

Assignment 2: Environmental Law and Policy  
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Excellent  
10/10

**Part 1**

Eilperin, Juliet. "Interior Department Ignored Science on Grand Canyon Water." Washington Post. January 28, 2009.

Word Count: 218

A recently surfaced memo written by Steve Martin, the Grand Canyon National Park Superintendent, suggests that the department purposely created a flawed EA for its plans to limit water flow in the Grand Canyon. The memo indicates that the Interior Department ignored "key scientific findings" in its assessment of the environmental impact caused by the government's "experiment" of reducing water flows within the Colorado River in order to increase efficiency in their hydroelectric energy production. The misinterpreted scientific findings related to the endangered humpback chub that would be affected by the change in water flows. This is important because the Department of the Interior is currently being sued by The Grand Canyon Trust over this water project. If it can be proven that the Department purposely created a flawed EA, The Grand Canyon Trust's case will be strengthened.

I did not detect any bias because Eilperin did an excellent job describing both arguments of the case. She also did a wonderful job highlighting the key question this debacle raises: Is the Department of the Interior (or any government agency) creating scientifically sound EAs and if not, is it because of special interests? A question I would like to know is – will Ken Salazar's appointment as the new Secretary of the Interior result in less litigation for the department? : )

Good

**Part 2**

*Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers*

Word Count: 499

1. Original Parties:

- Petitioner: Solid Waste Agency: SWANCC
- Respondent: Army Corps of Engineers

2. Facts:

- The SWANCC wanted to fill in several small ponds within an abandoned gravel pit. The Army Corps of Engineers asserted that the SWANCC needed to obtain a permit before doing so under section 404 of the CWA. Section 404 states that the Corps has authority to issue permits for filling "navigable waters."
- The Corps extended section 404 to cover interstate waters that is used as habitat for migratory birds that cross state lines (Migratory Bird Rule). This is the rule the Army Corps tried to use to exercise jurisdiction over the SWANCC.
- The SWANCC contended that the CWA does not cover non-navigable, isolated bodies of water and that Congress lacked authority under the Commerce Clause to regulate such waters.

3. Legal Issue:

- (1) Can section 404 of the CWA be used for these waters?
- (2) Does the Commerce Clause give Congress sufficient authority to regulate these waters?

4. Court Holding:

- (1) No
- (2) Did not come to a decision

5. Analysis of Court Reasoning:

- The Court was not persuaded by the Corp's interpretation of the CWA to define an isolated pond/ gravel pit as "waters of the United States," as a jurisdictional wetland under is "Migratory Bird Rule." Court declared that isolated ponds/gravel pits are not considered navigable waters, and to allow the extension of section 404 for this case would render the use of the word "navigable" within the statute insignificant because the water within these ponds will never enter

or become a navigable water body. The court held that Congress's use of term was important in establishing its authority in enacting the CWA, because of its pre-existing jurisdiction over navigable waters. If the CWA had jurisdiction over these waters, it would impinge on State's power over their water bodies.

- By answering the first question No, the court did not address the second question.

#### 6. Analysis of Dissent's Argument:

- Justice Stevens' dissenting opinion cited legislative history indicating that Congress and the Corps had jurisdiction over these waters because it involved *discharge fill* (CWA) and habitat used by migratory birds (Commerce Clause – because of birdwatching). He cited the Riverside Bayview case where a broad understanding of “navigable waters” was found and argued that it should not matter if the isolated pond is near or far from a navigable stream. The point was to protect biological function of the site.

#### 7. Discussion

- The ESA - because the taking of an endangered species typically happens within a state (not interstate) and can be a result of noncommercial activity. Also the endangered species might not be connected to any sort of tourism or commerce. *Gibbs v. Babbitt*.
- The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): It could be argued that Congress lacks author under the Commerce Clause to regulate a site, like a shut down plant, because it doesn't cross state lines or contributes to commerce (because it is no longer in operation). *United States v. Olin Corp*

### Part 3

Detail and comment on one major difference between the Clean Water Act and the Clean Air Act

Word Count: 105

The CWA and the CAA take different approaches in regulating pollution. The CWA for example adopted and primarily relies on a technology-based approach, where standards are based on the best available technology. This approach is supported by an ambient strategy for certain water uses, which aims at achieving water quality standards where the technology-based control shave failed. The CAA on the other hand is primarily reliant on the ambient approach supported by the technology-based strategy. The EPA will set national ambient air quality standards (implemented by the States) and when their standards fail to be met in a certain area (nonattainment), technology-based standards are imposed.