

FINAL EXAMINATION

ENVIRONMENTAL LAW

P.N. Davis

Wednesday, May 7, 2008
8:30 - 11:30 AM

THIS IS A THREE (3) HOUR EXAMINATION.

THIS EXAMINATION CONTAINS FOUR (4) PAGES.

THIS EXAMINATION CONTAINS FOUR (4) QUESTIONS.

I = 90 min. II = 30 min. III = 30 min. IV = 30 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

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YOU MAY BRING IN YOUR STATUTORY SUPPLEMENT, BUT NOTHING ELSE. You may write in the margins and on the blank pages of the supplement.

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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.
(90 minutes)

Cattail Lake is located in Missouri about one-half mile from the Johnson River. The lake is 100 acres in size. Rainwater runoff drains into the lake, but it has no outlet on the surface. Instead, its level is maintained and stabilized by the high groundwater table under the relatively flat surface surrounding the lake. That groundwater generally flows toward and into the river. The underground hydrologic connection between the lake and the river was confirmed a few years ago when the Missouri Geological Survey did a fluorescent dye test to trace the underground water flow. Dye dumped into the lake was detected in the river a few hours later. At that time, the surface of the ground between the lake and the river was dry. Water has never been seen to flow on the surface between the lake and the river because a 10-foot high watershed divide was interposed between them. But, the dye test showed definitely that water does flow between them.

The shore of the lake was owned by two people, 7/8ths of the shore line by James Brown, a farmer, and 1/8th by the Missouri Conservation Commission.. Under the common law of Missouri, the bed of the lake is owned by the shore owners; so, James Brown owns 7/8ths of the lake bed, and the Missouri Conservation Commission owns 1/8th. Brown farms his land. The Missouri Conservation Commission uses its land as a migratory waterfowl hunting preserve, and allows licensed hunters to hunt there during the hunting season. They hunt from blinds on the shore and from boats they bring with them. Among the waterfowl species using the lake is the endangered trumpeter swan. So many migratory birds use the lake that it is fouled by bird debris each spring and fall.

James Brown decided to fill in his portion of the lake, even though it was used by migrating waterfowl in the spring and fall. Hunters who had previously hunted at the lake were dismayed by Brown's plans. The day that Brown brought in bulldozers to regrade the ground and obliterate 7/8ths of the lake, the Corps of Engineers, at the suggestion of a local hunters group, obtained an injunction against Brown. The local hunters group joined the suit, although the Missouri Conservation Commission declined to do so. Brown's complaint states that the filled lake bed would add \$200,000 to the value of his \$1,000,000 farm and add \$10,000 to his annual farm income.

Does the Corps of Engineers have jurisdiction over Cattail Lake? If it does, can it decide to allow Brown to fill in the lake? Can the hunters group join the suit? If so, what theories should their suit use. If the Corps denies Brown a fill permit, must it compensate him? Discuss all relevant legal issues. State a result to each question.

II.
(30 minutes)

In northwest Missouri, United Electric Power Company constructed an electric power generating complex consisting of 30 large wind turbines. Each turbine is mounted on a 400-foot tall tower and has three blades 140 feet long. It can generate electricity whenever the wind blows at more than 9 miles per hour.

The turbines rotational speed is 10 revolutions per minute; this causes the tip of each blade to move at a speed of about 100 miles per hour, or 60 feet per second. While operating, the turbines emit a low frequency hum – under 500 hertz [cycles per second] – which bothers some people. (“A” on a musical instrument is 440 hz. The hum from appliances powered by commercial power is 60 hz. Recognition of human speech is focused on sounds between 400 and 2,000 hz.) The hum can be heard outside more than one-half mile away, but not inside a house at that distance.

The wind turbine “farm” is located in a major bird flyway. In spring and fall, some migrating birds have trouble negotiating the wind farm and are hit and killed by rotating blades, particularly at night when visibility is poor. Perhaps 100 birds are killed each day during migrating season and about 10 birds each day during the summer. (None of the birds is an endangered species.)

Susan Green, a resident nearby, is bothered by the hum sufficiently to make her sick if she goes outside. (Her hearing of low frequency sound is quite good.) She consults you for legal advice. She would like to sue United to enjoin operation of the wind farm. Besides making her sick, she tells you that neighbors have become grumpy and quarrelsome, complaining about the hum. In fact, she says, a couple of neighbors actually had a fist fight over whether the wind farm is making life unbearable in the neighborhood. She says she complained to the county prosecuting attorney; but she declined to take any action.

Does Susan Green have a cause of action? What theory might she use in a suit? What defense(s) might United assert if sued? Discuss all relevant legal theories.

[Because we don’t know what evidence, neighbors’ testimony, and expert testimony might be produced at this suit, if brought, do not discuss a substantive result. This question is asking only whether Green can state a cause of action and whether United has any plausible defense(s).]

III. (30 minutes)

The State of Missouri is considering a proposal from a private consortium to construct a multi-mode transportation corridor between Kansas City and St. Louis. It would consist of an 8-lane (4 lanes each way) turnpike with parallel 4-track private railroad (2 tracks for hi-speed passenger service and 2 tracks for heavy freight service) and parallel rights-of-way for 3 pipelines and 2 high voltage power lines on pylons. It is modeled on a proposal in Texas for a similar private multi-mode corridor between Laredo and the Oklahoma border, with a probable extension to Kansas City via Oklahoma City and Wichita. With all the facilities located on it, the corridor would have to be one-quarter mile wide (1320 feet). It would bypass all major urban areas by about 5 miles. It would have only 5 highway interchanges along its 250 mile route. Oasis style food and fueling facilities would be located about every 50 miles.

The corridor in Missouri is conceived as part of a NAFTA [North American Free Trade Agreement] transportation corridor to facilitate trade between Mexico, the U.S., and Canada. (Illinois, Indiana, Michigan, and Ontario are considering further extensions to Chicago, Detroit, and Toronto.) The corridor's route would be north of the Missouri River to take advantage of the flat rural land there, and some 15 miles north of Columbia MO (except for a southward deviation of the hi-speed passenger tracks closer to Columbia), terminating at the Mississippi River between St. Louis and Alton IL. Thus, it would cross two traditional federal navigable waters, the Missouri River (near KCI) and the Grand River (near Glasgow MO). It would require acquisition/ condemnation of a quarter-mile wide swath of land, mostly farm land, across the entire state. (The enabling legislation would give the corridor developers the same eminent domain power presently enacted for highways and railroads.) About 40,000 acres would be converted from present uses, mostly farms, to corridor use. The corridor would cross many small rivers and creeks and require the filling of many swamps and wetlands. All crossings of roads and railroads would be by overpasses and underpasses. Even though the route is relatively flat, considerable grading would be required for embankments and cuts. While an attempt will be made to minimize destruction of farmhouses and barns, and commercial and other buildings, construction of the corridor will cause considerable disruption or termination of existing uses in the vicinity of the corridor; compensation would be paid in the usual manner. Construction would create much construction business for local and out-of-state firms, with related employment, and permanent employment for workers servicing the corridor's facilities thereafter. It is estimated that the corridor would create 20,000 additional permanent jobs from secondary industrial, commercial, and travel-oriented development in Missouri, particularly near the 5 interchanges. It is not known to what extent streams, swamps, and wetlands will be affected, or whether there are any endangered or threatened species habitats along the route.

No federal funds will be expended on the project. Assume that the corridor developer(s) will need Federal Highway Administration approvals for all crossings of Interstate and U.S. highways, Surface Transportation Board approvals for the 2 railroads, Missouri Highway & Transportation Commission and county approvals for all other road crossings, Corps of Engineer approvals for all crossings of traditional federal navigable waters, and private approvals for railroads, utilities, and pipeline crossings. There may be a few small tracts of government-owned land (other than highway rights of way).

What steps under environmental statutes must the corridor developers take? Discuss all relevant legal issues.

IV.
(30 minutes)

Briefly identify and define the following:

- (1) PRP.
- (2) nonattainment area.
- (3) discharge.
- (4) EIS.
- (5) CERCLA.
- (6) release.
- (7) Best Available Control Technology.
- (8) NAAQS.
- (9) effluent limitations.
- (10) nonattainment area.