

ENVIRONMENTAL LAW FINAL EXAM (100 points total)

Essay

Atko Corp. operates a cement production facility in California. In connection with its cement business, Atko uses fly ash, a byproduct of burning combustibles, which it incorporates into cement. Atko typically charges a tipping fee to take fly ash from other businesses which generate ash and consider it a waste product; on occasion Atko will take fly ash at no charge, depending on its needs. At any given time, Atko stores 50 to 200 tons of fly ash on its premises.

Timco Corp. operates a timber mill adjacent to Atko's cement business. Timco uses coal-tar creosote as a wood preservative for some of the lumber that it generates for sale. Timco has a permit for the use of coal-tar creosote, a toxic chemical, but the permit expires in two years. Timco stores the creosote in an underground tank at the timber mill.

Atko and Timco's businesses both require substantial amounts of diesel fuel for the trucks and equipment used to operate the businesses. The presidents of both companies have met and discussed constructing a jointly owned fuel station to be shared by them, on property that is across the street from the two existing businesses. They have acquired the property, and need to acquire the proper permits to construct and operate the fueling station.

Atko and Timco have happily operated their businesses at the existing locations for over 20 years. In recent years, however, new residential development has occurred within 1.5 miles of the two facilities. The new residential neighbors have started to complain about dust and smells in the area. On windy days, dust clouds are visible from the Atko facility, blowing in the direction of the residential neighborhood. Noxious odors are common. The neighbors have called both facilities to complain about dust and smells. One particular neighbor is asthmatic and has frequent coughing attacks when she spends any time in her backyard, breathing the air. Another neighbor recently contracted a rare lung disease, which his doctors claim is only caused by inhalation of certain toxics. The rest of the neighbors are concerned that they might also develop health conditions in the future.

In addition to the dust and odor problems, the groundwater well supplying the residential neighborhood has recently tested positive for toxics. The well testing shows chemicals consistent with both fly ash and creosote.

As the neighbors have increased their complaints about the conditions at the two facilities, the local media have covered the story, which in turn has caused home prices in the residential neighborhood to decline.

The neighbors have also heard rumors about the plans to construct a fueling station across the street from the two facilities. The neighbors have gotten together and are determined to stop any such new construction.

Discuss. (40 points)

Clean Air Act potential liability for dust and odors. Citizen standing. 60 day letter required.

CERCLA liability for groundwater contamination.

RCRA for handling toxics in stream of commerce.

Takings issue for trying to stop fueling station; property likely has other value.

Joint and several liability between Atko and Timco. Other businesses that supply fly ash? Creosote?

Diminution of value of real estate.

Plaintiff personal injury issue for lung disease and potential future illnesses.

Common law torts—nuisance, trespass (but no physical invasion).

Administrative Law

What are the three elements required for standing? (1 point)

1. **Injury**—Party must allege that he/she will be injured by the action. A mere interest in the matter is not enough.
2. **Harm must be “fairly traceable to the action that is being challenged. (Causation.)**
3. **Redressability**—there must be a likelihood that a favorable ruling would actually redress the harm. If plaintiff wins, court could grant relief.

What injury to itself did Massachusetts allege to support its claim that it had standing in *Massachusetts v. EPA*? (1 point)

Massachusetts alleged concrete injury: eroding coastlines, lost property; reduction in GHG emissions from NMV’s could meaningfully contribute to reducing global warming; redressable by EPA regulating GHGs.

State the facts, issue, and holding from *Sierra Club v. Morton*. (3 points)

Facts

Mineral King is a very beautiful valley in the Sierra, near Sequoia National Park. The Forest Service invited bids from private developers for a ski resort. Walt Disney Company was chosen, and proposed extensive development—a resort to accommodate 14,000 visitors. California would build a road

through Sequoia National Park to provide access to the new resort. The Sierra Club sued to stop the development alleging that it was a membership corporation with a "special interest" in the conservation of National Parks.

Issue

Did the Sierra Club allege facts sufficient to entitle it to obtain judicial review? More generally, does an organization have standing to sue when it does not allege specific injury to itself or its members? Or, as the court states, the question is what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared?

Holding

A party has standing only if it will itself (or an organization's members) be injured by the action it is challenging. Since the Sierra club did not allege that it or its members would be affected in any of their activities by the development the club did not have standing.

Federalism/Pre-Emption

The California legislature, in an effort to continue to reduce significant air pollution throughout the state in order to come into compliance with California's state implementation plan (SIP), passes a law that requires all cargo trucks operating on California highways to meet strict new air emissions laws. The preamble to the new legislation invokes the "savings clause" of the Clean Air Act, 42 U.S.C. sec. 7416, which preserves state authority "to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." Will the new California law be upheld? Why or why not? (3 points)

Not. Federal law governing air emissions equipment pre-empts state laws. The savings clause will not save this law because it is attempting to regulate trucks in interstate commerce.

Identify the three types of federal preemption. (2 points)

Express preemption, implied preemption, conflict preemption.

NEPA/CEQA

A water district proposes to construct a new diversion facility on a Southern California coastal stream. It needs a permit from the State Water Resources Control Board (SWRCB) and a permit from the U.S. Army Corps of Engineers.

a. If the SWRCB prepares an initial study and concludes that the project is not exempt, but will not have a significant effect on the environment, what document will it prepare under CEQA? (1 point)

Negative Declaration

b. Now assume the opposite, SWRCB finds there will be a significant effect on the environment. What document will it prepare? (1 point)

Environmental Impact Report

c. If the Corps of Engineers prepares an Environmental Assessment and concludes that the project will not have a significant effect on the environment, what document will it prepare under NEPA? (Spell out and give the acronym.) (1 point)

FONSI, finding of no significant impact.

d. Now assume the opposite, the Corps concludes the project will have a significant effect on the environment. What document will it prepare? (1 point)

Environmental Impact Statement.

What does CEQA stand for, what does NEPA stand for? (1 point)

Water Rights

Rancher Rory and Farmer Frank are both riparian to the Rushing River. The patent to Rory's land dates from 1872, but she (and her predecessors) did not use any water until 1986, when she began to irrigate some pasture; Frank's patent dates from 1890, and his predecessors started using water in 1893 and have used it ever since. Frank is currently irrigating almond trees. In case of a drought, when there isn't enough water to fully meet the needs of both of them, how is the available water allocated? (Circle the correct answer.) (1 point)

- a. Rory gets her water first, because she has an earlier patent date.
- b. Frank gets his water first, because he has the earliest date of use.
- c. They share the available water.

Answer: C

What does Article X, section 2 of the California Constitution require? (2 points)

Reasonable, beneficial use of water; no waste of water.

Who owns the waters of the state of California, and pursuant to what doctrine? (2 points)

The people, pursuant to the public trust doctrine.

Endangered Species

Name the federal constitutional provision that provides a basis for the Endangered Species Act. (1 point)

The commerce clause.

What is an anadromous fish? Give an example from lecture of a species of anadromous fish. (2 points)

A fish that spends a portion of its life cycle in the ocean. Salmon.

What federal entity has the authority to exempt a project that might jeopardize a listed species? (1 point)

Endangered Species Act Committee (God Squad)

Under which section of the Endangered Species Act must federal permit-granting agencies consult with the U.S. Fish and Wildlife Service if there are endangered terrestrial species on the site? (1 point)

Section 7.

Federal Clean Water Act

What is a point source? Is it a violation of the Clean Water Act to discharge pollutants from a point source to navigable waters (navigable waters = waters of the U.S.)? (2 points)

A source of pollution; discrete conveyances, such as pipes or manmade ditches that discharge pollutants into waters of the United States. (1 points) It is unless you have an NPDES permit. (1 points)

What does NPDES stand for? (1 point)

National Pollutant Discharge Elimination System.

Industrial point source discharges are the most significant source of pollution for California's rivers. True or False? Explain your answer. (2 points)

False, nonpoint sources of pollution are the biggest polluters. (3 points) (add another point only if they name one or more examples of nonpoint sources (agriculture, hydromodification, urban runoff, storm sewers, and municipal point sources.)

State Water Quality

Greta Gold Miner has a gold mining company. She wants to mine an ore body in Jonestown, California. In order to do so she wants to create a large, open pit. While she is mining down into the ore, she will have to pump groundwater out of the way. After she is done mining, the pit will refill with groundwater. There are no interconnections between this pit and any surface water body. Studies show that once she exposes the pit's rock surfaces to air, there will be a chemical reaction that is likely to create arsenic and sulfate in the groundwater. Under state water quality law, does she need a permit to engage in this activity? If yes, why, and what is it called? (3 points)

Almost certainly yes. (1 point) Because this discharge threatens the quality of the waters of the state, which include groundwater. (1 point) She would have to get Waste Discharge Requirements from the CA Regional Board. (1 point)

What is a Basin Plan? (1 point)

It is the basis for all other actions by the State and Regional Water Quality Control Boards in California. It is one of the things that the State of California uses to achieve Water Quality Standards under the Clean Water Act. It establishes beneficial uses of water, water quality criteria (narrative or numeric) to protect those uses, and implementation programs (such as TMDLs) to achieve compliance with the objectives.

What agency or agencies adopt basin plans? (1 point)

CA's State and Regional Water Boards.

Clean Air Act (Air Quality)

What does NAAQS stand for? (1 point)

National Ambient Air Quality Standards

What is the purpose of the primary and secondary NAAQS? (2 points)

National primary ambient air quality standards define levels of air quality which the Administrator judges are necessary, with an adequate margin of safety, to protect the public health. Includes the health of "sensitive" populations such as asthmatics, children, the elderly, and those with preexisting illnesses.

National secondary ambient air quality standards define levels of air quality which the Administrator judges necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant. Such standards are subject to revision, and additional primary and secondary standards may be promulgated as the Administrator deems necessary to protect the public health and welfare. Protects Soil, crops, vegetation, animals, materials visibility and person comfort.

Using their abbreviations, or words, identify the criteria air pollutants discussed in class. (2 points)

PM particulate matter, Sulfur Dioxide SO₂, Ozone O₃, Carbon Monoxide CO, Nitrogen Dioxide (NO₂), Lead

Climate Change

Describe four global warming impacts. (1 point)

Higher temperatures = increased heat waves, sea level rise, eroding coastlines, early sierra snowmelt, impacts on ability to store water, increase in wild fires.

In its opinion in *Massachusetts v. EPA*, the United States Supreme Court found held that because greenhouse gases permeate the world's atmosphere rather than a limited area near the earth's surface, EPA's exclusion of greenhouse gases from the category of air pollution "agent[s]" is entitled to deference under *Chevron*. True or False? Explain your answer. (2 points)

False. The court found that greenhouse gases fit within the CAA's broad definition of "air pollutant" and thus EPA had statutory authority to regulate emission of such gases from new motor vehicles. Carbon dioxide and other greenhouse gases were "physical [and] chemical substances...." and as such were included in the broad definition.

In California, climate change analysis is most likely to occur under what state law? (2 points)

The California Environmental Quality Act (CEQA).

Environmental Enforcement

Identify the things discussed in class that may trigger environmental enforcement. (1 point)

Any of:

- **monitoring data**
- **inspections**
- **reporting**
- **citizen complaints/news coverage sparks agency attention**
- **problem "industries"**

The Golden Gate Fish Ranch (Ranch) is a fish farm in Border, California. The Ranch farm-raises fish. The Ranch gets intake water from the Totally Impaired River, a fishable, swimmable waterway that runs through California, Oregon, and other states. The Ranch raises fish in water-filled raceways and harvests them when they are ready for commercial sale. Ranch-raised fish excrete waste into the raceway water. The fish waste is a pollutant. The Ranch sends all the water it uses in its fish-raising process to a settling pond. A pipe allows water from the settling pond to discharge to the Totally Impaired River. A small amount of fish waste is in the water that discharges through this pipe. The Ranch has a permit that sets discharge limits on the amount of fish waste it can discharge from its settling pond and the Ranch violated those limits on three occasions in the last three years. The most recent violation was a month ago. Angry Citizens Group (ACG) is a local group that uses the Totally Impaired River in the vicinity of the Ranch for recreation, fishing, swimming, and birdwatching. ACG plans to sue the Ranch to get it to stop violating its permit.

1. What does ACG need to do before it files its lawsuit? What purpose or purposes does this requirement serve? (2 points)

It needs to send a 60-day letter notifying the feds, state, and the Ranch of the violations it plans to include in its lawsuit. The purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit and to give the gov't a chance to file an action if it wants to.

2. What critical allegation about the status of the permit violations does ACG need to allege in its complaint in order for the complaint to survive a motion to dismiss? (Assume plaintiffs have alleged facts establishing standing already.) (2 points)

Something like: A good faith "allegation" of ongoing violations. Violation cannot be wholly in the past. Intermittent or sporadic suffices. Do not need "proof" of ongoing violations, only good faith allegations; allege past violation and "reasonable likelihood" of violation in future is enough to obtain fed-ct jx.

RCRA/CERCLA/Superfund

In 2010, Bammoco purchased a chemical manufacturing plant "as is" from Gordon Chemicals. Gordon operated the plant from 1905-1950, when it closed the plant's doors and mothballed it. After the purchase, Bammoco learned that Gordon used the property surrounding the plant to dispose of wastes including chemical process byproducts. Gordon also left a 35-acre waste pile containing low-level radioactive material with mixed, higher-level radioactive "hot spots." Bammoco's consultants tested the wastes and determined that all of the waste dumps qualify as CERCLA hazardous substances. Bammoco cleaned up the property at a cost of 4 million.

- a. Bammoco brings suit against Gordon to recover its cleanup costs under CERCLA. What does CERCLA stand for? (1 point)

Comprehensive Environmental Response Compensation and Liability Act.

- b. Gordon argues it cannot be liable for cleanup recovery because operations ceased in 1950 and CERCLA did not exist when it disposed of the wastes, therefore it was not negligent in doing so. Is Gordon correct? Explain your answer. (2 points)

No. CERCLA is a strict liability statute. Gordon will be liable as a former owner and operator of a facility where there was a release of hazardous substances into the environment and Gordon does not have a statutory defense.

United States Oil operates a petroleum refining facility. In petroleum refining, impurities are removed and usable hydrocarbon fractions are isolated from crude oil and feedstock. Large quantities of water are used, and the resulting wastewaters contain a small percentage of residual oil. These "oilbearing wastewaters" are run through a three-step treatment process. As part of the first step of this process, up to 1,000 barrels of oil is removed from the wastewater. In a rulemaking proceeding, EPA took testimony, developed an extensive record, and made detailed findings showing that the primary purpose of the first step in the wastewater treatment process is to remove any residual oil present in

the water in order to sell the oil. EPA thus decided to classify oilbearing wastewaters as solid wastes under RCRA only in the second step of treatment, after the oil is removed in the first step of the treatment process. Environmental groups who properly exhausted their administrative remedies now sue, arguing that EPA's decision is arbitrary and capricious. Will the environmental groups prevail? Explain your answer. (2 points)

Not likely. The *American Petroleum* case explained that unless EPA made findings showing that the oilbearing wastewater was "discarded" at the time of primary treatment, it would be arbitrary and capricious to classify the wastewater as solid waste at the time of primary treatment. Here, EPA made detailed findings in the opposite direction – the primary purpose of the first phase of treatment is reclamation.

Random

What is the federal constitutional basis for a takings claim? (2 points)

The United States Constitution, 5th Amendment.

TMDL stands for? (1 point)

Total Maximum Daily Load.

What does FIFRA stand for? (2 points)

Federal Insecticide, Fungicide, and Rodenticide Act.