

Watson

ENVIRONMENTAL LAW

Spring 1993

INSTRUCTIONS

1. You have three hours and 15 minutes to complete the exam. Do not begin writing during the first 15 minutes -- use this time to read over the exam. You may begin writing at 9:15 a. m. Please budget your time.
 2. All answers are to be written in the blue books. Please write legibly and on every other line. YOU MAY WANT TO DO THE SHORT QUESTIONS FIRST. INDICATE ON BLUEBOOK COVERS THE QUESTIONS ANSWERED THEREIN.
 3. The examination is closed book. You may not bring written or printed materials into the examination room. Attached at the end of this exam is a listing of selected statutory provisions from RCRA, CERCLA, the Clean Water Act, and the Clean Air Act.
 4. Write your exam number in the space provided on this page.
 5. You must turn in your examination along with your bluebooks.
 6. There are 260 total points in this exam. (Percentage figures given below are rounded approximations.)
 7. The first fact situation gives rise to Questions 1-3.
- Question 1 counts for 20 points (8%)
Question 2 counts for 70 points (26%)
Question 3 counts for 20 points (8%)

8. The second fact situation gives rise to questions 4-6.

Question 4 counts for 15 points (6%)

Question 5 counts for 40 points (14%)

Question 6 counts for 15 points (6%)

9. The rest of the exam consists of 10 short questions, requiring short answers or discussion. Questions 7-17 together count for 85 points (32 % of exam). The weight of each question is noted.

FACT SITUATION FOR QUESTIONS 1-3

In 1961, a corporation named ABLE DISPOSAL began operating a waste disposal site on 40 acres of land it owned in Montgomery County, Ohio. (See map below). ABLE DISPOSAL was visited by county health inspectors in 1966, who discovered dozens of leaking barrels of chromium, zinc, and other hazardous wastes on the premises. Numerous local health ordinances had been violated; however, in light of an oral promise given by ABLE DISPOSAL to fence in the land and not to accept any additional wastes, the county informally determined that no official action need be taken.

ABLE DISPOSAL fenced in the property, and then sold the 40-acre site in 1967 to BEXEL, INC., which made no use of the site, but instead held the property for investment purposes. BEXEL sold the land in 1979 to CAUSTIC CONTAINERS, INC., which already owned an adjacent 60 acres of vacant, unused land. CAUSTIC was planning to use its 60-acre parcel as a waste disposal site, and it seemed logical to purchase the 40 acres from BEXEL for "reserve capacity" in case the 60-acre parcel became full of wastes.

After obtaining the proper federal RCRA permit for a treatment, storage, and disposal (TSD) facility, CAUSTIC

contracted with two companies for disposal of their wastes on the 60-acre parcel. DELL OIL shipped barrels of used diesel fuel. EDIBLE CHEMICALS sent several types of wastes, including zinc, mercury, chromium, and trichloroethylene (TCE). Pursuant to their contracts, DELL OIL and EDIBLE CHEMICALS were responsible for transporting their wastes to the disposal site.

The 60-acre parcel was unfenced, and trespassers were becoming a problem, insofar as the site was located to the south of the local Catholic college, and just north of a strip of beer joints:



In response to the trespassing problem, CAUSTIC erected a five foot chain link fence around the 60-acre site, and posted signs every 50 feet which stated in very large letters: "NO TRESPASSING! WASTES STORED ON SITE MAY BE HAZARDOUS TO YOUR HEALTH!"

On the evening of March 17, 1989, several drunken law

students from the college decided to take a shortcut back from the bars to the campus -- directly across the 60-acre CAUSTIC disposal site. While on the site, one student (an undergraduate chemistry major) decided to conduct an experiment. The student removed a lid from one of the barrels and threw a lit match into the barrel. The student's hypothesis -- that something might happen -- proved correct. The substance in the barrel ignited, and a fire of major proportions raged for four days, fueled by the hundreds of barrels at the site. Luckily, the fire did not spread beyond the 60-acre site.

Realizing the enormity of the problem, local officials requested help from the federal EPA. EPA determined that both the 60-acre site and the 40-acre site should be placed on the National Priorities List (NPL). After following the proper procedures for listing the "CAUSTIC Site" on the NPL, EPA decided to use Superfund monies to clean up the two parcels. The area was sealed off, a Remedial Investigation/Feasibility Study (RI/FS) was conducted, and public input was solicited on the selection of a cleanup remedy. In its Record of Decision, EPA determined that it would remove the wastes that were still in barrels, and would conduct on-site incineration of the leaked wastes and contaminated soils.

Needless to say, the fire caused the closure of CAUSTIC's waste disposal business. This in turn caused CAUSTIC to default on its mortgage, which was secured by both parcels. The mortgagee, FIRST FEDERAL ("the friendly bank") immediately instituted a foreclosure action. FIRST FEDERAL ended up with title to the 100 acres, and began (in the fall of 1991) to seek out a new owner. FIRST FEDERAL to date has received only one offer for the site, which it turned down because the offer was only 1/2 of the appraised value.

Just last week, EPA declared the completed cleanup a

success. At the same time, the United States filed a law suit in federal district court, seeking to recover the \$13 million drawn from the Superfund in order to finance the cleanup. The government relies on the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as the authority for its suit. The defendants -- each alleged to be strictly, jointly, and severally liable -- are ABLE DISPOSAL; BEXEL, INC.; CAUSTIC CONTAINERS, INC.; DELL OIL; EDIBLE CHEMICALS; ANNA WATSON, president and majority stockholder of EDIBLE; and FIRST FEDERAL.

QUESTION #1 (20 Points) (8% of the exam)

(A) Identify the statutory authorities pursuant to which the federal government (1) expended Superfund monies to clean up the site; and (2) filed its lawsuit to recover from the defendants the monies expended. [Just identify; no discussion required.]

(B) What must the United States show in order to establish entitlement to recovery of its cleanup costs? For this question, briefly discuss in general terms -- without reference to the circumstances of the particular defendants -- what the government must prove in order to prevail on its claim.

QUESTION #2 (70 points) (26% of the exam)

For each defendant, please discuss whether the defendant falls within one of the categories of persons subject to liability under CERCLA. Please also identify, and briefly evaluate, any possible defenses to liability that the defendant in question may raise.

(A) ABLE DISPOSAL

(B) BEXEL

(C) CAUSTIC

(D) DELL OIL

(E) EDIBLE CHEMICALS

(F) ANNA WATSON

(G) FIRST FEDERAL

[NOTE: you do not need to be redundant. If you think the situation is the same for two defendants, you can simply say so. (For example, you can say: "as to the X issue or Y defense, see discussion for defendant Z"). However, be sure to discuss any issues, facts, or defenses that are peculiar to a particular defendant.]

QUESTION #3 (20 points) (8% of the exam)

Assume for purposes of this question that you have been hired to represent ABLE DISPOSAL. Your research reveals that ABLE DISPOSAL sold the 40 acres "as is" to BEXEL, and agreed to accept only 75% of the (1967) fair market value. Briefly discuss whether this information is helpful in any way to ABLE DISPOSAL.

FACT SITUATION FOR QUESTIONS 4-6

In 1992, the Lovely Harbor Company (LHC) purchased 250 acres of vacant coastal land for development purposes. The proposed plan of development divides the parcel into three parts:

(1) for the 25 acres along the coast, LHC plans to subdivide into lots and build waterfront residences with boat slips.

(2) for the 125 acres located inland and next to the proposed waterfront lots, LHC proposes to construct a golf course with associated golf course lots on which a single family homes would be built.

(3) as for the remaining 100 acres of land located further inland, LHC may in the future develop the tract for single family residential use if market conditions are favorable. The current plan is to clear and drain the land and plant corn.

The LHC land is located just west of a navigable body of water called Polly Beach Sound. It is a beautiful, quiet area of tidal marshes and wetlands teeming with aquatic life and water birds.



A biologist has warned LHC that as much as 75% of the 250 acres is covered by hydrophytic plants that grow in wetland areas. In addition, the 25 acres bordering Polly Beach Sound are periodically flooded by tidal waters.

LHC has just submitted its plan of development to the United States Army Corps of Engineers, along with a permit application, under §404 of the Clean Water Act, for permission to discharge dredge and fill materials into

"waters of the United States."

QUESTION #4 (15 points) (6% of the exam)

With respect to the 250 acres, how much of this acreage is subject to §404 of the Clean Water Act? Would additional facts be helpful? Briefly discuss.

QUESTION #5 (40 points) (14% of the exam)

Assume for this question that the Corps has §404 jurisdiction over at least some of the dredge and fill activities proposed for each of the three parts of LHC's proposed plan of development.

(A) Briefly describe how the Corps will apply the §404(b)(1) guidelines. [NOTE: you do not need to discuss the Corps' "public interest review" regulations.]

(B) Briefly discuss whether LHC can invoke any of the statutory exemptions to §404. [NOTE: nationwide permits are regulatory authorizations to discharge -- not statutory exemptions to §404.]

QUESTION #6 (15 points) (6% of the exam)

In processing LHC's §404 permit application, must the Corps also comply with the requirements of NEPA? If so, briefly outline what the Corps must do to comply with NEPA. If not, briefly explain why the Corps need not comply with NEPA.

THE REMAINDER OF THE EXAMINATION CONSISTS OF SHORT QUESTIONS. REQUIRING SHORT ANSWERS OR DISCUSSION

QUESTION #7 (10 Points) (4% of the exam)

My six-year old son remarked at dinner last week that "EPA's

Clean Water Act antidegradation policy reflects both the conservationism and preservationism schools of thought." He was, of course, quite correct. What did he mean by his remark, and why was he correct?

QUESTION #8 (8 points) (3% of the exam)

EPA is in the process of assessing administrative penalties, under §309(g) of the Clean Water Act, for certain NPDES permit violations. What effect, if any, does the pendency of EPA's administrative action have on the ability of a citizen to bring a suit against the same permittee under §505? [NOTE: this question is not intended to raise the Gwaltney issue.]

QUESTION 9 (8 points) (3% of the exam)

Describe two situations in which the government would choose to sue under RCRA, not CERCLA, to remedy a problem involving hazardous materials.

QUESTION #10 (10 Points) (4% of the exam)

Give one example of how NAAQSs and Water Quality Standards are similar. Give one example of how NAAQSs and Water Quality Standards are different.

QUESTION #11 (6 points) (2% of the exam)

The "new source review" provisions of §173 of Part D of the Clean Air Act govern permit applications for major new sources in nonattainment areas. Does the Part D nonattainment program impose a permit requirement or any other requirements on existing sources in nonattainment areas? [If the answer is no, just say so. If the answer is yes, identify one requirement imposed on existing sources in nonattainment areas.]

QUESTION #12 (5 Points) (2% of the exam)

In our discussion of NEPA, mention was made of categorical exclusions. What is a categorical exclusion?

QUESTION #13 (5 points) (2% of the exam)

Assume a state issues an NPDES permit, and an environmental group has standing to seek judicial review of the permit issuance. Would the challenge be brought in state court, federal district court, or a federal court of appeals?

QUESTION #14 (6 points) (2% of the exam)

What in the world is LAER? When does it come into play?

QUESTION #15 (9 points) (3% of the exam)

One stated goal of Clean Water Act is the elimination of discharge of pollutants into navigable waters. Yet certain provisions of the CWA, and related doctrines, do not move the country towards that goal. Identify three provisions of the Clean Water Act, or related doctrines, that do not move the country towards the goal of elimination of water pollution.

QUESTION #16 (12 points) (5% of the exam)

The 1970 Clean Water Act started off with BAT and BPT. In 1977, Congress added BCT. Briefly answer the following questions:

(A) why was BCT added to the statutory scheme?

(B) to what does BCT apply?

(C) is BCT more or less stringent than BPT?

(D) is BCT more or less stringent than BAT?

QUESTION #17 (6 Points) (2% of the exam)

What is Best Professional Judgment (BPJ)? When is BPJ used?

END OF QUESTIONS

SELECTED PROVISIONS FROM RCRA

SUBCHAPTER III (or "SUBCHAPTER C"): HAZARDOUS WASTE MANAGEMENT

§ 3004 STANDARDS FOR OWNERS/OPERATORS OF TSD FACILITIES

§ 3005 PERMITS FOR TREATMENT, STORAGE, DISPOSAL OF HAZ. WASTE

§ 3008 FEDERAL ENFORCEMENT

SUBCHAPTER VII: MISCELLANEOUS PROVISIONS

§ 7002 CITIZEN SUITS

§ 7003 IMMINENT HAZARD

SELECTED PROVISIONS FROM CERCLA

SUBCHAPTER I: HAZ. SUBSTANCES. RELEASES. LIABILITY, COMPENSATION

§ 101 DEFINITIONS

§ 103 NOTIFICATION REQUIREMENTS FOR RELEASED SUBSTANCES

§ 104 RESPONSE AUTHORITIES

§ 105 NATIONAL CONTINGENCY PLAN (NCP)

§ 106 (EPA-ORDERED) ABATEMENT ACTIONS

§ 107 LIABILITY (FOR CLEAN-UP COSTS)

§ 108 FINANCIAL RESPONSIBILITY

§ 109 CIVIL PENALTIES AND AWARDS

§ 111 USE OF THE SUPERFUND

§ 112 SUPERFUND CLAIMS PROCEDURE

§ 113 CIVIL PROCEEDINGS (JUDICIAL REVIEW, CONTRIBUTION)

§ 114 RELATIONSHIP TO OTHER LAWS

§ 116 SCHEDULES (TIMETABLES FOR ACTIONS)

§ 117 PUBLIC PARTICIPATION

§ 120 FEDERAL FACILITIES (LIABILITY OF UNITED STATES)

§ 121 CLEANUP STANDARDS

§ 122 SETTLEMENTS

§ 123 REIMBURSEMENT TO LOCAL GOVERNMENTS

§ 126 INDIAN TRIBES

SUBCHAPTER III: MISCELLANEOUS PROVISIONS

§ 309 ACTIONS UNDER STATE LAW... (STATUTES OF LIMITATION)

§ 310 CITIZEN SUITS

SELECTED PROVISIONS FROM THE CLEAN WATER ACT

SUBCHAPTER I: RESEARCH AND RELATED PROGRAMS

§ 101 CONGRESSIONAL DECLARATION OF GOALS AND POLICY

SUBCHAPTER III: STANDARDS AND ENFORCEMENTS

§ 301 EFFLUENT LIMITATIONS

§ 302 WATER QUALITY RELATED EFFLUENT LIMITATIONS

§ 303 WATER QUALITY STANDARDS & IMPLEMENTATION PLANS

§ 304 INFORMATION AND GUIDELINES

§ 306 NATIONAL STANDARDS OF PERFORMANCE

§ 307 TOXIC AND PRETREATMENT EFFLUENT STANDARDS

§ 309 ENFORCEMENT

§ 311 OIL AND HAZARDOUS SUBSTANCE LIABILITY

§ 313 FEDERAL FACILITIES POLLUTION CONTROL

§ 319 NONPOINT SOURCE MANAGEMENT PROGRAMS

SUBCHAPTER IV: PERMITS AND LICENSES

§ 401 CERTIFICATION

§ 402 NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

§ 404 PERMITS FOR DREDGED OR FILL MATERIAL

SUBCHAPTER V: GENERAL PROVISIONS

§ 502 DEFINITIONS

§ 505 CITIZEN SUITS

§ 509 ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

§ 510 STATE AUTHORITY

SELECTED PROVISIONS FROM THE CLEAN AIR ACT

SUBCHAPTER I: PROGRAMS AND ACTIVITIES

PART A: AIR QUALITY AND EMISSION LIMITATIONS

§ 101 CONGRESSIONAL FINDINGS & DECLARATION OF PURPOSE

§ 107 AIR QUALITY CONTROL REGIONS

§ 108 AIR QUALITY CRITERIA AND CONTROL TECHNIQUES

§ 109 NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS)

§ 110 STATE IMPLEMENTATION PLANS (SIPS)

§ 111 STDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

§ 112 HAZARDOUS AIR POLLUTANTS

§ 113 FEDERAL ENFORCEMENT PROCEDURES

§ 114 RECORDKEEPING, INSPECTIONS, MONITORING, ENTRY

§ 120 NONCOMPLIANCE PENALTY

PART C: PREVENTION OF SIGNIFICANT DETERIORATION (PSD) (skip)

PART D: PLAN REQUIREMENTS FOR NONATTAINMENT AREAS

§ 171 DEFINITIONS

§ 172 NONATTAINMENT PROVISIONS

§ 173 PERMIT REQUIREMENTS

§§174-93 [MOSTLY CONSISTS OF POLLUTANT-SPECIFIC REQUIREMENTS]

SUBCHAPTER III: GENERAL PROVISIONS

§ 302 DEFINITIONS

§ 304 CITIZEN SUITS

§ 307 ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW

ROUGH OUTLINE OF ANSWERS

1(A) Identify the authorities pursuant to which federal government (1) expended Superfund monies to clean up the site; and (2) filed its lawsuit to recover

ANSWER: (1) §104 (2) §107

1(B) What must the United States show in order to establish

entitlement to recovery of its cleanup costs?

ANSWER: MUST SHOW DEPENDANT IS A

- a. person includes corporations, individuals (including corporate officers)
- b. responsible causation - limited. STRICT LIABILITY. LOOK TO 4 CATEGORIES IN §107.
- c. for the disposal courts split on whether passive leaching is disposal
- d. of haz. Substance (not petroleum)
- e. facility
- f. release/threat includes: blowing of a hazardous substance from a site by the wind; leaching of h/s into soil or GW; leaking from tanks, pipelines, drums; need only be threat (drums are deteriorating);
- g. incurred costs
- h. consistent w/NCP

2. FOR EACH DEFENDANT, EVALUATE LIABILITY & POSSIBLE DEFENSES

(A) ABLE DISPOSAL

First owner of 40-acres -- liable under 107(a)(2) as owner/operator - meets all elements. No plausible defenses.

(B) BEXEL

Intermediate owner of 40 acres -- liable under 107(a) (2) if there was a release during ownership -- raises question of whether passive leaking is enough.

(C) CAUSTIC

Intermediate owner of 40 acres and 60 acres - liable under 107(a)(2). Possible defense for 60-acres: 3rd P defense?

1. were damages from release caused solely by a third party? Cannot be by employee/agent of defendant, nor can it be one with whom defendant has a contractual relationship relating to disposal issue or site; AND

2. did defendant exercise due care with respect to the hazardous substance; and take precautions against foreseeable conduct (Won't excuse willful/negligent blindness).

(D) DELL OIL

Generator/Transporter for 60-acres -- 107(a)(3) and/or 107(a) (4). DEFENSES: (1) diesel oil falls under petroleum exclusion; (2) 3rd Party defense (see above)

(E) EDIBLE CHEMICALS

Generator/Transporter for 60-acres -- 107 (a)(3) 107(a)(4).

DEFENSE: 3rd Party defense (see above)

(F) ANNA WATSON

Generator/Transporter for 60-acres 107(a) (3) and/or 107(a) (4). DEFENSES: (1) no personal liability because

insufficient involvement/control (2) 3rd Party defense

(G) FIRST FEDERAL

Present owner of 40 & 60 acres - 107(a)(1). DEFENSES: (1) 3 Party defense; (2) secured creditor exemption.

EPA RULE FOR POST-FORECLOSURE: must (1) wind-up and get rid of property or assets fairly rapidly; and (2) must not have participated in management before foreclosure.

3. YOUR CLIENT, ABLE DISPOSAL, SOLD THE LAND "AS IS" TO BEXEL, AND AGREED TO ACCEPT ONLY 75% OF THE (1967) FAIR MARKET VALUE. IS THIS INFORMATION HELPFUL IN ANY WAY?

CERCLA -- won't permit seller to avoid liability on basis of "as is" clause. -- but may help shift costs to BEXEL in subsequent §113 contribution action.

Smith Land said caveat emptor not a permissible defense to CERCLA liability. Congress intended 3 defenses in 107(b) to be the only defenses to §107 liability. No equitable defenses in §107 suit. However, can consider equitable factors in contribution suit.