

Examination No. _____

LEGISLATIVE AND ADMINISTRATIVE PROCESS
SPRING 2005

UNM School of Law
Professor Denise Fort
Final Examination
Three Credits

INSTRUCTIONS

A. This is a take-home, open-book examination. **You have six consecutive hours in which to complete the examination. Time starts when you download the examination.** You may use:

1. All materials supplied in connection with the course;
2. materials prepared by you, including class notes, any outlines or notes you have prepared as a study aid; and
3. the assigned casebooks.

You may not use any commercial outlines or nutshells.

B. You may not discuss any of these questions with any person, ask any person's assistance in research, nor discuss these questions until the end of the exam period.

C. Read the questions very carefully and organize your answers before you begin to write. Be concise in your answers. Make sure your answers are responsive to the questions that are asked. Do provide informal citations to authority (cases, statutes, etc.).

D. For question II you may use the Internet or use library resources.

E. Questions I and III are fictitious, and any resemblance to living persons is purely coincidental.

If there is anything about the facts that you do not understand, just postulate an interpretation, tell me what you are postulating, and continue to answer the question.

Have a good vacation; please stay in touch as you pursue your career. Best wishes!

Question I. Acme Organic Foods and contaminated milk

50 Points. No more than 10 double spaced typewritten pages. Provide a short written outline of your answer.

Your client has a problem. Ten minutes ago the client, Acme Organic Foods, was threatened with civil action under an environmental law that imposes civil penalties on companies that sell foods contaminated with pesticides above acceptable levels. The U.S. Environmental Protection Agency has alleged that Acme's milk contains a pesticide residue in excess of .05 ppb (parts per billion). The pesticide is called "Weed-be-gone" and the regulatory standard for it in food is .05 ppb. EPA has demanded that Acme cease distribution of this milk, withdraw it from the shelves, and pay a fine to EPA of \$100,000 for every day that the milk has been in distribution. EPA has asked the assistance of state health departments in seizing any product that remains on the shelf. The seizure will occur 24 hours after it faxed this demand letter to Acme. EPA calculated the amount of the fine by assuming that all milk distributed by Acme since the statute of limitations (3 years) has been contaminated. EPA has informed Acme that it must remove the product from sale and destroy all of its stock immediately, and that the fine is due upon receipt of the letter.

Acme is in a cold sweat. The pesticide is used by alfalfa farmers to control emergent weeds in their fields. The alfalfa is sold to dairy farmers and consumed by their milk cows. The milk is eventually purchased by Acme from contract farmers. Acme routinely screens for contaminants, but has not tested for this contaminant because it was unaware that it was taken up by the dairy cattle. The letter from the EPA does not reveal how many samples EPA relied upon in reaching its conclusion that the milk was contaminated.

Acme also questions EPA's authority to regulate this pesticide in a processed food product. The statute under which the legislation was enacted provides that EPA can regulate pesticides "that pose a threat to public health and the environment, taking into consideration the costs and benefits of regulation." The legislation appears to be concerned with the effects of pesticides on farm workers and the environment. When EPA listed the pesticide in the regulations that it promulgated under the "Safe Foods Act," it did so on the basis of evidence that demonstrated the dangers of the pesticide to farm workers from inhalation. No evidence was presented at the administrative hearing held by EPA that the pesticide would be harmful if ingested. The Code of Federal Regulations lists this pesticide as a regulated substance under the Act. Acme has informed you that no published studies have ever examined the effects of ingesting this pesticide, and contends that it poses no dangers when consumed in milk.

Acme's business reputation is built on the purity of its product. The company does not allow the dairy farmers that supply it to use Bovine Growth Hormones, or antibiotics, and it requires that its farmers treat their the dairy cattle humanely. However, it is not sure that it will be able to find sufficient quantities of alfalfa grown without this pesticide, because the product is widely used across the United States.

Please analyze all of Acme's legal defenses in this situation. (Do not discuss contractual or tort related claims.)

What advice would you have for Acme as to long term steps that it might take to protect its ability to use alfalfa containing Weed-be-gone?

II. Clearing the Air- 20 points- no more than 4 typed, double spaced pages.

For the following question you may use any research source, other than speaking to any person.

Carbon dioxide is a substance that is released as the result of burning fossil fuels, including petroleum. Its release changes the global atmosphere, with deleterious effects on human and nonhuman species.

Has this Congress (year 2005) addressed the release of carbon dioxide from automobiles and other mobile sources?

Did the 2005 New Mexico legislature consider this issue? What action, if any, did it take?

III. Choosing Water Projects- 30 points- no more than 8 typed, double spaced pages.

Inspired by your 2005 trip to Santa Fe, you have accepted a position with the New Mexico legislative council service. Several state senators have shared with you their extreme frustration with how the Governor has controlled capital expenditures under the Water Trust Board. It is their contention that poor policies are being made by the Board, and that individual projects are not being overseen with enough stringency. They want to amend the governing statute. Currently it provides that the five person Board is to recommend the amount of funding that a project receives to another executive board that then issues bonds for the projects. These recommendations are always followed by the bonding authority.

The legislators want to amend the legislation to appoint three members of the legislature (the President of the Senate, and the ranking majority and minority leaders of the House) to serve on the Trust Board. They would also like one of New Mexico's representative from Congress or his or her designated representative, and a member of the state judiciary to serve on the Board, to get greater buy in from these institutions. These members would be appointed by the state Legislative Council Committee, a standing legislative committee. The Governor can remove any member, but only for good cause.

1) Are these proposed changes susceptible to legal challenge? Analyse each potential claim.

2) Please give your advice about their proposal and alternatives that would survive legal challenge and meet the legislators' concerns.

Please assume that the state law and constitution are identical to the federal constitution for purposes of this question and that all of the cases that we read in LAP are applicable.