

FINAL EXAMINATION

ADMINISTRATIVE LAW

PROFS. HELMLINGER AND LIEBEN

SPRING 2006

INSTRUCTIONS

1. You have a total of **three (3) hours** to complete this examination. Though it is not required, you may allocate 1.5 hours (90 minutes) to each question.
2. This is a **partial open book** exam. No materials are allowed with the exception of ONE 8-1/2 by 11 PIECE OF PAPER with notes. Again, other than this, no outside materials are allowed.
3. The exam consists of two (2) essay questions, each of which is divided into two or three subparts.
4. Please answer these questions in the blue books provided to you. Write only on the right hand side of the page (skipping a page each time) and double-space your work. Please write legibly.
5. Write your exam number on your exam envelope. Put your student exam number at the top of this page, each page of questions, and each blue book. Do not use your name, student ID number or Social Security number on any exam materials.
6. At the conclusion of the exam, return all exam materials to the exam envelope and submit it to the proctor. Do not seal the envelope. Students who do not return all exam materials at the end of the exam may not be graded.

GOOD LUCK!

PART ONE

Due to growing evidence regarding the carcinogenicity of electromagnetic radiation fields, Congress creates the Remedial Agency for Dangerous Radiation (RADR) tasked with protecting the U.S. public from the health threats of electromagnetic fields (EMF). RADR's organic statute, the Xenith Radiation Act of the Year (X-RAY), states in Section 5 that RADR shall after creation of a record, regulate electromagnetic fields emanating from appliances, devices and discrete objects to a level requisite, to the extent feasible, to protect human health. Section 11 of X-RAY allows the U.S. to file a civil lawsuit against a violator of any requirement of X-RAY. Section 12 of X-RAY contains a provision that allows for any U.S. citizen to file a lawsuit against anyone in violation of any requirement of X-RAY and allows for both injunctive relief and penalties to be paid to the federal treasury. Nothing in X-RAY explicitly authorizes the filing of a lawsuit against RADR, however. The Senate report for X-RAY contains the following statements:

The Senate passed X-RAY to protect the public from the newly understood and emerging threat of electromagnetic fields and radiation, which emanate from all appliances, devices and other conveyances present in our work and home environments. Due to the magnitude and immediacy of the threat, it is important that the laws and regulations be enacted quickly with minimal litigation.

Shortly thereafter, pursuant to Section 553 of the Administrative Procedures Act, RADR proposed in the federal register certain rules called the Federal Rule for the Inhibition of Electromagnetic Dangers (FRIED). Under FRIED, RADR proposed an EMF level of 1 milliGauss (mG) as the legal limit for radiation emanating from certain identified appliances, devices or discrete objects. In the rule, RADR identified studies indicating that this was the minimal level considered safe by many preeminent scientists. RADR also found that chronic and focused sources of EMF, such as cell phones, are the most dangerous sources of EMF and that exposure from phones should be severely reduced if not eliminated entirely. RADR proposed to require all cell phone service providers to limit their customers cell phone usage to 30 minutes a day through the use of cell phones with automatic shutoffs. RADR proposed such requirements despite the fact that the U.S. Senate, in the context of other laws, had made various statements that the unimpeded and free use of cell phones is vital to the continued growth of the U.S. economy.

During the 30-day comment period, the Toaster Oven Association of South Teaneck (TOAST) submitted comments that the high industry costs necessary for the R&D and eventual compliance with FRIED's proposed levels would likely put many manufacturers of appliances and devices out of business. TOAST recommended an EMF level of 3 mG. RADR issued a final rule establishing an EMF regulatory level of 5 mG and finalizing the cell phone limitations as proposed. In the final rule, RADR agreed with TOAST's comments that the agency should have considered the costs of the new requirements on the regulated community and stated, In consideration of such costs and other information, RADR believed that it was appropriate to raise the EMF limit to 5 mG. While staff level

employees of RADR relied upon additional studies to finalize the higher standard, the other studies were never identified or provided to the public.

In an unrelated informal agency policy, RADR interpreted the statutory term discrete object in Section 5 of X-RAY to also include power lines, which were not previously identified in FRIED for regulation, and established a standard of 4 mG for these sources. The Merriam-Webster Dictionary defines discrete as individually distinct and object as something that may be seen or felt.

(Question continues on next page.)

Singularity Cellular, Inc. (Singularity) and International Communications Media (ICM) are two cell phone service providers regulated under FRIED. Singularity is in violation of FRIED by not providing cell phones with a 30-minute shutoff to its customers. RADR has failed to enforce against Singularity.

QUESTIONS to Part I:

1. NO Waves (a nonprofit group formed to advocate for more stringent EMF requirements) and ICM both want to directly challenge in federal district court the legality of FRIED. Neither entity submitted comments on the proposed rule. NO Waves claims that the 5 mG standard is not stringent enough. ICM claims that X-RAY did not authorize RADR to regulate cell phones the way it did under FRIED. ICM also wants to challenge RADR's failure to enforce against Singularity, as it puts ICM at a competitive disadvantage. What are NO Waves and ICM's best arguments and what are RADR's best defenses?
2. The Acme Power Company (APC), a retail power provider whose power lines would be regulated under RADR's informal policy, wants to challenge the legality of the policy. What are APC's best arguments and RADR's best defenses? (for this question, assume jurisdiction and reviewability and only discuss the merits of any legal claim)
3. NO Waves wants to file a lawsuit against Singularity for the violations of the requirements of FRIED. No member of NO Waves can demonstrate any actual harm from EMF waves, but its members can demonstrate that they routinely use cell phones. Will NO Waves have trouble with standing? Why or why not? How should NO Waves best plead its lawsuit to ensure standing?

PART TWO

The Athletic Achievement Administration (AAA) is a federal agency formed in the wake of several recent sports doping scandals that have shaken the public opinion and confidence in professional sports. To demonstrate its commitment to finding a solution, the U.S. legislature quickly passed the Authentic Achievement Act, which provides only that AAA is to be an independent agency to regulate the use of sports supplements to promote athletic accountability and to restore the public confidence, and that the Administrator of the AAA is appointed by the President with the advice and consent of the U.S. Senate. With this charter, AAA promulgates an aggressive series of rules, among which is a requirement that all supplements administered to professional athletes must be licensed by AAA. Supplements are defined broadly to include any substance used or ingested for the purpose of increasing athletic ability beyond the traditional means of training. Because the supplements often are marketed to the public as well as professional athletes, AAA also requires all supplement manufacturers to provide material disclosure of the active ingredients and intended use for all supplements. Additionally, supplement manufacturers are required to provide a complete chemical formula for each supplement to AAA as part of the licensing requirement. To promote competition among supplement providers, AAA also published a minute statement that it will revoke or deny a license for any supplement provided to more than four teams in any one professional sport.

Body Better, Inc. (BBI) is a pharmaceutical company that makes various health and fitness supplements. Its CEO is the brother of the U.S. president. Its primary product is a cream-based supplement called Flax-o-Lax. BBI obtains a license from AAA for Flax-o-Lax after providing information to AAA asserting that the supplement is useful for maintaining muscle tone and that its active ingredients only include flax seed oil. BBI did provide a complete molecular formula for the supplement.

After Carrie Lou Rotten, a professional basketball player, publicly blames Flax-o-Lax for causing sudden, unanticipated weight loss, an AAA investigation reveals that Flax-o-Lax contains a very powerful laxative that interferes with a body's absorption of nutrition. BBI thereafter submitted a revised licensing application to AAA for Flax-o-Lax, asserting a change in the intended use from muscle toning to weight loss. AAA never replied to the amended licensing application.

Instead, AAA sent a letter to BBI informing it that its license to manufacture and distribute Flax-o-Lax is suspended pending a review of any information BBI wishes to send to AAA to argue otherwise. BBI is allowing 15 days to send a written statement to AAA, which may include all arguments against the license revocation. AAA will provide an administrative law judge (ALJ) to review the statement from BBI and a written statement from AAA, and to determine whether the license suspension should become final.

Soon thereafter, the President sends a letter terminating the services of the Administrator of the AAA, noting that the Administrator's services no longer are consistent with the interests of my administration.

Prior to any hearing on the licensing of Flax-o-Lax, Drug Co. purchases BBI. Drug Co. already provides a supplement licensed for the same purpose and similar to Flax-o-Lax to four professional basketball teams.

After BBI and AAA exchange arguments in writing before the ALJ, the ALJ rules in favor of AAA and upholds the license revocation.

(Question continues on next page.)

QUESTIONS to Part II:

1. What arguments should Drug Co. (formerly BBI) have included in its statement to the ALJ?
2. What issues must Drug Co. (formerly BBI) address in any appeal of the ALJ's ruling?
3. For consideration in a personal injury action but prior to any judicial filing, can Carrie obtain the chemical formula for Flax-o-Lax from AAA?
4. May the President remove the Administrator of AAA?

END OF EXAM