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**Environmental Law 580-001
Fall Semester 2006**

**UNM School of Law
Final Examination
Three Credits**

**Professor E. Gauna
Saturday, December 09, 2006
Thursday, December 14, 2006
Part II (135 minutes)**

Examination Format

Essay Answers

1. **Laptop** computer users: Start the Secureexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.
2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen & close bluebook immediately. If using a laptop, save & exit the program.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

Part II

1. Part II of this exam is 135 minutes consisting of one essay question.
2. You may take in only your own prepared outline into the exam. **Leave all other materials with the proctor at the check-in table.**
3. Please be sure to write your anonymous examination number on the upper right hand corner in the place indicated on the examination itself and on each blue book. If you use multiple blue books, please number them consecutively.
4. Please write on only one side of each page of the blue book and only on every other line. Please use ink, do not use pencil. If you are typing this examination, double space and leave room for adequate margins.
5. **Essay Question:** The essay question will be graded on the basis of the thoroughness and effectiveness of the analysis it contains. Answers which merely state conclusions, or answers without an explanation of the reasoning and analytical process used to reach the conclusions, will receive little credit. Similarly, answers that recite abstract principles of law without applying them to the facts of the problem presented in the question will receive little credit. Although your answer should be complete, you should not volunteer information or discuss legal doctrines that are not necessary or pertinent to the solution of the problem

7. **NOTE: You MUST TURN IN THE EXAMINATION.** Answers are invalid if the examination itself is not attached to your answers.

ESSAY QUESTION
(Approximately 70% of Grade)

Douglasville is an area of Oldcity (City), a city situated below sea level along the Gulf Coast region, in the State of Mind. This area was developed in the late 1930's and designated as a "Negro Subdivision" that would house the City's growing African American population. As the City grew in the late 1940's, much of the City's industry came to be located in Douglasville and in the 1950's the City, as a development initiative, rezoned the area heavy industrial and mixed use. The City recognized that residential and heavy industrial uses were not compatible, but anticipated that the residents would eventually move elsewhere and the area would become primarily industrial. Hence, the City did not expend resources necessary to build large-scale levies and dikes as it did in other, more established areas. There were smaller levies and dikes, but they were not sufficient to ward off flooding, particularly during the hurricane seasons. While many of the residents did eventually move away from Douglasville, the poor of the area stayed because they had few housing options. As a result, Douglasville is mostly industrial but with a fair amount of small dilapidated houses interspersed among the factories.

One of the few services that Douglasville has is a medical center that accepts indigent patients. Several parents, sitting in the waiting rooms of the medical center, began to discuss their families and discovered that many of their children and grandchildren suffer from a rare form of cancer. They became concerned that maybe something in the area was causing it. They formed an informal, non-profit group called "Save our Kids" (SOK) to see what could be done about the situation. Their mission is to improve matters so that other children in the area will not become sick.

Ms. Banks, the president of SOK, made an appointment with the director of the medical center to see if he might have any ideas about what might have caused the cancer cluster in Douglasville. The director told her that he had no idea, but that the medical center had just received a grant from the federal National Institute of Health (NIH) to build and annex a biolab onto the medical center. Perhaps, he said, one of the researchers could secure funding to study the incidences of cancer in the area (although there were currently no plans to do so). Ms. Banks reported the meeting to SOK. Members were glad that there was a possibility that the illnesses could be studied, but decided to check further into the newly planned biolab.

Two of SOK's members did some research, and what they found was disturbing. This particular biolab would be unique in that it would house medical research on the most dangerous disease-causing organisms and toxins known to mankind. This is particularly alarming to the SOK members that live adjacent to the facility. One member is raising a grandchild that suffers from the rare form of cancer that has afflicted this community.

Much has already been done in anticipation of the biolab project. As it turns out, the biolab annex will be built on a fifty acre parcel of land immediately behind the medical center. This parcel has been owned by HealthCorp, the corporation that has owned and operated the medical center since 1935, when the medical center was first built. The parcel that will house the biolab is currently full of shrubs and a few trees; it "ponds" during the winter and spring months. The parcel also contains a stream that runs intermittently throughout the year. This small stream flows for about six months each year, but it is dry during the summer and fall. This intermittent stream empties about five miles downstream into Big River, which is a traditionally "navigable" water body. HealthCorp had conferred with the Army Corps of Engineers (COE), who is taking the position that HealthCorp needs to acquire a Clean Water Act Section 404 permit (a "wetland permit"). The parcel is used extensively as a feeding and breeding area by migratory birds. HealthCorp disputes the COE's conclusion that it needs a 404 permit.

HealthCorp also contacted the Fish and Wildlife Service (FWS), who informed HealthCorp that during the spring season, a salamander that is currently listed as “threatened” uses the intermittent stream as a breeding ground (called the red-eyed salamander). There are about five other breeding grounds between HealthCorp’s parcel and Big River. FWS is in the process of determining whether building of the biolab will jeopardize the red-eyed salamander. No critical habitat has been designated for the salamander, although an environmental group has petitioned for the FWS to list critical habitat.

Meanwhile, HealthCorp and NIH are anxious to go forward with the biolab project. They feel there is a pressing need to study some of the organisms that are slated for research projects. The NIH prepared an environmental assessment in which it determined that:

- *The biolab is unlikely to have a significant effect on the environment because the surrounding area is heavily industrialized and degraded.*
- *The alternative of not building a biolab has been considered and rejected by NIH because of the current security threat posed by the potential for “bioterrorism.” No other site locations have been considered because other sites will not have any less of an environmental impact.*
- *Although an endangered salamander might use the site on a seasonal basis, there is not likely to be a significant effect on the species because it has alternative breeding grounds. The COE previously declined to build a larger levy in the area because a large levy would disturb the breeding grounds of the red-eyed salamander. The COE’s decision in this respect has probably increased the numbers of the salamander substantially. Any additional effect on the salamander is likely to be adequately mitigated by HealthCorp.*
- *While the medical center might have to get a permit to increase the capacity of a facility it operates to produce medical tubing, NIH does not believe this to be a related action that it needs to consider. However, even if it were to consider the additional air pollutants from this process, those emissions are not likely to be significant because HealthCorp believes it can “net out of review.”*
- *NIH does not believe it needs an extensive discussion of the likelihood of adverse weather events, and its impact on the biolab, because industry has existed in the area for decades without adverse consequences.*
- *NIH does not believe it needs to discuss environmental impacts likely to result from a terrorist attack because (a) the possibility of terrorist attack is too far removed from the natural or expected consequences of agency action to require further study; (b) because the probability of terrorist attack cannot be determined, the analysis is likely to be meaningless; (c) the National Environmental Policy Act (NEPA), does not require a “worst case” analysis; and (d) NEPA’s public process is not an appropriate forum for sensitive security issues.*
- *The plans for the biolab contain adequate provisions for evacuation of the biolab and surrounding area in the event of an emergency; automobile evacuation routes have been designated for the surrounding communities.*
- *NIH and HealthCorp (the project sponsor) vigorously dispute the contention that the site is subject to federal wetland regulation.*

Therefore, NIH in this environmental assessment makes a Finding of No Significant Impact (FONSI).

SOK members also discovered that the FWS had commented on NIH’s Environmental Assessment and Finding of No Significant Impact. The FWS was highly critical of NIH’s findings.

In terms of the air quality issues, SOK members also discovered that employees of the medical center had developed and patented a specialty medical tubing. Because HealthCorp’s medical center was in an

industrial area, it decided to use part of its facility to manufacture this specialty tubing. An existing wing of the medical center houses the production facility. Historically, in the immediate past five years this process had emitted about 120 tons per year of volatile organic compounds (VOCs, a regulated criteria pollutant under the Clean Air Act). In the five years before that, the process emitted 150 tons per year of VOCs. HealthCorp now plans to increase production of this tubing, not only for the biolab and the medical center, but plans to sell this specialty tubing to other medical and research centers in order to raise revenue to help run the biolab. Currently the production facility runs three burners that each emit about 40 tpy. The center plans to completely replace one of the burners. Because it cannot find a "like kind" replacement for it, the replacement burner will have the capacity to emit 85 tons per year of VOCs.

The area in question is not in attainment for ozone (VOCs is an ozone precursor and as such is regulated instead of ozone) and the applicable offset ratio for VOCs is 1 to 1.3. Forty tons per year (tpy) of VOCs is the level above the baseline that is statutorily considered a significant increase of VOCs. HealthCorp is currently deciding whether it will replace one burner and leave it at that, hoping to avoid "new source review," or whether it should retire one burner and install two additional burners (instead of one). This will allow the medical center to substantially increase its capacity to produce medical tubing. The new burners are expensive, and will each cost about 20% of the capital cost of the center's production facility. If new source review is triggered, it will be very difficult to obtain the necessary offsets. Other industries in the area have already utilized all reductions that qualify as offsets.

Discuss the applicability of federal environmental laws and related constitutional issues covered this semester in environmental law. Your discussion could include, but need not be limited to, the following inquiries:

- Will the COE be able to successfully assert federal jurisdiction, and, if so, are all requirements met for issuance of a wetland permit? (pro and contra arguments)
- Is the EA/FONSI defensible? Why or why not? How is the court likely to rule and why? If an Environmental Impact Statement must be prepared, what must it contain? (what would each stakeholder—including sister agencies—want it to contain and why?)
- What do you anticipate the Fish and Wildlife Service will do? What are its options? What, if anything, can NIH and HealthCorp do in response?
- What must HealthCorp do to comply with requirements applicable to its VOC emissions? What are its options at this point? What would you advise it to do and why?
- Strategically, what would be the best way for HealthCorp to proceed and why? What would be the best way for SOK to proceed and why? If SOK decided to file a lawsuit, what does it need to show in order to establish Article III standing?

If you need to make any plausible factual assumptions, list the assumptions you are making and why you need to make them. If in your assessment, further factual investigation is needed by SOK or HealthCorp, what facts would need to be developed further and how would the facts be legally relevant?

Have a good time with this. Really.