Questions to Think About

Hour 1: What is a wetland? What are the different types of wetlands? What are the values and functions of wetlands? What is delineation and what factors are examined as part of the delineation process? What agencies are involved in the regulation of wetlands?

Hour 2: What waters are regulated under the Rivers and Harbors Act? What limits does it impose on activities in wetlands? What activities are prohibited by Section 301 of the Clean Water Act? What are the two major types of permitting programs under the Clean Water Act and how are they different from each other? What are delineation manuals? What are the two major types of jurisdictional determinations? Can a landowner challenge the determinations in court? Does the Corps use formal or informal adjudication when issuing permits? With what other agencies will the Corps consult when reviewing a Section 404 permit application? What types of studies will the Corps have to do to comply with other laws when issuing a section 404 permit? What limits will other laws place on the ability of the Corps to issue a Section 404 permit? Who can challenge permit decisions of the Corps and must they challenge the decisions administratively first? What limits are imposed by the 404(b)(1) guidelines? When is an alternative to a proposed activity a "practicable alternative"?

Hour 3: Does the text of the Clean Water Act prohibit discharges into wetlands? Which wetlands? How does the Clean Water Act define "navigable waters"? Is it the same definition as in the Rivers and Harbors Act? How did the Corps of Engineers define "navigable waters" shortly after Congress amended the Clean Water Act in 1972? What waters were identified by the Corps in its regulations defining "waters of the United States" in the 1980's? What was the dispute underlying the litigation in *United States v. Riverside Bayview Homes*? What were the two questions that the Supreme Court had to resolve in *United States v. Riverside Bayview Homes*? Did the Supreme Court invoke the constitutional avoidance canon in interpreting the Clean Water Act? Did the Supreme Court uphold the Corps' interpretation of its regulations as including, within "adjacent wetlands", wetlands that were saturated by groundwater? Did the Supreme Court decide the statutory interpretation question in *Riverside Bayview Homes* using the *Chevron* analysis? If so, did it decide the case at Step One or Step Two? What role, if any, did legislative acquiescence play in the Supreme Court's decision? What category of waters, in the Corps' regulations, were at issue in the *Solid Waste Agency of Northern Cook County* case? On what basis did the Corps assert jurisdiction over the waters in the case? Did the Court uphold or reject the Corps' interpretation of the statute and did the Court apply the *Chevron* test to review the interpretation?

Hour 4: What was the dispute that led to the lawsuit in *Sackett v. EPA*? What were the two statutory interpretation questions that the Supreme Court addressed in *Sackett v. EPA*? What waters did the Court conclude were regulated as "waters of the United States" and why? How does the Court's test compare to the tests in the *Rapanos* opinions? Did any of the Justices vote to keep the "significant nexus" test as a means of determining the scope of "navigable waters"? What wetlands did the majority conclude were regulated under the Clean Water Act and how did the majority reach that conclusion? How would the concurring Justices have defined "adjacent wetlands"? Did the *Sackett* Court overrule *Riverside Bayview Homes*? What waters are regulated as "waters of the United States" in the regulations adopted by the federal government after the Sackett decision?

Hour 5: What is dredged material? What is fill material? How did the Corps, through regulations and guidance, attempt to limit ditching and draining of wetlands prior to the *National Mining Association v. U.S. Army Corps of Engineers* case? How did the Tulloch rule define "discharge of dredged material"? Did the *National Mining Association* court apply *Chevron* in reviewing the Corps' regulation? If so, did the court decide the case at Step One or Step Two? How did the government argue that incidental fallback was a discharge of dredged material or an addition of a pollutant? Do the majority or concurring judges in the *National Mining Association* case suggest that a permit might ever be required when material that is dredged from a body of water is returned to the same body of water? What is sidecasting? Can the Corps or EPA regulate sidecasting as a discharge of dredged material? What is "deep ripping"? Why did the *Borden Ranch* majority uphold the federal government's authority to regulate deep ripping as a discharge of dredged material? Does the *Borden Ranch* dissent believe that the *National Mining Association* decision is controlling? How does the dissent distinguish the 9th Circuit's *Rybacheck* decision?

Hour 6: What is mountaintop removal mining? What are the health and environmental concerns raised by valley fills? Why would mining companies prefer to be subject to the 404 permitting program instead of the 402 permitting program? What was the basis for the plaintiffs' lawsuit in *Kentuckians for the Commonwealth v. Rivenburgh*? What were the issues that the 4th Circuit had to resolve on appeal? Did the Court apply the *Chevron* analysis? If so, did it decide the case at step 1 or Step 2? Why did the 4th Circuit conclude that the Corps' interpretation of its regulatory definition of "fill material" was permissible? Why did the 4th Circuit conclude that the Corps' interpretation of the Clean Water Act was permissible? What are some of the environmental justice implications of mountaintop removal mining and regulating it under Section 404, rather than section 402?

Hour 7: What was the dispute that led to the lawsuit that was ultimately decided by the Supreme Court in *Coeur Alaska v. Southeast Alaska Conservation Council*? What was the basis for the plaintiff's lawsuit in *Coeur Alaska*? What were the two questions presented for the Supreme Court in Coeur Alaska? Did the Court conclude that EPA had authority to require a Section 402 permit for the disposal of the mine slurry into the lake? Did the Court conclude that the Corps had authority to require a Section 404 permit for the disposal of the mine slurry into the lake? Why do the dissenting Justices in Coeur argue that EPA has the authority to require a Section 402 permit for the disposal of mine slurry into the lake? Is groundwater included in "navigable waters"? Were the challengers in *County of Maui v. Hawaii Wildlife Fund* arguing that groundwater is included in "navigable waters"? What was the statutory interpretation question that the Supreme Court was trying to resolve in the *County of Maui* case? Did the Supreme Court agree with the 9th Circuit that the test for whether a section 402 permit is required turns on whether effluent that reaches a navigable water is "fairly traceable" to a point source? Did the Court agree with the defendant that a section 402 permit is only required when a point source directly discharges effluent into a navigable water? When did the majority find that a discharge of effluent through groundwater to a navigable water requires a section 402 permit? Does the *County of Maui* Court discuss the rule of lenity?

Hour 8: What activities does Section 404(f) exempt from the Section 402 permit requirement? What activities led to the lawsuit in *United States v. Huebner*? Did the landowners in *Huebner* challenge the government's finding that the wetlands in the case were "navigable waters" or that there was a discharge into the wetlands? Who issues general permits and what process is used to issue general permits? What activities can be regulated together in a general permit? What was the basis for the challenge brought by the environmental group in *Ohio Valley Environmental Coalition v. Bulen*? What activities were authorized by NWP 21? Did the 4th Circuit conclude that the Corps appropriately identified "activities .. regulated together" in NWP 21? Did the 4th Circuit conclude that the Corps appropriately determined that the activities would cause only minimal adverse environmental effects before issuing NWP 21?

Hour 9: What do the Section 404(b)(1) guidelines require regarding mitigation? How does mitigation sequencing work? What are the different types of compensatory mitigation? Does the Corps prefer certain types of compensatory mitigation? Do the Section 404(b)(1) guidelines specify how many acres of mitigation are required, the types of mitigation that are required, or the location of mitigation that is required to compensate for destruction of wetlands by permitted projects? What were the traditional preferences for mitigation projects? How are compensatory mitigation requirements enforced? What is the hierarchy of preferred mitigation

methods that is now set forth in the regulations of EPA and the Corps? What is mitigation banking and how does it work? What are the economic and environmental advantages and disadvantages of mitigation banking? What are the differences between single user banks, multiple user banks and entrepreneurial banks? What are in lieu fee arrangements?

Hour 10: What roles does EPA play in the Section 404 permitting process? How frequently has EPA "vetoed" a Section 404 permit? What was the action that EPA took that was challenged in *Mingo Logan Coal Company v. U.S. Environmental Protection Agency* and on what grounds was the action challenged? What question was the D.C. Circuit reviewing on appeal in the Mingo Logan case? Did the court apply Chevron? If so, did the court decide the issue at Step 1 or Step 2? Can EPA "veto" a discharge before someone applies to the Corps for a section 404 permit? What are four primary tools that States can exercise to protect wetlands or other waters in their states in accordance with the Clean Water Act or other federal laws? Can States establish their own wetland protection programs and what limits are placed on their power to do that? Can States take over the Section 404 permitting program from the Corps of Engineers? What limits are imposed on the transfer of permitting authority to States and how many States have taken over the section 404 permitting program? What control does section 401 of the Clean Water Act provide to States over the issuance of federal permits or licenses?