

FINAL EXAMINATION
ENVIRONMENTAL LAW

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Wednesday, May 2, 1990

8:30 - 11:30 AM

THIS IS A THREE (3) HOUR EXAMINATION.

THIS EXAMINATION CONSISTS OF SEVEN (7) PAGES.

THIS EXAMINATION CONTAINS FIVE (5) QUESTIONS.

I = 60 min.

II = 45 min.

III = 30 min.

IV = 15 min.

V = 30 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

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THIS IS A CLOSED BOOK EXAMINATION.

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Instructions:

1. These questions will be graded on the basis of the times indicated with each questions. The indicated time for the questions total 3 hours. You will be given 3 hours to write the examination. Budget your time carefully or you may not finish.
2. Be sure to state a result whenever a question asks for one. Merely stating the arguments on both sides of a legal issue will result in only partial credit because you will not have completed the analysis required by that type of question.
3. If you find it necessary to make factual assumptions in order to answer a question, be sure to state the assumption.
4. Do not assume additional facts for the purpose of avoiding a legal issue or making its resolution easier.
5. Comment briefly on each legal issue reasonably raised by the questions and on each reason for your answer, even when you decide that one legal issue or reason controls the result.
6. The difference between triumph and disaster may lie in a careful reading of the questions.

I.

(60 minutes)

Railroad Equipment Salvage and Disposal Company in 1988 was awarded a contract from Amtrak (National Railroad Passenger Corp.) to scrap and dispose the components of 45 obsolete worn-out large electric locomotives. One of the components to be scrapped was a large high voltage transformer which used PCBs as a cooling medium.

[PCBs are polychlorinated biphenols, a toxic chemical similar in environmental effect to the pesticide DDT. Its use in new electrical equipment was banned in the late 1970s under the Toxic Substances Control Act. PCBs are listed as hazardous chemicals under all federal environmental statutes.]

Railroad Equipment Salvage and Disposal Company was located in a small town in the State of Jefferson adjacent to a mainline of the Jefferson Pacific Railroad. It occupies the former car shop of that railroad. When the railroad sold the shop to RES&D, there was no problem with hazardous chemicals on the premises. RES&D proceeded to cut up the locomotives and to sell the scrap metal to steel companies. It drained the PCBs from the transformers into approved sealed containers and contracted with Hazardous Waste Disposal Company, a licensed facility in another state, to dispose of the PCBs. It washed out the drained transformers, removed and sold the scrap copper windings, removed and sold the scrap iron cores, and contracted with Careful Landfill, Inc., to dispose of the scrap coolant tubing and transformer cases.

The used wash water was allowed to soak into the ground at the RES&D's scrap yard. It contained substantial trace amounts of PCBs. The scrap coolant tubing contained no traces of PCBs.

In late 1989, because of the absence of new railroad scrap business, RES&D was closed and the corporation was dissolved. (It paid all of its outstanding debts.) The local bank accepted title to the premises in exchange for release of the outstanding mortgage. The three former owners and the manager of RES&D still live in the town.

Assume for the following questions that the State of Jefferson has no environmental regulatory statutes, and that all regulation is done by the federal government.

A.

Suppose that in late 1988 (while RES&D was still in business and was in the process of scrapping the locomotives), an enterprising journalist published an article in the local newspaper a description of how RES&D was scrapping the locomotives and disposing of its components, especially including the PCBs. The newspaper article suggested that the PCBs might migrate to adjacent

properties with diffused surface water flow over the surface of the ground after rains, and might also percolate into the groundwater and contaminate nearby livestock wells and Public Water Supply District well. Assuming that such contamination can be proven, what remedies are available to the following groups?

- (1) the neighbors,
- (2) the Public Water Supply District, and the local and state governments, and
- (3) the federal government.

Discuss all relevant legal issues. Mention each available basis for relief, and the nature of relief available.

B.

Suppose that the newspaper article was published in early 1990, after RES&D had gone out of existence. Assuming that such contamination can be proven, what remedies are available to the following groups?

- (1) the neighbors,
- (2) the Public Water Supply District, and the local and state governments, and
- (3) the federal government.

Discuss all relevant legal issues. Mention each available basis for relief, the prerequisites for each basis for relief, and the nature of relief available.

II.

(45 minutes)

Central Power & Light Company proposes to build a hydroelectric power dam in the State of Jefferson on the Jackson River, a river considered navigable under federal law. In order to build this dam, Central must obtain a hydrodam license from the Federal Energy Regulatory Commission under the Federal Water Power Act of 1920. In order to issue the license, FERC must find that the dam project "is best adapted to the comprehensive development of the river".

Central's dam will create a reservoir 100 miles long and will inundate the only know habitat in the United States of Wilber's Egret. While common in South America, Wilber's Stork is a recent migrant to temperate North America and summers in the tops of trees in the 25 square mile Sharpe Swamp along the Jackson River. It is not known whether the stork will successfully move to another swamp when the reservoir behind Central's dam is filled.

While the paddlefish is no longer considered an endangered species, because it has many spawning grounds around midwestern United States, the dam will have three effects on the paddlefish population in the Jackson River. First, it will block paddlefish migrating from the Mississippi River system to one of its spawning grounds located above the area to be inundated. That will cause gradual

elimination of the paddlefish above the dam, unless paddlefish fry are artificially introduced into the reservoir. Second, if such artificial introduction is carried out, some of the paddlefish attempting to migrate to the Mississippi River system will be caught up in the dam's generator turbines, be killed, and their chopped up parts be washed into the river through the powerhouse tailrace below the dam. Third, low-oxygen water accumulated in the bottom of the reservoir during the winter will be released into the river below the dam and cause massive fish kills from time to time.

A local environmental group, "Stop the Dam", composed of fishermen and bird lovers, consult you about how they can prevent construction of the dam, or at least to delay it while they seek to build up political opposition to the dam. Assume that FERC has filed a Negative Declaration, has determined that the dam project "is best adapted to the comprehensive development of the river", and has issued Central a license to construct the dam. Assume also that the State of Jefferson has no environmental regulatory statutes, and that all regulation is done by the federal government. Assume further that there are no legal issues under the Federal Water Power Act of 1920.

There are several legal issues presented:

- (1) can the group or its members bring suit to enjoin construction of the dam, either permanently or temporarily?
- (2) what basis, if any, exists to permanently enjoin construction?
- (3) what basis, if any, exists to temporarily enjoin construction?

Discuss all relevant legal issues. State a result as to each legal theory you discuss.

III.

(30 minutes)

Suppose EPA has just issued an air emission standard for radioactive uranium from coal-fired power plants under its toxic air emission authority. Uranium is an element which is naturally radioactive. It appears in trace amounts in coal. More uranium is emitted into the atmosphere from coal-fired power plants than from nuclear power plants. While the amounts emitted are very small, they accumulate as a particulate over wide areas downwind of coal-fired power plants along with other particulates. Very gradually the uranium particles will raise slightly the background level of radioactivity to which all living organisms are exposed.

Suppose that the Committee Against Nuclear Power and other environmental groups think that EPA has set the uranium emission standard at too high a level. It filed a suit against EPA challenging the validity and appropriateness of the uranium emission standard. The court's decision in the case will include findings of fact and conclusions of law.

Describe in general terms what types of evidence and what types of legal arguments should be presented to the court in order for it to reach a decision. (In answering this question, you have not been given enough facts for and should not discuss the particular technical facts. Nor should you try to determine who would win this case.)

IV.

(15 minutes)

Sometimes EPA may treat a complex of air emission sources at a facility as if it were a single air emission source, that is, to treat it as a "bubble". Identify the circumstances when EPA may do so for existing (pre-1977) and new (post-1977) emission sources, and discuss the role of "bubbles" in the federal air quality regulatory system.

V.

(30 minutes)

Define the following terms:

- (1) National Contingency Plan
- (2) public trust doctrine
- (3) State Implementation Plan
- (4) National Performance Standards
- (5) manifest system
- (6) nonattainment area
- (7) Sierra Club v. Morton
- (8) imminent endangerment
- (9) best available control technology
- (1) National Priority List

ANSWERS

I. (60 min.)

A.

Common law: private & public nuisance, negligence, strict liability?

Statutory: subject to SWDA [RCRA] licensing -- not licensed.

- can be enjoined pending licensing
- imminent endangerment response by EPA
- statutory liability: strict, joint & several
- statutory liability for clean up costs -- who?
 - generator: Amtrak
 - owner/operator: RES&D
 - inc. persons who have control over disposal

Citizen suit: for injunction; none available for private damages

- but can recover natural resources damages [check]
- any person can bring suit against polluter/discharger
- inc. gov't unit

B.

Common law: same theories, but is judgment proof at common law.

Statutory: subject to CERCLA -- as abandoned site.

- imminent endangerment response by EPA
- statutory liability: strict, joint & several
- statutory liability for clean up costs -- who?
 - generator: Amtrak
 - former owner/operator:
 - out of existence
 - inc. persons who had control over disposal
 - present owner/operator: bank

Citizen suit: for injunction; none available for private damages

- but can recover natural resources damages
- any person can bring suit against polluter/discharger
- inc. gov't unit

II. (45 min.)

standing: NEPA action -- any person who has an interest

- interest means some impairment of enjoyment or activity

public trust action -- any member of public, as beneficiary of trust
CWA citizen suit -- any person can sue to enjoin violation
ESA suit -- citizen suit: any person

NEPA action: dam license cannot be issued without an EIS

- project is "major" & will "significantly affect env't"
 - fed. licensing is "major"
- EIS must discuss adverse env'tl impacts & alternatives
 - e.g., effects on stork & paddlefish

public trust action: matter of state law

state cannot act to degrade overall useability of public waters for water use & recreational purposes

no state action here; trust never has been applied to fed. gov't

CWA action: point source discharges require NPDES permit

dam is not a point source (low oxygen water / fish parts) -- no addition

ESA action: fed. gov't can take no action which will destroy or substantially threaten the existence of an endangered or threatened species or cause substantial impairment of its habitat

building dam arguably does that to stork, but not paddlefish