academy - group of carefully selected scientists range of knowledge in everything in US

- announced global warming needs to be top priority

- operates by reading its charge very carefully (letter asking if reference dose for mercury is the right number RFD - amount if fed on teaspoon or inhaled so to be ok) mercury affects neurons and neurological development - impedes cognitive capacities

- they convened a panel to figure this out - spent 3 years studying - report said: the pop at highest risk is children of women who eat fish in pregnancy (do not stop eating fish - need the regulation)

- but EPA didn't regulate - acts as if study never even exists - studied remote islands

- four arguments:

- mother nature did this (mercury does do it naturally, ice cores determine that 50% were produced by anthropogenic emissions - IR, cracatova, mount saint helens) coal and indus sources (18%) burning of municipal waste (19%) coal burned by utilites (34%)!!!! major source. (we can take a look at this by fish advisories - least controlled power plants in country surround this areas). we export 20% more than import mercury emissions. persistent as a heavy metal. now huge split in international environmetnal movement - have to act now or catastrophic change or china needs to go first, our posture = we all affect each other and need to take the resp and understand these problems are international. more diff to make progress for whole slew of international problems envir

- china did it

- who knows who did it

- people should just stop eating fish

- public health - 15% of women of childbearing age have mercury dangerous levels, most affected are subsistence fishermen and families - great lakes area - native americans and asian people highest levels. mercury rule uses cap and trade:

- set cumulative tons that are emitted put CAP on it - award allowances. (instead of putting up clean up equipment (pollution control equipment) (scrubbers). but if one has a scrubber and cleans up - has extra allowances to sell to national market. (base line year of performance set up at what plants to determine allowances) (do we sell allowances / or give out for free - mostly - instead of emissions control)

-what was bothering the court: EPA should be directly regulating mercury by requiring cleaning equipment to be put on

-listed - mercury is dangerous! evidence from national academy, bill cinton listed mercury, no cap but pollution control on all plants --> but would have to prove that there is no substantial harm (that clinton is wrong --> but bush admin didn't want to look ridiculous)

-opinion: deploying the logic of the queen of hearts (from const govt perspective it is so imp for congress to play this role bc gave advice in first place - so now need to write a detailed statue) checks and balances - congress rewrote the statute.

(bc congress is so divided they are ineffectual - congress needs to change old laws. its appropriate for executive branch to get in and change laws - consistency affected by interests/

contributions - most laws not touched in 30/40 years ie CAA) - there are constant entreaties to executive branch to interpret these laws. = result is enormous delay

September 23 lecture

RCRA

- 1976 - passed to close final loop hole in enviro law
- subtitle C= hazardous waste
- subtitle D= municipal solid waste
- preventative
- designed to be cradle to grave v. end of the pipe (fix)

1. identification
2. tracking
3. permitting
4. restriction and control
5. enforcement and compliance
 - cost incentive
 - recycling and landfill as last resource

-solid waste definition - pg 354 - ...and other discarded material.

American mining Congress vs. EPA

- waste product reused in processes
- EPA rule considered the product solid waste
- challenge EPA's inclusion of their waste product
- court at plan meaning of RCRA was not discarded material --> decided it was not solid waste "clean and unambiguous"

are in process secondary materials solid waste under RCRA?

- plan meaning v. functional (does substance pose a risk, spill, leaky, storage, transport result (in enviro harm)?)
- statute clear v. statute ambiguous
- who decides if this is part of waste disposal problem?
- final result: only materials destined for immediate reuse in same process (within 90 days) are exempt and not regulated as solid waste

RCRA Hazardous Waste Classification

- hazardous characteristic
- listed waste
- generators determine hazardous characteristics of their own emissions themselves....hmmm

City of Chicago v. Environmental Defense Fund

- fly ash incinerator
- incinerator operators claim exempt in household waste (they burned so exempt) --> incinerators not regulated under RCRA as they are exempt
- court found them not exempt! (treaty, story, disposing of, or otherwise managing)
- it does not say generating and does not cover them in the household waste

(ambiguous language)??
(problem of common sense)?

is ash generated from incineration of MSW considered hazardous waste under RCRA?

- yes, household hazardous waste exclusion does not apply to generation of hazardous waste by facility it only applies to management of waste at facility (treatment, storage, disposal)
- waste brought to them for incineration is exempt and are regulated as generator if ash exhibits hazardous characteristics

Lecture September 28

last class

- proof beyond reasonable doubt
- percentages tests, to thinking about issues
 - not fixed (subjective)
- National academy of science- how committees put together - independent group to evaluate the science
 - national research counsel
 - committees are resp for review
 - balanced point of view
 - make sure that there are no conflicts of interest - no financial stake in result - so rigorous
- screening
 - recently made big report on climate change (next class)

SUPERFUND

- dealing with past disposal sights
- v. RCRA - cradle to grave - preventing waste - enacted in 76
- Love canal triggered it - homes and schools affected by chem company's disposal of haz waste (these things happen to get congress to act - impetus for the law)
- extension common law - who could be responsible
 - like CWA provision of oil spill liability - provides fund to clean up, and sets up liability --> strict liability (liability without fault - used against abnormally dangerous activities) - you do something so dangerous that not need causation, harm etc you are guilty! liable for cleanup
 - why so strict: deterrents - be resp from the beginning in, and make sure there is a fund for cleanup and that it gets cleaned up
- 2 liability provisions of CERCLA
 - creates superfund to pay for clean ups
 - authorizes responses to releases and specifies who will be resp for clean up (liability provisions deterrent effect
 - fear of liability means less waste disposed
 - method to finance clean ups
- taxes on raw materials for industrial processes provided initial funds - CERCLA
- National priorities list (NPL)- website EPA/superfund
 - removal- quick remove!
 - remediation - long term removals (NPL)

CERCLA Liability

- strict liability
- site is a "facility"
- there has been a "release" or "threatened release" (broad definitions) of a haz substance at the facility
 - haz substance is broader definition than RCRA - under more acts
- the release caused the incurrence of response costs
- defendants fall within the 4 categories of resp persons

Who is liable under CERCLA:

Current owners/ operator, owner /operator at time at disposal
Generator / arranger liability
Transporter person - accepts it and transports it

- release - spilling, leaking, pumping pouring emitting discharging escaping into the environment
- threatened release - not defined in the statute. not enough that the substance was just.....

-2 challenges to CERCLA on broad insti grounds:

- impermissible retroactive - can't have something imposed on you retroactively
 - court said that it legit leg purpose - they should have been more resp earlier on

- law challenged on constit ground
 - court found that not against the const

NY v. Shore Realty Corp

- piece of land bordered by 3 bodies of water
- NY cleaned it up and went after SHore for clean up costs
- shore knew waste on land - still bought it after waver denied
- as current owner liable!
- shore argued that they were not the “current” owners at the time of disposal
- there were are a number of defenses in CIRCLA - there was an act or emission by third party - then blamed current tenants
 - court said third party cannot be prior tenant
- tried to use defenses
- there was amendment to protect innocent person

CIRCLA defenses

- act of god, act of war, act or omission of third party
- innocent purchaser defense
 - purchasers without knowledge of the presence of haz substances
 - must make all appropriate inquires to establish that nothing gave you reason to know that the property could be contaminated (need to do your research)
 - also includes govt agency acquiring land through involuntary transfer and acquisition of land through inheritance

liability extended to current owners-

- internalize costs of cleanup -not just getting cheap land
- going after deep pockets

brownfield programs-

encouraging redevelopment in bad sites
amendment to law -

Bona Fide Purchaser Defense

- added with 2002 amendments (small business relief and brownfields revitalization Act) to encourage redevelopment
- only applies to purchases after statute was enacted
- allows a person with actual knowledge of contamination to purchase contaminated property without liability if requirements are met
 - that they do not impede the restoration or response action and fully cooperate
 - that disposal occurred prior to acquisition
 - that person made all appropriate inquiry regarding previous ownership and uses (extend of appropriate inquiry currently in rule-making)
 - excise care and takes steps to stop continuing releases and to prevent future releases

-shore tried to use this - yet know unknowledgeable for this issue

-operator liability - US v. Best foods case

- Best foods - parent under OTT under facilities
- look at owner, operator
- parent own stock in subsidiaries - shield for liability - stock holders are not liable for something that company does
- ”corporate veil”
- no owner liability - best food is not as owner unless piercing corporate veil - corruption/fraud
- could be operator liability - if bestfoods is controlling management of pollution of the facilities - show substantial control

Operator liability

-derivative liability of a parent as an owner for actions of subsidiary - only when the corporate veil is pieced - fraud

-direct liability as an operator - only if the parent manages, directs, or conducts operations spec related to pollution at the facility

-makes you want to turn your head when you know bad stuff is going on (instead of helping with pollution management at a facility)

Generator/Arranger liability

-any person who by contact, agreement, or otherwise ARRANGED FOR DISPOSAL OR TREATMENT, or arranged with a transporter for transport for disposal or treatment, of haz substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such haz substances

-make sure that where you send your stuff is a good place!

-Burlington Northern and Santa Fe Railroad Co v. US Supreme Court

-Shell selling pesticides to B&B and railroads who applies or sells to farms

-all haz waste on B&B

-pesticides are not waste at the beginning

-used to bring in drums but now in bulk --> trucks, but spills always.

-appellate court agreed with EPA - that not resp for this "arrangement" - but mere knowledge is not enough - had to have made intentional steps to dispose. did not have intent that would. SC says not liable (reversing)

Burlington Northern - an entity may qualify as an arranger when it takes INTENTIONAL steps to dispose of a haz substance

-shell must have entered the sale with the intention that at least a portion of the product be disposed of during the transfer process.

-shell was aware of the spills but did not intend that they occur

-took steps to reduce

-mere knowledge is not enough to be held liable

-dissent

-mere knowledge may not be enough, but shell did more than "know"

-controlled the mode of delivery and transfer

-relieving shell of liability is at odds with the purpose of CERCLA which puts liability on those that contribute to contamination rather than taxpayers.

September 30 Lecture

Superfund wrap up

-6107 McKeldin library next class

-on remand in Bestfoods case decided not liable as operator

(parent resp at something at facilities? had to look at state common law or as an operator liability - fraud?)

-generator/arranger liability - in between cases are difficult --> unused useful product (pesticide) Burlington Northern case

-there is a de minimis generator exemption of small generators are exempt as arrangers - ie car repair oil change and disposal

-stricter causation standard - common law - have to show substantial harm, but CERCLA is relaxed cause and connection, broad liability net - covering a lot of people

AIR POLLUTION -

powerplants, factories, car/emissions, burning of fossil fuels, combustion in general

- criteria pollutants - SO₂, org compounds, particulates, ozone, carbon monoxide, lead

- haz air pollutant - mercury

health effects:

- lung problems
- ashma
- breathing problems
- high irritation
- cancer

damage to crops, veg, ecosystem, species

difficult to regulate because transboundary issue
really hard to manage non point source pollution
atm harder to clean up - atm mixes things together

CAA passed in 1963 but main one was passed in 1970 and amended in 77 and 90
-prove significant harm is difficult vs Georgia v. Tennessee

Key Clean Air Act Components

- National Ambient Air Quality Standards - set for the 6 criteria pollutants
- State Implementation plans - how to achieve the standards so write a SIP, if it doesn't do this then the Fed comes in and write one for them
- NonAttainment areas- areas are not in standards
- Attainment areas- make sure - prevention of significant deterioration
- new stationary source standards
- mobile source controls - fed law has control around this except for in CA
- regulation of hazardous air pollutants - ie mercury
- SO2 Emissions trading - Acid rain
- permit program
- enforcement, citizen suits, judicial review

can climate change and GHG be regulated by the CAA?

- co2, methane, etc
- problem w/ CO2 - is it air pollutant that traps heat by IR
- cars, burning fossil fuels causes it
- is it an air pollutant?
 - "air pollutant" means ANY air pollution agent or combination of such agents, including ANY physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes ANY precursors to the formation of any air pollutant, to the extent the Admin has identified such precursor or precursors for the particular purpose for which the term air pollutant is used.

- 1998 - during clinton admin - cannon EPA memo said CO2 is an air pollutant but that you have to find an Endangerment finding
- in 1999 there is a petition by enviro groups/states for the EPA for endangerment
- 2001 NRC/NAS - to do research/report came out saying
- 2003 - EPA denies the petition saying CAA not meant to regulate it, and even if it does- unwise to regulate at this time
- 2005 - lawsuit Massachusetts v. EPA DC Circuit - DC circuit agrees with EPA that EPA doesn't have to regulate it
- 2007 - it was wrong to deny the decision and go back to EPA - Mass v. EPA SC
- 2009 - EPA makes the proposed endangerment finding - GHG endangerer still not done!
 - most likely: congress shoots it down, or a lawsuit will be set in place

-Stevens and other guys said that CO2 was an air pollutant - definition all encompassing (keep use the word "any" and very broad)

CO2 standards for new motor vehicles:

-section 202 states: the admin SHALL by regulation prescribe standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to *endanger public health or welfare*.
(this case used earlier for the issue of standing)

justice stevens says - Welfare defined (broad)
-effects on crops, soil, weather

-stevens said that in 2003 - they didn't follow statutes at all and ignored the issue of climate change
- said could regulate before but now did nothing, did not look back at section 202
- said that it would hinder president, economy etc

Mass v. EPA

-CAA authorizes EPA to regulate if it makes an endangerment finding
-GHGs are air pollutants
-EPA has offered no reasoned explanation for its REFUSAL to decide whether GHGs cause or contribute to climate change.
-policy judgements to do not relate to the endangerment std
-EPA's action was arbitrary and capricious
-remand EPA so that EPA can ground its reason or action or inaction in the statute
-issue an endangerment finding OR
-explain why it is not issuing na endangerment finding under the CAA

Scullia dissented - need to ground decision in statute and not in policy decisions - doesn't have to follow policy regulations/reasons
-but if hold on bc no time limit in statute: against precautionary principle - act before harm occurs

final rule proposed - 22 sept - GHG final goal: EPA requiring sources report amount of GHG emissions- gathering info to tailor regulations (more info, more we can do).

EPA issued an endangerment finding - april 2009 -

- have to be preventative and not wait until danger
- health and welfare look at and then cause and contribute part of section 202
- health - not direct health affects - yet things occur bc of climate change, issues to heat, water born illnesses, welfare to all parts of human life
-concluded that GHGs endanger public health and welfare --> go forward and regulate CO2

-US chamber of commerce is looking for a trial - everyone brings in their scientists and bring the info to the table for comment --> but this is major major delayyyyy

-proposed finding not very compelling - weak - not being able to quantify things - cost benefit not required

Wednesday October 17

Latest developments

-GHG reporting Program - final rule 9/22/09
-only california can seek waiver to request special circumstances , but denied
-CA waiver granted - 6/30/09, other states may follow
-lawsuit challenging waier filed 9/10/09
-action in Congress
-house passed american clean energy and security act of 2009 june - cap and trade program
-senate, introducing kerry -boxer 9/30/09
-international
-deal in copenhagen?

- some people bringing up fuel security - changing for environment not for national security - but usually contradicting each other when one developed. (ie sonar testing and whales)
- House version: if law is enacted, it preempts CAA for regulation of CO2
- Senate version: left out, being used as bargaining chip
 - > everyone wants it, but different view points

New material

NAAQS - set for criteria pollutants

- CAA requires EPA to set NAAQS at the level which “in the judgement of the admin, based on (the ambient air quality) criteria and allowing an adequate margin of safety, are requisite to protect the public health”
- current criteria pollutants - carbon monoxide, sulfur dioxide, nitrogen oxide, ozone, particulates, lead

-NAAQS set by epa by fed, implemented by state by SIPs

difficult for EPA to set standard - most people want no pollution but pollution is inevitable - need to sacrifice a little public health to industry

-science and policy mix

what is adequate safety? what pops consider? many many questions and issues.

Lead Industry Association v. EPA

-challenging NAAQS for lead

-lead industry association was arguing that the levels of NAAQS has has to set standards that are very clearly harmful, rather than changing something in change in body

points:

-court said that it was an adequate margin of safety before adverse effect

-EPA does not have to wait for bad effects - address adequate margin of safety, and always has been lowered criteria

-statute meant to be preventative, not wait for medical certainty, have evidence is enough

- in statute the courts have found that eco considerations play no part in setting the rule, only look at health effects, not costs

- when setting standard cannot think of costs, but yes when implement it (SIPs by states are allowed to consider costs)

non attainment areas for lead - 2 places near lead smelter--> so have SIPs set up , not need regional attainments --> have national standards to avoid the race to the bottom

Lead Industries Assoc. v. EPA (slide online)

A NAAQS for CO2?

-to be a criteria pollutant, its presence “in the ambient air (must) result from numerous or diverse mobile or stationary sources” and its emissions must “cause or contribute to air pollution which may reasonably be anticipated to endanger public wealth or welfare”

-does it meet this standard?

-is NAAQS/SIP framework realistic for controlling GHGs?

-- meets statutory regulations but not possible to regulate as transboundary issue

-CO2 uniform in global atmosphere - everyone would be under non attainment since global levels set the same (if the standard is set lower) or v vsa.

arguments made: expensive

-health based standard - NAAQS

- what is feasible to do - technology standard

Midterm

1 hour

10 MC questions - 2 pts each

8 questions but 6 short answer questions answers - 5 points each - based on concepts

not test on specific cases

stationary sources questioned - on test

georgia vs tennessee copper

nuisance laws

list criteria pollutants and which one is not

lopez case/ commerce clause - understand the challenges to envir law in terms of commerce clause - struck down gun free school zone, how it relates to envir law

main points to come out of case know

refer to cases if can - facts of case

intro materials

notes/readings/powerpoints - nothing not mentioned in class will be on test

MIDTERM

Lecture October 14

Clean Water Act

Waters of the US - what are they? why important?

-discharges into water of US : dredge of fill, point source (pollutant) --> both not allowed

As consequences of polluted waters:

-contaminates drinking water

-disrupts ecosystems

-loss of fisheries

-public health is endangered

-harm to ecosystem and harm to humans

CWA - harms to ecological life mostly deals with

-phenteria - sores on people not just

history:

Missouri v. Illinois - states suing each other - mostly for raw sewage - nuisances - mostly this way addressed waters river and harbors act - navigable waters, meant to deal with obstructions in travel on water (sewage piles)

WWII / industrialization - program allocating money to states to control pollution

- need fed program

state by state still 60

72 - congress passed CWA

ocean dumping act

oil pollution act

coastal act

Safe drinking water act

main purpose of CWA:

-”to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”

CWA

- prohibits discharge of any pollutant to navigable waters without a permit

- point sources must have a NPDES permit (sec 402 of the CWA)

- to dredge and fill in a wetland, must get a wetlands permits (sec 404 of the CWA) (before dredging and filling) (are these waters of the US?)
 - effluent limitations on existing sources enforced through permits - managed at state limit with fed oversight
 - water quality standards - choose designated use and set limit to meet (ie swimming)
 - TMDL s - total maximum daily load - includes point and non-point source pollution
 - non-point source management programs - only really significant in TMDLs - law has no teeth in this - difficult to control
 - citizen suits, enforcement, judicial review - criminal and civil enforcement - discharge monitoring report - report on how much you discharge into water and see if company is abiding by law
- > technology instead of cost benefit analysis approach - bc less complicated (have to go through every source to quantify and there is a lot of uncertainty)

CWA doing its job but needs to do better - need to address non point source pollution

prohibits discharge pollution without permit
98-99 % of water bodies not navigable
where comes up the most section 402 and 404

cycle nutrients, flood control, habitats, toxins buffer for pollutants --> wetlands imp
when can fed jurisdiction stop? --> Riverside Bay View Case

- proximity of wetlands to navigable waters - wetland is water of US?
- filling in wetlands to build on developments -
- arguments - "adjacent" to wetlands but no physical connection
- army coop of engineers worked together with EPA
- final supreme court said that jurisdiction did extend to adjacent wetland and developers needed permit --> said this because did chevron analysis and found the statute to be ambiguous (wording of US), looked beyond language in second stage and looking in intent and background
- emphasized importance of water moves in hydrologic cycles: impacting and surviving as buffer/habitat
- allowing jurisdiction of wetlands - decision

(things that connect to each other is important - set this idea and referred to this case)

Navigable Waters

- these defined as "waters of the US"
- applies in NDPES (national pollutant discharge elimination system) point source context and in dredging and filling of wetlands but questioning scope of "waters" arise mostly in wetlands context

Riverside Bayview Homes

- corps has jurisdiction over wetlands that are ADJACENT to navigable waters
 - EPA and Corps interpretation is reasonable and entitled to deference - technical expertise
 - covers adjacent wetlands, even those that may not be regularly flooded by conventional waters
 - statute and legislative history evidence a broad ecosystems approach and awareness of the
- interconnectivity of the hydrologic cycle
 - wetlands play key role in maintaining water quality
 - here the wetlands actually abutted the waterway

Riverside Bayview Homes

- court adopted a Functional Approach
- BROAD interpretation of navigable waters- "navigable" has limited importance

-in early 1980s there was two cases brought up LOPEZ and filling of wetlands used for migratory birds (not adjacent to waters) pg. 657 book

Questions of this:

is whole law - CWA strikable down?
is it in jurisdiction of corps, etc?

- habitat for migratory birds - artificial wetland created by accident (significant nexus (link) between on navigable water and wetlands)- and one company want to create landfill
- unlike bayview - migratory bird rule exceeds scope of CWA
 - isolated not adjacent
 - seasonal
- when chevron analysis - unambiguous - these are not US waters, cannot defer to agency's interpretation - in-
hinging on states rights to interpret issues, close to shaky constitutional grounds

SWANCC

- post Lopez
- corps exceeded its authority under the CWA by extending jurisdiction to isolated wetlands used as habitat for migratory birds
- RBH involved waters inseparably bound bc it abutted the waterway - there was a significant nexus bw the wetland at issue and navigable waters
- court will not construe a statute in a way that could present constitutional issues or impede areas of traditional state of local concern
- corps' jurisdiction does not extend to isolated wetlands where only connection is migratory birds
- cannot read the word navigable out of the statute

SWANCC

- non functional approach
- no deference to agency interpretation
- does not find CWA unconstitutional but raises concerns

--> functional approach (bayview) vs. non functional approach (swancc) (didn't bother to look at ecological effects - just wording)

(-corp should not extend its jurisdiction to artificial wetlands - i don't think its correct)

after SWANCC case - a lot of litigation came up when people said that jurisdiction should not be on their lands

Rapanos case

- adds confusion
- facts: criminal charges brought against him
 - 175 acre in michigan - wetlands connected to 100 year old manmade drain which eventually flowed into lake (10-20 miles)
 - decided to start clearing - even though not had permit - but said that not CWA wetlands (ignored cease order)
 - noted case daniel boll (tried to say not physically navigable with boat - which court rejected)
 - court - no majority, plurality (less than 5) with 4 justices decision (split equally), 1 concurring opinion - remanded to lower court , but have different approach, and 4 dissenting
(not need to know what a plurality is on test)

Rapanos, Plurality

- wetlands connected to drain which drained into a creek - wetland adjacent to non-navigable water - 11-20 miles in between wetlands and navigable water
- court adopts webster's dictionary definition of "waters" - water as found in streams and bodes of water forming geographical features such as oceans, rivers, lakes
 - navigable waters must have the permanent presence of water
 - this definition is respectful of state rights with respect to their water resources
- rejects idea that ecological considerations alone should be relied upon
- high cost to landowners brought up - but not relating to CWA - so forgotten

-states actually brought amicus brief "friend of court" supporting side of the corps where the states say they do not have/want jurisdiction on this (against the plurality) --> paradoxical

2 questions here on remand:

-is the adjacent water a "water of the US" - a permanent, continuous flowing body of water
-does the wetland have a continuous surface connection to that water, making it difficult to know where water ends and wetland begins.

-if yes, there is jurisdiction - permit required
-wetlands with only an intermittent, physical remote hydrological connection to "waters of the US" lack the necessary connection and cannot be regulated - no permit required
(non functional approach - not looking at ecosystem importance etc etc)

review:

- adjacent wetlands - yes waters of US

-isolated wetlands - no

-then Rapanos case:

-plurality adopted textuality approach - permanent/flowing water and wetlands had to have some sort of connection to water

2 questions: is the adjacent water (the drain) a "water of the US" / flowing body of water and continuous connection where difficult to determine where stop and begin?

Rapanos, Kennedy Concurrence

- plurality adopted the wrong approach - question is whether the wetland has a SIGNIFICANT NEXUS with the navigable water, if so, it can be regulated.

- must assess this on a case by case basis

- plurality's requirements of a surface connection and a continuous flowing body of water ignore purposes of the Act

- should take a functional approach looking at the purposes of the Act (first slide/ biologically protect)

liked kennedy's opinion (significant nexus) better than plurality but said that need to defer to EPA to get facts:

Rapanos, Dissent

- Defer to EPA/Corps judgement

- should not be on a case by case basis- should rely on the general determination by EPA and the Corps that wetlands adjacent to non-navigable waters have impacts on water quality

plurality - textual argument

kennedy - case by case functional approach

Dissent - functional approach - deferring to EPA

how do you put all these opinions together? (melding together the opinions)

look at nexus test and surface connection, and EPA came out with guidance doc (which is not law, but guide how jurisdiction should be established) in 2008.

-test question based on what you think the rules are a scenario - significant nexus (wetland's functions), permanent surface connection, permanent flow know

all confusion with the word "navigable water" should congress just amend the word and tell what you want to mean?
--> no, bc if no link to interstate commerce than have constitutional issue (ground water, surface water, etc?) harder to pass too

October 19 Lecture

Endangered Species Act Overview

Guest Speaker: Wildlife Marine Resources Section:

most in DC

ESA:

section 7 provision - puts obligation in Federal Agencies

Why do we protect species?

- keystone species
- environmental / ecological importance
- recreation
- education
- aesthetics
- cultural - indian island tribes - built around fishing/hunting/plants special
- moral reasons ("custodian")
- TVA v. Hill and Gibbs discussion

Who's in Charge:

- secretary of interior (FWS) - jurisdiction over terrestrial and freshwater species
- secretary of commerce (National Marine Fisheries Service) - jurisdiction over marine species
- what about anadromous species? (freshwater/saltwater species - spawning and living)

sometimes interior and commerce have competing views on how a project proceeds - have to reconcile their differences and issues opinions

What are we protecting?

- animals (mammals, fish, birds, amphibians, reptiles, mollusks, crustaceans, arthropods) and plants (no insects!)
- "endangered" means any species which is "in danger of extinction throughout all or a significant portion of its range"
- "threatened" means any species which is likely to become endangered within the foreseeable future

Who can bring suit?

- the ESA contains a "citizen Suit" provision, that allows any person to commence an action on their own behalf to enforce the provisions of the ESA
- Environmental interests, industry groups, and the government can all initiate an action under the ESA (provided certain other requirements are met).

How?

- section 4 Listing Process - how species get put on list, warrants protection?
- section 7 Consultation Process - federal agencies are on hook for ESA compliance
- section 9 Take Provisions- prohibits the take of species - affirmative prohibition of killing/harassing species
- section 10 Habitat conservation plans - applies to private entities that want to get insulation from section 9
- criminal penalties

Section 4

- typically - petition filed to list (or delist)
- 90 day finding ("to the maximum extent practicable") as to whether petition presents "substantial scientific or commercial information that the petitioned action may be warranted"
- if a positive 90 day finding is made...

petition process is very slow, litigation drives whole process (leaving out another species bc of time)

12 Month Finding is made

-the secretary shall determine whether any species is an endangered species or a threatened species because of ANY/ of the following factors (based on the best available scientific and commercial data):

Section 4 Listing Factors

- the present or threatened destruction, modification, or curtailment of habitat or range;
- over-utilization for commercial, recreational, scientific or educational purposes
- disease or predation
- inadequacy of existing regulatory mechanisms
- or other natural or manmade factors affecting its continued existence

Section 4 Continued

- critical habitat is also to be designated at this time (usually down the road)
- critical habitat is the specific areas within the geographical area occupied by the species at the time it is listed which are “essential for the conservation of the species”
- **CH designation is the only time balancing of interests comes into play (the secretary may exclude any area from CH if he determines that the benefits of such exclusion outweighs the benefits of designation - unless extinction will result)
- (moratorium on defining critical habitat process because - not listing CH since Northern Spotted Owl v. Lujan, overwhelmed for ch)

Section 4 Continued

- candidate process also exists if Secretaries determines if some species is in bad shape and decides to take up issue
- in reality, the section 4 process is driven by litigation and court-ordered deadlines
- budgetary restrictions/1996 Congressional moratorium

ESA - decision needs to be made on the best commercial and scientific information

definition of harm was changed under ESA from harm to significantly harmed or killed (changed it to be more drastic)

Section 7

- 7(a)(1) - conservation measures; affirmative obligations on fed agencies (do good things to for species)
- 7 (a)(2) - inter and intra - agency consultation

Section 7 (a)(2)

- “each Fed agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered... or threatened species or result in the destruction or adverse modification of [critical] habitat..”
- applies to dep of trans, energy, postal service ---> all fed agencies

Section 7 Consultation

- can be informal or formal
- biological assessments are not always required, but are frequently done to define scope of the consultation (by fed agency)
 - more often to be crafted when “may affect” “likely to adversely affect” and want opinion of fed agency

Section 7 informal consultation

- what critters are present? (agencies have internal scientists as well)
- no affect/may affect determination
- if “no affect” - done
- if “may affect” - then determine whether its “likely to adversely affect”?
 - if no, get concurrence from FWS/NMFS- done
 - if yes, then... formal consultation

Formal Consultation

- requires preparation of a biological opinion by FWS/NMFS to determine whether the proposed action is “likely to jeopardize the continued existence” of the species
- if “jeopardy” opinion is reached, develop “reasonable and prudent alternatives” (RPAs) to enable project to go forward

Consultation (side note)

jeopardize	not jeopardize
RPA	Done

What’s in a BiOp?

- proposed action
- status of the species

- environmental baseline
- direct, indirect, cumulative effects
- effects of the action
- conclusion
- RPA (if necessary)
- ITS (if take is anticipated) - (which is like a permit allowing the agency to go forward with their action as long as they follow the measures set forth in the biological opinion.)

What's an ITS?

- exempts the action agency from Section 9 sanctions for "takings" that result from but are not the purpose of, carrying out an otherwise lawful activity conducted by the federal agency or applicant
- ITS must specify the impact on the species of those takes, measures to minimize the impact, and how those measures should be implemented

Section 9 Take (harm is in take)

- the ESA defines take as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct"
- sweet home- upheld Dep of interior's definition of within take which harm does include significant modification - finished final definition of harm

Other Notable Provisions

- Section 7 (d)- allows agencies to proceed with non-jeopardizing activity pending consultation
 - not really sure what is meant by a "resource" - is it money spending or is it the tree?
- section 7 (e) - creates the "God Squad" - secretaries can be convened for reasonable and prudent issues but never been called on to do it
- Section 10 - creates the HCP process - when need federal permit/action joe needs to proceed with construction - federal hook - not need this if your action is private
- Section 11 - citizen suit provision

Case Studies

- Navy Sonar
 - Marine Mammal protection act
 - National Marine Service examines proposed activities of sonar testing
- Polar Bear Listing
 - Climate change has been used for basis for species listing
- Water system litigation (columbia River, Colorado River, Klamath Basin, ACF, OCAP/CVP) - chopped up salmon
 - sucking up species to water oranges in CA, vs right of salmon, vs indians
- fire retardants
 - using chemicals to stop fires - clean up after the fact
- gray wolf, grizzly bear reintroduction

Other ESA points

- listing v. Critical habitat
 - listing based solely on best available scientific data
 - critical habitat economic consideration and balancing as well as scientific data
- section 7 v. section 9:
 - section 7 - agencies have to make sure their actions do not jeopardize species
 - action agency (takes its action) and dep of commerce (NMFS - for marine species, anadromous species) or dep of interior (FWS - the fed agency consults with terrestrial/freshwater species)
 - section 9 - private people taking, incidental take permit
- ESA v. NEPA comparison - both statutes that *****
 - ESA - procedural and substantive provisions
 - NEPA - procedural (EIS)
- TVA v. Hill Case
 - huge enviro case

- snail garder and it eats snails
- dam was almost completed, before any suing
- sued under NEPA- envir impact statement - under section 7 had to prove that not jeopardize species - so yes it would be irradiated
- SC said that it is priority over dam - issued injunction by section 7 (looked at language of statute and legislative history)
 - ESA section 7 is an "affirmative command" that "admits of no exception"
 - ESA was meant to half the trend toward species extinction "whatever the cost"
 - priority of endangered species over the primary mission of federal agencies
 - injunction issued- value of endangered species "incalculable"

>>(balancing in this case (like under nuisance) was not taken into account because the species is more important)

invoked the God Squad - ES committee made up with cabinet leaders
 appropriations rider was issued in the bill - so it did go forward and this is why.

treated exact same same (section 7 and section 9): (unless secretary makes comment)
 endangered - definition - extinct in all or significant range - disputed before in congress (hundreds of years ago or narrow it) (historic or current range)
 threatened - lesser

October 21 Lecture read book!

wildlife agency writes the biological assessment (ie fish and wildlife, NIMFS)
 action agency is fed agency doing the project (like army corp of engineers, dep of defense, TVA)

CWA

- prohibits the discharge of any pollutant to navigable waters without a permit. (NPDES section 402 for pollutants, section 404 for dredge and fill material)
- discharge of a pollutant - any addition of any pollutant to navigable waters from any point source
- pollutant - dredged spoil, solid waste, incinerator residue, sewage, garbage, chemical wastes,...etc

CWA, continued

- point source - any discernible, confined and discrete conveyance, including BUT NOT LIMITED to any pipe, ditch, channel, tunnel, conduit, well, ... concentrated animal feeding operation... from which pollutants are or may be discharged.
- navigable waters- waters of the US

Court case:

everglades water flowed as sheet south naturally - but people altered the environment by building canals and bring water to other lands/farming.

S9 pump needs a clean permit? -- discharge of pollutant phosphorous

is it a:

-addition of pollutant - everyone agreed that if it is all one body of water, you do not need a permit, is C-11 canal the same as WCA3 body of water?

-district court remanded to determine if distinct bodies of water

-point source- court said it was, S9 pump is a *conveyance*

water management facility was pumping water into canal

SFWMD v. Miccosukee Tribe (point source case)

- phosphorous is a pollutant
- waters are navigable waters
- pump is a point source - the point source need not be the original source of the pollution, it need only convey it.
- discharge of a pollutant:
 - if one of water, no permit needed

- if 2 separate and distinct bodies of water, may or may not need a permit depending on whether you adopt the “unitary waters theory”
- COURT remands for factual development on this issue without adopting or rejecting the “unitary waters” theory

Unitary waters theory

- all navigable bodies of water should be treated as one for NPDES permitting requirements, thus a transfer from one to the other is not an addition and not subject to NPDES permitting requirements
- if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not “added” soup or anything else to the pot.” SC in *Miccosukee*
 - under the theory, navigable waters are one pot rather than a number of separate pots

SC remanded and see if it is separate body of water of US

Unitary waters theory (rule adopted)

- the theory has been rejected by lower courts and those courts have found that these types of water transfers DO result in an addition of a pollutant constituting a discharge (theory here)
- but, June 2008 Water Transfers Rule adopts the unitary waters theory and so far it has been upheld in court (Rule here, deference applied)

to be point source you do not have to ADD pollutant - conveyance
unitary waters theory - not concrete - but EPA does have rule that transferring water from 1 body to another does not require permit (if not subjecting this water to something else)

Case (look in book)

- co owner of blood testing lab and dumped into Hudson River, some children found Hep B infected blood in vials, can we use CWA against him, is he a point source?
- criminally prosecuted and convicted
- he’s challenging that he is a point source “ i am not”, and if CWA applies to him
- court found that he is NOT point source - bc not industrial source, ambiguous:
 - point source: any discernible, confined and discrete conveyance, including BUT NOT LIMITED TO any pipe, ditch, channel, tunnel, conduit, well, ...concentrated animal feeding operation.. from which pollutants are or may be discharged.

-dissent said this should not apply bc discrete conveyance by person into water, he wasn’t applied to point source, ambiguous

Wetlands regulation and 404

- the definitions of dredge and fill material and pollutant determine whether 402 or 404 is applicable
- dredge material is material that is “excavated or dredged from the waters of the US”
- fill material is material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body”

Coeur Alaska

- ⌋ **If tailings are regulated as fill material under Section 404, then Section 402 and accompanying standards (new source performance standards) DO NOT APPLY.**
- ⌋ **Chevron analysis: Statute is ambiguous because neither section refers to the other. Go to Step 2 and defer to agency Memorandum.**
- ⌋ **404 applies and permit can be issued if that determination is made on remand.**
- ⌋ **Result? Are they gaining immunity from pollution control by labeling the material “Fill?”**

Wetlands identification

- soil
- vegetation
- hydrology

Wetlands permit process

- alternatives analysis
- mitigation

Lecture October 26

Outline

- NEPA generally
 - obligations
 - court interpretations
- when must an EIS be prepared?
 - major federal action
 - significantly affecting the quality of the human environment
- is the EIS adequate?
- how well does NEPA work?

NEPA Generally

- ✓ **NEPA creates judicially enforceable duties and mandates a certain decision-making process (Calvert Cliffs)**
- ✓ **EISs must be considered, not merely written and put in a file. (Calvert Cliffs)**
- ✓ **Must consider impacts at every stage of the decision-making process (Calvert Cliffs)**
- ✓ **Procedural duties (Strycker's Bay, Public Citizen)**
- ✓ **Does not mandate substantive results or require that environment get determinative weight (Strycker's Bay)**
- ✓ **Must consider environment in decisionmaking (Strycker's Bay)**

Calvert Case

Hudd Case

- low income housing project
- socio economic effects would have
- Hudd said that done analysis but if proceed then too long delay
- "picked wrong one" - if at least considered c/b analysis and consider them, you do not have to pick most enviro friendly one
- triumph of process over substance --> NEPA can't stop a decision from happening BUT can delay to the point that agency stops/abandons its action out of frustration (paper pushing exercise)

NEPA similar to ESA

- have to write impact statements

ESA and NEPA differences

- procedural and substantive (consult and act on) -- ESA
- NEPA procedural
- NEPA applies to Fed and private parties that require fed approval
- ESA you are liable as private citizen and enforcement aspect, as well as fed

The NEPA Process

- if it unclear whether an EIS is required, agency prepares an environmental assessment (EA)
- environmental assessment (EA) includes:
 - brief discussion of the need for the proposal
 - alternatives
 - environmental impacts of the proposed action and alternatives
 - list of agencies and persons consulted
 - "this is known as a mini EIS"
- after EA, agency will issue EIS or FONSI (Finding of No Significant Impact)

a lot of categorical exclusions --> usually big projects to do EIS

When must an EIS be prepared:

major fed actions:

- proposal legislation - not many EISs done for this
 - rules, regulations, interpretation adopted
 - plans adopted
 - approving of construction projects

significantly affecting the quality of the human environment

When is an EIS required?

- ✓ **An Environmental Impact Statement (EIS) is required for "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment"**
- ✓ **Major federal action**
 - **Includes private projects that require federal approval**
- ✓ **Significance**
 - **Context and Intensity**

Significant? (pg 895)

- context
 - national v. site-specific, society v. local. short v. long-term
- intensity (pg 895)
 - both beneficial and adverse impacts
 - does it affect public health or safety
 - unique characteristics of the geographic area- proximity to resources, parklands, farms, wetlands, etc.
 - effects likely to be highly controversial
 - uncertain/unknown risks
 - precedent for future actions
 - cumulative impact
 - scientific, historical, cultural resources
 - endangered species
 - does it threaten a violation of other fed law

Public Citizen - significantly affecting - (NAFTA case with mexican trucks)

- moratorium on mexican trucks entering US bc not same pollution standards
- this violated NAFTA so bush lifted moratorium
- FSMCA no pollution control
- no EIS not required bc said EA done and major fed action bc have no authority with pollution and president mandated rule.
- court said that EIS not needed: (not served the 2 NEPA questions)
 - is there a decision to make?
 - informational purpose?

basically cannot do anything about it --> EPA would have to deal with this

it IS a significant (according to guidelines above)

seen as setback to NEPA

-->cant control pollution and president ultimately decides to lift the moratorium
EPA would need to require the EIS.

When is an EIS required?

- effects (what effects are to be considered when deciding whether to prepare an EIS?)
 - on the human environment
 - requires reasonably close casual relationship bw the affect (air pollution) and the alleged cause (regulation allowing mexican trucks).

- rule of reason

Contents of an EIS

- a summary of the proposed action
- purpose and Need for the action
- description and comparison of alternatives
 - bounded by notion of feasibility (vermont yankee)
- a description of the affected environment
- analysis of the Environmental Consequences and Alternatives

Vermont Case?

October 28 Lecture

- NEPA would never allow GHG emissions to be regulated
 - would have them think about it and assessed
- problem exercise:
 - EIS call for considerations of 5 different impacts:
 - direct operational impacts
 - electricity purchased
 - transportation - goods and people
 - construction materials and construction equipment at site
 - impact of climate change
- problem exercise: NEPA and Climate Change pg 910 (answering questions)

Winter Case - Navy Sonar case (on blackboard)

- sonar technology - harms whales
- deal with wanting to prepare EIS bc only did an EA - said by enviro groups
- marine mammal protection act had already granted exemption
- needs to be a preliminary injunction - stop it until determine if EIS is needed or not.
 - court needs to balance when decide whether to issue injunction or not
 - so court issues 6 restrictions
 - navy said didn't like 2 restrictions
 - so went and asked for special circumstances:
 - NEPA Emergency Circumstances
 - "where emergency circumstances make it necessary to take an action w/ sig enviro impact w/o observing the provisions of these regulations, the fed agency taking the action should consult with the Council about the alternative arrangements. agencies and the council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. other actions remain subject to NEPA review."
- court denied this
- preliminary injunction
 - elements plaintiff must prove:
 - plaintiff is likely to succeed on the merits
 - plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief
 - balance of equities tips in Ps favor
 - injunction is in the public interest
- harm to marine mammals outweigh the harm to navy
- did not balance properly (irreparable harm issue) and didn't take into account the professional opinions
- EIS supposed to happen before starting activity, and if this had been done, it would have been sued for not enough analysis probably
- why not use low frequency sonar? --> not as effective

next class discuss:

citizen suit cases
Lujan case (enjoy foreign species)

November 2 Lecture - citizen enforcement

important things

Winters issues :

- preliminary injunction and standard - so bad that you need to issue injunction right away
- whether to prepare an EIS - navy didn't seem as significant, but in end did make one (after the fact)
- timing EIS - do it before the action, navy did one bc got sued (but it is to inform the decision to choose best option)
- emergency circumstances- national security in this case
- national security - determines HOW we implement enviro law and its effects on nat security

Morton: standing is important:

- it is threshold issue! to sue
- in what instance can citizen challenge the land that they use but not know
- citizen enforcement of environmental laws

difference bw:

judicial review - when citizen brings suit - review decision that is already been made that is not in line with the law - review action that agency took
citizen suit- when citizen brings suit - brought as enforcement vehicle (act as private attorney general), and requiring an agency to do their duties

Judicial Review

- actions for judicial review
 - actions filed to challenge agency action, ie a challenge to an agency decision to go forward with a project, or the agency's issuance of a regulation
 - each enviro statute has a provision setting forth the requirements

Citizen Suits

- the enviro laws authorize citizen suits against:
 - govt agencies that fail to implement the laws (ie set a standard by a certain date)
 - govt agencies and private parties who violate the laws (discharging pollutants without a permit)
 - authorize any person to commence an action against any person alleged to be in violation of environmental laws - act as "private attorneys general" (supplement govt actions)
 - usually require 60 days notice to alleged violator prior to filing suit
 - suit is barred if federal or state authorities are diligently prosecuting an action

Judicial Review and Citizen Suits

- citizens can sue in both contexts (environmentalists, industry groups, etc)
- plaintiffs must prove that they have standing in both contexts

pg 1071

4-part Standing Test - (first 3 are constitutional - derives from article III)

- actual or threatened injury from the challenged action/inaction
- the injury is fairly traceable to the challenged action/inaction (a fairly traceable connection bw the plaintiff's injury and the complained of conduct)
- the injury in fact is redressable by judicial action (that plaintiff will get some relief for their injury)
- the injury is within the zone of interests of the statute

- not constitutional but prudential - able to be altered by congress:

Scalia is openly hostile to enviro and thinks that standing should be very narrow, unless people can show these exact injuries

Sierra Club v. Morton

- Aesthetic and enviro harm can be an injury in fact, but "injury in fact" requires that the party seeking review be among the injured

Lujan v. *Nat wildlife fed*

- Case challenging action of bureau of land management - must prove use the land where the challenge occurred
- no one goes to area, and requires must go to middle to "use it"
- beginning of what sculia makes the standing requirement really strict

Lujan v. Defenders of Wildlife

- challenging that section 7 did not apply to overstates action
- Nile crocodile, Sri Lanka - leopard --> people concerned about animals and fed action against them
- sculia said that just interest in it is not standing
 - must show injury actual or immanent and no plans to return (if had home/plane tickets would be different - but only some day plans)
 - said ecosystem nexus argument - is bogus because then everyone in world displaced will worry about the enviro problems around the world

overall he rejects:

- some day intentions not enough
- rejects ecosystem nexus argument
- animal nexus - desire to view animals
- vocational nexus - study species

Lujan v. Defenders of Wildlife

- injury must be actual or imminent
 - "some day" intentions to return not enough, must have concrete plans
- rejects ecosystem nexus theory (if you are there)
 - despite language of ESA itself about the ecosystems
- rejects vocational nexus theory (job)
- rejects animal nexus theory

Kennedy

- protect enviro under strict standing requirements is difficult

how do we draw this line?

Citizen action against NPDES permit violation

in 80s the citizen enforcement was stronger than fed govt

Lujan v. Defenders, Dissent

- wrong to demand such a particularized showing of harm
- wrong to require rigid geographic nexus
 - many environmental injuries cause harm far from the area immediately affected

after Lujan v. Defenders

- courts started to require enviro harm directly as well as harm to plaintiff

Steel Co v. Citizens for a Better Enviro pg 1084

- EPCRA requires them to report toxic emissions
 - filed 60 day notice while violating then start to comply and then a complaint issued
 - past injury
 - court says injury is not redressable because started complying before the complaint was filed
 - injunctive relief does not work, declaratory relief not work, civil penalties don't redress the injuries bc go to us not you.
 - injury to enviro not to plaintiff

Laidlaw

- CWA
- 60 day notice then complaint filed they start to comply and then judgement in DC
- 900 mercury violations
- completely past violations ongoing continuous violations
- award civil penalties \$400,000 but assessed penalties really was a little above \$ 1 mill
- civil penalties are redressable (ultimately decided)
- court comes in and says "moot" (controversy is not there anymore - not anything for court to decide)
- look at harm on plaintiff (not swimming fishing) this is imp injury
- thinking not just about \$ goes to US treasury, you get knowledge that this deters them and punishes them (companies)

Citizen Enforcement Actions injury in Fact in Laidlaw

- the relevant showing for article III standing is injury to the PLAINTIFF, not injury to the ENVIRONMENT
- injury in fact = use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity

Redressability and Civil Penalties

steel co.

- EPCRA
- wholly past violations
- defendant came into compliance after 60 day notice but *before* complaint was filed

- holding: neither civil penalties nor injunctive relief remedied the issue

laidlaw

- CWA
- continuing violations
- defendant came into compliance *after* the complaint was filed

- holding: civil penalties serve deterrent effect and will redress ongoing or future injury

Implications/Juxtaposition of Steel Company and Laidlaw

- standing to seek civil penalties will be denied if the violator has come into compliance by the time the suit is filed. (fed govt can still enforce during this time) - REDRESSIBILITY
- creates a powerful incentive for violators to come into compliance when they receive a 60-day notice letter
- a violator who receives a 60-day notice letter knows that if he comes into compliance before the citizen suit is filed, he will be able to defeat plaintiffs standing, but if he does not do so, he will be unable to escape civil penalties if he later complies.

Key Points in Laidlaw

- standing
 - INJURY in FACT - injury to the plaintiff, not injury to the enviro
 - REDRESSABILITY - civil penalties can redress violations that are ongoing at the time the suit is filed
 - an allegation that members of a plaintiff organization who live near or use an area in proximity to illegal discharges have changed their behavior as a result of reasonable concerns about the discharges should be sufficient for standing.

Key Points in Laidlaw

- mootness
 - defendant's voluntary cessation of illegal conduct is not enough to moot a case
 - must show that subsequent events make it absolutely clear that the challenged behavior could not reasonably be expected to recur - heavy burden is on defendant

Summers v. Earth Island Institute

- court's latest pronouncement on standing
- didn't need to go through process of notice and comment etc if the area is smaller timber harvest
- groups still wanted to have time to comment on it
- district court entered preliminary injunction
- plaintiffs settled but still wanted to have say in future harvests

- scalia looked on burnt ridge project / said it was finished case then said that must point to exact place of use etc (gps coordinates)
- descent said that : requiring where going to exact site where sale going on, was ridiculous
- court is disarray over this issue

Summers

- court denies standing to enviro groups to challenge Forest Service regs
 - Scalia majority opinion goes back to defenders approach and requires:
 - specific plans to visit the exact parcels where the regulations will be applied
 - very rigid view of standing adopted
- sharp dissent shows that Court is deeply divided on the issue of standing
 - there is a realistic likelihood that the challenged conduct will recur and harm plaintiff
 - do not need precise times, dates, and GPS coordinates

November 4 Lecture - civil enforcement

trying to make standing very broad in

CWA, CAA, RCRA, etc - provisions that make compliance mandatory

Enforcement in our Environmental Laws (all enviro laws include these)

- monitoring and reporting requirements
- administrative - agency level, no court involvement
- civil - actions brought in court for violations of the environmental laws
 - can be brought by govt or by citizen suit
- criminal - actions brought in court for knowing or willful violations of the law (used for most egregious violations)
 - can only be brought by govt
 - (ie cruise ship pollution strait into water - rigging bypass past real waste monitors)

--> very expensive violations and jail time is a few years
 but these are max penalties, so more sensible for companies do violate and make up costs further down the line (like for consumers)
 complexity of enviro law, confusing, lack of resources, but now ignorance is not so valid

detect and monitoring violation

- look at the permit and compare it to discharge report
 - inspections occur only after search permit issued and fed comes in way after company quickly cleans up
- sampling - some days are not so consistent with the others (so makes it diff)
- statutes have protections:
 - bounty - rewards if you report on a crime (cruise ship pollution)
 - whistle blower
 - resources are limited for enviro issues
- rely on reporting - states have come up with 2 privileges/immunities from being sued

Self Audits

- states - audit Privilege - audit protected from disclosure, Immunity from suit if violation was found through audit and corrected
- federal - policy statement on Self-Policing

if circumstances are met, gravity based penalty will be reduced (above and beyond economic benefit - money they made from not complying)

- if meet all conditions - get 100% off criminally exempt have to pay for econ costs made from not complying
- if don't do audit - get off 75% --> encourage you to do these

Circumstances include:

- did audit
- voluntary discovery

prompt disclosure - within 21 days
discovery of disclose independent of govt
correction and remediation - take care of problem and harm that came from it in 60 days
make steps to prevent recurrence
cannot be a repeat violator - not in last 3 years

EPA's Policy Statement on Self- Policy (not econ benefit, just reducing)

- incentives
 - reduction in gravity-based penalties (100 or 75%)
 - no recommendation for criminal prosecution for entities
- conditions
 - systemic discovery
 - voluntary Discovery
 - prompt disclosure
 - discovery and disclosure indep of govt
 - correction and remediation
 - prevent recurrence
 - no repeat violations
 - no serious harm
 - cooperation

Exxon Valdieste

- reported spill
- could not remediate in 60 days obviously
- could not meet conditions:
- discovery and disclosure indep of govt
- systematic
- no serious harm

self audit privilege and immunity - fed govt does not agree with this so made sure to give you a \$ incentive to meet these conditions

Very small number of cases settled with big penalties

Approaches to Environmental Enforcement

- Deterrence - based Model
 - rational econ actors seek to maximize profits
 - comply if costs of noncompliance > benefits of non-compliance
 - cost: penalty/fine, high probability of being discovered, install monitoring
 - benefits: profits, investments, money saved by not purchasing controls
- Cooperation/ compliance-based Model
 - businesses try to comply because of social responsibility, market forces

deterrence based model - uses consequences of non - compliance - companies are irrational and only --> current framework

cooperative compliance model - audit system, try to reward and give breaks to these

calculating civil penalty

Cedar Case

- successful citizen suit
- finding that company was in violation for polluting water
- 25,000 \$ per day per violation * 809 days = 20 million
- looked at elements:

how are penalties calculated?

- 25,000 \$ per day per violation - CWA civil penalties
- CWA requires court to consider:

- seriousness of the violation
- econ benefit
- history of violations
- good faith efforts to comply
- econ impact of penalty on violator
- such other matters as justice may require

Supplemental Environmental Projects

- most fed actions against businesses or indivs for failure to comply with enviro laws are resolved through these (settlement agreements)
 - characteristics:
 - there must be relationship bw violation and human health / enviro benefits that will result for SEP
 - sep must improve, protect, reduce risk to public health / enviro although in some cases a sep may as secondary matter also provide violator with certain benefits
 - sep must be undertaken in settlement of an enforcement action as a project that the violator is not otherwise legally required to perform.

SEP categories:

- public health
- pollution prevention
- pollution reduction
- enviro restoration and protection
- emergency planning and preparedness
- assessments and audits
- enviro compliance promotion
- catch-all category

(basically: alternative action - give money to another project instead of giving money to treasury directly)

November 9 Lecture - criminal enforcement

environmental enforcement and enviro crime

more than 1 way to bring enforcement action: venues to enforce enviro violation

- criminal enforcement
 - incarceration
 - fines
 - during probation could bring clean up methods
- civil enforcement action - brings citizen suits
 - injunction issued - address ongoing harm - clean up your mess
 - fines
- both civil and criminal --> parallel proceedings, have to go to court for both
- administrative - like getting a ticket
 - CWA / CAA discharge permit
 - permits require monitoring reports and then inspector comes and finds violation
 - get fine only
 - not court but get "notice of violation"
 - ALJ
- cannot use admin and criminal together - ie not take admin search without permit

How do you go from admin to civil to criminal?

took until 79 when felony provisions came into CWA

individual deterrence

the justification for criminal provisions:

- we are going to control society by having various statutes CWA, CAA
- enforcement regime says that there will be a penalty for it
 - the seriousness includes enforcement pyramid

criminal (500) (tiny)
 ----- civil (1000)-----
 -----administrative (rest) ----- (huge #/ most)

when think about how to go to trial:

- harm - indiv/groups/envir
- knowledge
- duration *
- probability of reoccurrence *
 - * administrative history - have they done it again and again
- economic benefit - critical part for all cases
- evidence:
 - for criminal - without reasonable doubt
 - civil- preponderance of evidence - have to be shown more believable than not
- result/penalty - what's your goal?
- deterrence
- efforts to conceal - made the crime and coverup
- where are you bringing these actions, what is your jury pool (liberal pro-envir state? or conservative-private rights movement?)
- making choices that help support public compliance with the law

Criminal Enforcement

- └ **Criminal provisions found in all major environmental statutes, i.e., Clean Water Act, Clean Air Act, RCRA, ESA, Migratory Bird Treaty Act**
 - **Reflects view that criminal penalties and jail are necessary to punish and to deter future violators**
 - **Demonstrates public view of importance of maintaining the environment and public health**
 - └ **Goals of criminal enforcement: public health, pollution control,**
- └ **Three levels of enforcement**
 - **Criminal**
 - └ **Most egregious cases**
 - └ **Past behavior**
 - └ **Remedy: Jail, fines, but no injunctions**
 - └ **Only brought by the government**
 - **Civil**
 - └ **Ongoing behavior**
 - └ **Remedy: Injunctions, fines**
 - └ **Can be brought by government or citizens' groups**
 - └
 - **Administrative**
 - └ **Most violations fall into this category**
 - └ **Minor violations**
 - └ **ALJ - Remedy: Small fines**

Factors to Consider in deciding whether to prosecute

- └ **Extent of damage to the environment and/or public health (harm to individuals)**

- ┆ **Knowing, deliberate conduct**
- ┆ **History of violations, likelihood of recurrence**
- ┆ **Efforts to Conceal/Deceptive Behavior**
- ┆ **How good is your evidence**
- ┆ **Will prosecution have deterrent effect**
 - **Individual – deters THIS actor**
 - **General – Will deter others from doing it because they don't want to go to jail**

Most common envr crimes

- RCRA
- CWA
- Title 18 of the US code (conspiracy, false statements, fraud, etc)

Prosecutors of envr crimes

- DOJ's Envir crimes section
- US Attorney's office slide

investigators of envr crimes slide

what makes an envr case criminal slide

US v. Exxon Valdesse

- exxon valdesse ran aground bc captan was drunk
- prosecuted bc public health to envr and species
- criminal case made by fed

US v. Exxon Corp and Exxon Shipping Co

plea agreement and sentence

- exxon corp pleaded guilty to migratory bird treat act offenses
- exxon shipping co pleaded guilty to CWA, refuse act, and migratory bird treat act offenses --> all misdemeanors
- exxon corp and Exxon Shipping Sentenced to total fine of \$ 125 mill.....slide

US v. William Recht Co, inc et al

- company uses toluene - highly toxic vapors
- instead of haz waste clean up - put in dumpster
- MSDS sheet says that it is very toxic
- slides

US v. Allan Elias

- recycling center that didn't really didn't do recycling
- denied everything defense
- slides

US v. royal caribbean

- orphan oil slicks - coast guard looked for this stuff
- found coming out of cruise ship
- cruise ship had bypass pipe - eliminate evidence of violation before its caught because disposed of pipe in puerto rico
- slide

US v. John Morrell and Co et al.

district of South Dakota

- meat processing company
- reporting data different from real discharge limit
- letterheads are so evident!

November 11 Lecture

Chesapeake Bay and Watershed

- encompasses the district of colombia and 6 other states: MD, VA, PA, WV, DE, NY
- 3830 square miles - surface area
- largest estuary in the US and third in the world
- diverse species many

problems stem from

- 21 feet depth - shallow bay
 - 36,000 plants and animal species
- the immense land area to water volume largest in the world
- “impaired” under the CWA
- crabs, oysters - decreasing
- dead zones are growing - eutrophication - algae are depleting the oxygen
 - sedimentation - sediments are problems especially the nitrogen and phosphorous
 - agricultural runoff is the biggest contributor to this pollution

-late 70 early 80 --> agreement made chesapeake bay agreement by states (slide bay restoration policy history):

- Chesapeake Bay Agreements –1983, 1987, 2000
- Chesapeake 2000 (C2K) –over 100 specific commitments to be achieved by 2010
 - Water quality (nutrient and sediment reduction)
 - Living resources (fisheries and their habitats)
 - Vital habitats (open water, wetlands, forests, streams, submerged aquatic vegetation)
 - Sound land use (land conservation and development)
 - Stewardship and community engagement (outreach, education, partnerships)

- after 25 years state and fed policy has failed but now

A New Bay Restoration Framework Emerges in 2009

- Federal Chesapeake Bay Protection and Restoration Executive Order (May 2009)
 - Two-year achievement milestones (instead of 10-year goals)
 - Development of first Chesapeake Bay-wide Total Maximum Daily Load (TMDL)
 - Federal Legislation –Chesapeake Clean Water and Ecosystem Restoration Act of 2009

Chesapeake Bay Executive Order (EO 13508)

- established a fed leadership committee to:
 - develop an annual action plan (start 2010)
 - submit annual progress reports (start 2010)
 - finish a final restoration strategy (may 2010)
- requires an independent auditor to periodically report on progress toward meeting executive order goals

Shorter Milestones = better accountability?

- in may 2000, the chesapeake executive council agreed to a new framework of two- year incremental bay restoration goals
- first milestone period (2009-2011)
 - watershed-wide, reduce nitrogen by 15.8 million pounds and phosphorous by 1.05 million pounds (from 2008 levels)
 - in MD, reduce N 3.75 million pounds and P by 193,000 pounds (from 2008 levels)

- all state programs must be in place by 2025

generally this is very aggressive policies

Reaching the Milestones

- Maryland plans to implement a suite of 27 actions with specific, measurable targets
 - Implementing best farming practices on agricultural lands
 - Reducing pollution from developed lands
 - Restoring natural filters on private lands
 - Restoring natural filters on public lands
- Funding needs significant and unresolved

Development for First Bay-wide Total Max Daily Load (TMDL)

- watershed-wide pollution budget that allocates pollutant load caps by jurisdiction
- potential sanctions if pollution caps exceeded:
 - restrictions on new development; and
 - loss of fed grant funds
- EPA anticipates a final TMDL by december 2010

Pending Federal Legislation

Chesapeake Clean Water and Ecosystem Restoration Act of 2009 (H.R. 3852 and S.1816) introduced October 2009.

Seeks to, among other things:

- reauthorize EPA's chesapeake bay program
- authorize a 1.5 billion storm-water grant program
- codify recent federal executive order

Numerous Uncertainties Remain

- who implement, how, how much is the cost, etc

The two articles and answering questions:

people who live there, politicians, developers, environmentalists

Recent Legislative Efforts in Maryland

- Bay Restoration Fund (2004) –Wastewater
- Healthy Air Act (2006) –Air deposition - emission limits, penalties for industries, GHGs
- Agricultural Stewardship Act (2006) –Farming practices
- Chesapeake and Atlantic Coastal Bays 2010 Trust Fund (2007/2008) –Nonpoint sources
- Smart, Green, and Growing Legislation (2009) –Smart growth and development

Bay Restoration Fund

- Fund financed by a 30\$ (in general) annual fee on users of wastewater treatment plants (WWTPs) and septic systems
- funds from users of WWTPs used for enhanced nutrient removal upgrades to State's 67 publicly owned WWTPs
- funds from septic systems users used to:
 - upgrade septic systems with best available technology for nitrogen removal and
 - provide payments to farms for planting winter cover crops

2010 Trust Fund

- fund financed from portions of existing motor fuel tax and sales and use tax on short-term vehicle rentals
- funds used to implement non-point source projects (cover crops, stormwater, stream/wetland restoration)
- 50 million in annual funding anticipated, but only 8 million provided this year (fiscal 2010)