

**FINAL EXAMINATION
ADMINISTRATIVE LAW
PROFS. HELMLINGER AND LIEBEN
SPRING 2007**

INSTRUCTIONS

1. You have a total of **three (3) hours** to complete this examination. Though it is not required, you may allocate 1-½ hours (90 minutes) to each question.
2. This is a **closed book** exam with the exception of ONE 8-1/2" by 11" PIECE OF PAPER with notes (permissible on both sides). 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 page (use the left hand page to correct mistakes or margin additions) and double-space your work. If you do not write legibly, the answer may not be graded.
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

In 2004, the United States Congress passed legislation creating the Embryo Protection Agency (“EPA”). In its organic statute, Congress authorized EPA to “ensure protection of human embryos to protect the public health or welfare.” The statute further provided that “EPA may issue such regulations to implement the purpose of this Act, and all such regulations shall be subject to the discretion of the Administrator.” The statute also provided for civil penalties of up to \$32,500 per day for violations of regulations promulgated by EPA.

On August 1, 2005, EPA promulgated the following regulation:

No person shall use human embryos as a source for stem cells except as from designated lines. No person shall conduct medical research using stem cells without a permit from EPA.

A stem cell line existing prior to the date of these regulations shall be a designated line if, within thirty days from the date of these regulations, the line is registered with EPA.

Arnold Eiermann is a medical researcher hoping to find a cure for diabetes. In 1996, he initiated a culture of stem cells and continued breeding from that line of cells to promote his work. This line, however, had not been registered with EPA. In 2006 Arnold set about beginning a clinical trial phase of his work. Arnold used chemotherapy to break down the immune system of 15 diabetic patients, and used stem cells from their own bone marrow to rebuild the immune systems. Thirteen of the patients were cured of their diabetes. The other two patients were not cured.

One of Arnold’s non-cured patients, “Sweets” Zuckerman, sent a letter to EPA requesting that it take an enforcement action against Arnold for the unpermitted use of stem cells. The Administrator of EPA sent a letter to Sweets that read: “Arnold’s use of his existing stem cell line in his research raises an interesting question that EPA will review. However, his use of stem cells from adult patients does not violate EPA regulations.” Subsequently, EPA issued an administrative complaint against Arnold alleging that his use of the unregistered stem cell line in his research violated the EPA regulations.

Brenda Bowtalks is a cosmetic engineer. While working to develop an anti-wrinkle cream, she finds that she can obtain embryo stem cells on the internet that are “guaranteed federally approved lines.” Unknown to Brenda, the cells are from a University of Hong Kong laboratory that gets its supply from Taiwanese family planning clinics. When her order arrives, federal marshalls arrived with an administrative warrant from EPA and seized the packages and shipping information. Although the warrant recites that it is based on EPA’s delegated authority, in fact no statute expressly provides authority for seizures. The marshalls left a notice allowing ten days for her to file a written response to allegations that she had violated EPA’s stem cell regulations and that she should be liable for a penalty. Brenda filed a response in which she denied that she had violated EPA regulations and petitioned for the return of her packages. The hearing officer made a written denial of the petition to return the packages, and noted that he was considering the rest of Brenda’s response and would make a ruling based on the data and statement that he had received from EPA and from Brenda (none of which had been made available to Brenda). Before the end of the penalty

(Question continues on next page.)

proceedings, Brenda filed a petition in the federal district court seeking the return of her package, and seeking an injunction to prevent the continuation of the administrative proceeding.

Carli Congresswoman is a federal representative for Brenda's district, and was so outraged by EPA's actions with Brenda and at similar businesses throughout the country that she spearheaded legislation authorizing Congress to remove the administrator of EPA, which passed over the veto of the president. The new legislation authorized Congress to remove the Administrator when it "deemed that the Administrator was not acting in the best interests of the United States or within the purpose of the Embryo Protection Act." Subsequently, Congress passed a resolution by which it "deemed the Administrator of EPA was not acting in the best interests of the United States or within the purpose of the Embryo Protection Act," and removed him, leaving a vacancy in the position.

QUESTIONS to Part I:

- A. What arguments might Arnold make in his defense of the EPA enforcement action?
- B. Sweets is very angry that it appears from the letter he received that EPA is not taking an action against Arnold. What could he do? Can Sweets obtain information from EPA about its actions against Arnold?
- C. What claims should Brenda raise with the district to court to obtain the relief she requests, and how do you think the court will resolve those claims?
- D. The (former) EPA administrator wants his job back. What arguments can you make on his behalf, and how do you think courts will handle them?

PART TWO

Inspired by the *Massachusetts v. EPA* Supreme Court Ruling, Congress passed a statute in 2008, the Greenhouse Action Statute (“GAS”), to combat the effects of global warming. Section 10 of GAS directs the Secretary of the Internal Revenue Service (“IRS”) to “take action in implementing the tax code, as she deems appropriate, to encourage non-carbon utilizing energy sources.” Section 11 of GAS creates a \$5,000 tax credit for “energy efficient vehicles” to be applied on April 15 of each year to each eligible purchaser of such a vehicle. Section 12 states that the Secretary shall “implement GAS in a manner that deters the use of non-energy efficient road vehicles.” Section 16 of the Statute creates an administrative review process administered by an independent hearing officer for taxpayers who wish to challenge any IRS tax decision under GAS. It also states that “no court of the United States will otherwise have jurisdiction to review decisions by the Secretary under the provisions of this Statute” and requires that the taxpayer file an appeal by May 15. GAS contains no other provisions for judicial review. The legislative history for GAS almost exclusively focuses on the importance of the government taking immediate action to address one of the major challenges facing humanity today, global warming. There are also statements in the legislative history that the IRS should have wide discretion in implementing GAS.

Shortly after the enactment of GAS, the IRS proposed pursuant to Section 553 of the Administrative Procedures the Rule Against Greenhouse Emissions (“RAGE”) that, among other things, identified categories of applicable vehicles eligible for the \$5,000 tax credit. The IRS proposed that the tax credit only be available to purchasers of “hybrid” technology vehicles that are co-powered by a battery and an internal combustion engine. RAGE also included a proposal that requires any purchaser of a Humvee to pay a \$2,000 tax penalty to deter use of these vehicles.

During the public comment period, Humdinger, a Humvee manufacturer, submitted comments on the proposed rule. Humdinger claimed that the Humvee penalty was unfair because the company could now produce an ultra-fuel efficient version of the Humvee utilizing tiny solar panels on the roof and hood of the vehicle. Humdinger submitted a report from a national expert on fuel efficiency supporting this claim. Based on this, Humdinger argued that purchasers of its Humvee should not be penalized, and in fact, merit the tax credit. Moreover, Humdinger claimed that most of its purchasers are from the Dwibe-Phast Native-American group who need the vehicle due to the roughness of the terrain of their reservation, and they would no longer be able to purchase the Humvee. This could also put Humdinger out of business.

Normal Car, Inc. (“Normal”), a manufacturer of conventional, albeit highly fuel-efficient, cars commented that its vehicles should be open to the tax credit as well. The CEO of Normal had a dinner “date” with one of the IRS Commissioners during the comment period, and they generally talked about how incentives like those created in GAS could finally change the purchasing habits of consumers in regard to the fuel efficiency of vehicles, but did not talk about the specifics of RAGE.

The IRS finalized RAGE by enlarging the tax credit portion of the regulation to apply to “all non-Humvee passenger vehicles that meet at least a fuel efficiency standard of 35 miles per gallon, regardless of the type of engine in the vehicle.” The IRS provided no explanation in the preamble to the final rule for the change, other than a statement that the Agency determined that the

(Question continues on next page.)

additional flexibility to obtain a tax credit for conventional vehicles “would provide an incentive for the majority car manufacturers to increase mileage standards.” The IRS did not change the treatment of Humvees per the penalty, and did not provide a specific response to Humdinger’s comments.

Shortly after promulgating RAGE, the IRS issued an informal guidance that it would be assessing a \$500 tax penalty for purchasers of lawn mowers, as the federal government identified them as a major source of air emissions. The guidance also said that during the first 5 years of implementation of RAGE, other than for “exceptional circumstances”, IRS would not bring enforcement actions against purchasers of Humvees who did not pay the penalty at tax time.

QUESTIONS to Part II:

1. Humdinger wants to challenge RAGE. Batteries Machines Work (“BMW”), a manufacturer of hybrid cars, also wants to challenge RAGE because giving the tax credit to non-hybrid vehicles impacts its competitive edge. Will each be able to challenge the rulemaking in district court and what are the best legal claims, along with IRS’s defenses, against the rulemaking? Will these claims be successful?
2. Go Mow, a manufacturer of internal combustion engine lawn mowers, wants to challenge the IRS’ guidance creating a tax penalty for purchasers of its products. Is the guidance legal? Why or why not?
3. Citizens Against Roads (“CAR”), a non-profit group with a stated interest in fighting global warming, wants to challenge as arbitrary and capricious the IRS’s position that it will not take enforcement action against scofflaws of the Humvee penalty requirement. What advice would you provide to CAR to best ensure standing and why?
4. An individual taxpayer, who is part of the Dwibe-Phast tribe and who purchased a Humvee, wants to challenge in federal district court the \$2,000 penalty which he already paid. The date is May 16. Without discussing the merits of the claim, describe the factors impacting whether he will be able to obtain review in federal district court? Will he also be able to generally challenge the RAGE rulemaking if the court allows review?

END OF EXAM