

Practical Component for Environmental Law I – Fall 2008

4:40 PM – 6:20 PM

Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers makes tens of thousands of regulatory decisions every year that affect the use of private property containing “waters of the United States.” We will work with two different scenarios, both applications to the Corps of Engineers for the fill of wetlands, raising issues related to Section 404 of the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. The scenarios are based on actual proposals for the residential/commercial development of private property in Kentucky and Michigan. The student will assess the client’s intentions for the property, advise the client as to the appropriate federal regulatory process, counsel the client regarding difficult issues that may arise, and interact with the government on particular issues. Success in the course will be evaluated on a pass/fail basis, based on one written and one oral exercise, as well as classroom participation.

October 1

In preparation for this class, please review:

- (1) 33 C.F.R. Part 328 (*bring to class*)
- (2) *Rapanos v. United States*, 547 U.S. 715 (2006) (*bring to class*)
- (3) <http://www.usace.army.mil/cw/cecwo/reg/> (the Corps’ Section 404 website)

During this class, we will discuss:

- goals of the class;
- tools for helping your client get through the Section 404 process;
- threshold questions about your clients’ intentions and the applicability of Section 404 to the proposed project for the client’s property;
- the first fact pattern

Assignment (due 10/1): ½ of class write a letter to the Corps asserting that there is no jurisdiction under the CWA; ½ class write internal Corps memo finding that jurisdiction is legally supported

October 8

Memo/letter on jurisdiction due

During this class, we will discuss:

- section 404 jurisdiction over the property described in the first fact pattern;
- strategies for working with clients who may disagree with your conclusions;
- the process for seeking a permit once jurisdiction is established;
- substantive issues that the applicant and Corps have to address;

October 22

In preparation for this class, please review & bring to class:

- (1) 42 U.S.C. § 4332 (part of the National Environmental Policy Act)
- (2) 40 C.F.R. §§ 1501.3, 1501.4, 1502.4, 1508.7, 1508.8, 1508.9, 1508.11, 1508.27
(sections of Council on Environmental Quality regulations implementing NEPA)
- (3) Friends of the Earth v. U.S. Army Corps of Engineers, 109 F. Supp. 2d 30 (D. D.C. 2000)
- (4) Permit Application/Public Notice (handouts on 10/8)
- (5) Fact Pattern #1

During this class we will discuss:

- The public notice process;
- NEPA requirements;
- How the Endangered Species Act and the National Historic Preservation Act may affect the process;
- How to present your clients' position in a persuasive manner

Assignment (due 10/29): Prepare for a public hearing on the permit application, 1/2 of class represent an environmental group that argues that an EIS is required, 1/2 of class will represent the applicant arguing that no EIS is required

October 29

Public hearing during class

Other Topics:

- Discuss Corps process regulations in more detail
- Discuss the practicable alternatives analysis required for each permit application
- Discuss relevance of state approval to Corps process
- Discuss **second fact pattern** and next assignment

Assignment for 11/5: Prepare for an attorney/client meeting on the second fact pattern; attorneys must be prepared to get the necessary facts from the client, outline the regulatory process, and identify potential hurdles to getting a permit; clients must be prepared to explain their intention, the relevant facts, and assist the attorney in evaluating how the regulations apply to the plan for the property.

November 5

Client meeting during class & group discussion (each team to present list of important facts & potential hurdles)

November 12

In preparation for this class, please review & bring to class:

- (1) Environmental Assessment (to be handed out);
- (2) 65 Fed. Reg. 16486-16503 (March 28, 2000) (this is long, focus on the actual regulation which starts on 16492, but skim the preamble)
- (3) Agency Appeal Form (to be handed out)

Topics:

- review actual agency permit decision
- discuss appeal regulations and appeal process
- identify issues that might be appealed

Assignment for 11/12: Fill out the appeal form and write a memo supporting your client's appeal of the permit denial (limited issues will be identified)

November 19

Appeal and supporting memo due

Topics:

- discuss appeal and reasons
- discuss next steps
- review appeal officer decision
- discuss client options