

Final Examination
Environmental Law & Policy
Professor Rechtschaffen
Fall 2006

INSTRUCTIONS

1. You have **two (2) hours** to complete this exam.
2. This is a **closed** book exam. There are **four** essay questions. Please make sure to completely **all questions completely**,
3. Please take your time to think about the question before answering it. I am more interested in how you apply and analyze various rules and principles than in having you simply repeat the rule back to me. Please also keep in mind that I expect you to discuss general statutory and regulatory provisions (not necessarily precise sections). If there are insufficient facts for you to give a more definitive answer, please state what additional facts you would need to answer the question more completely.
4. Please write your response in the blue books provided. Please write clearly. Write on every other line and every other page to permit instructor comments. Typed answers also should be double spaced.
5. Write your exam number on your exam envelope. Put your correct class section and student exam # 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 test materials, including blue books, scratch paper, and this exam packet to the 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 have their exams graded.

**GOOD LUCK AND HAPPY
HOLIDAYS!**

Question

(Two Hours)

There are four subparts to this question. Please be sure to answer all of them.

Company wants to build a new superstore comparable in size to a Wal-Mart store in Fresno County, in the Central Valley of California. Company has proposed that the store be located on a 50 acre parcel, all of which is wetlands. The parcel, which the company owns, has excellent access to existing highways. Fresno County conducted an economic study that demonstrated that there was a need in the area for a low-price superstore and that such a store could bring several hundred, badly needed new jobs to the county.

The wetlands on the project site are seasonal in nature, ponding during the winter and spring months. The wetlands are adjacent to a small stream, that runs intermittently through the year - it flows continuously for about 6 months of the year, but is dry during the summer and fall. The stream empties about 5 miles downstream into the Kern River, which is a traditionally navigable water body. Expert testimony indicates that the wetlands are used extensively as a feeding and breeding area by migratory birds, and that the wetlands filter pollutants that would otherwise enter the stream and the Kern River.

Company approaches the Corps of Engineers to determine whether it will require a permit under Section 404 of the Clean Water Act (CWA) for the project. The Corps determines that it has jurisdiction over Company's wetlands and that a permit is required.

After the Corps determination, Company applies to the Corps for a permit to fill the 50 acres of wetlands. The Corps grants the permit. Two environmental groups file suit challenging the Corps' decision, alleging that it has violated the CWA and the National Environmental Policy Act (NEPA). The first plaintiff is a national group of wetlands scientists who research seasonal wetlands in the Central Valley of California, including in the Fresno area. The scientists allege that their professional interests will be harmed if the project is built because it will diminish the pool of seasonal wetlands in the area available for study and research. The second plaintiff is the Central Valley Birders Group, whose members live about 150 miles from the project site. The members of this group allege that they have visited the project site every two years for the past 15 years and intend to do so indefinitely in the future to observe migratory birds feeding, resting, and frolicking.

The Corps files a motion to dismiss on the grounds that both plaintiffs lack standing to bring suit. The court denies the motion, and rules that both plaintiffs have standing to sue.

The court then considers the merits of plaintiffs' challenge. The Corps prepares an Environmental Impact Statement (EIS) for the project, which also includes the Corps' analysis of whether the project satisfies the requirements of the CWA Section 404 regulations. In its discussion of project alternatives, the EIS evaluates three alternatives: (1) the no project alternative; (2) building a superstore on half the site, 25 acres in size; and (3) building a superstore using all 50 acres, the preferred alternative that the Corps

selects. The EIS does not evaluate as alternatives three 50-acre sites located in two nearby counties. These sites are not wetlands, and are not owned by Company.

Plaintiffs challenge the Corps' evaluation of alternatives as inadequate. The court rules: I find that the proposed project is building a superstore that will satisfy consumer demand for low priced goods and reduce unemployment in Fresno County. The Corps' evaluation of alternatives under the NEPA and the CWA is adequate.

A few miles away from the project site is a Local Gun and Rod Club. Patrons of the Club regularly use lead shot, supplied by the Club, to shoot ducks and other birds. Some of the lead shot is consumed by wildlife in the area, including the endangered Swanson's hawk, in amounts that can cause death or serious injury. In addition, the Club's hunting dogs very occasionally have wandered off the Club's boundaries and dug up some areas that are not currently occupied by the Swanson's hawk but that could be used in the future as breeding sites. The Club's shooting program is approved each year by the California Department of Fish and Game. The population of the Swanson's hawk had been relatively stable at around 1000, but in the past two years has dropped by approximately 15 hawks each year. Plaintiffs have asked your advice about whether they could sue the Club or the Department of Fish and Game for violating the Endangered Species Act (ESA).

Please answer the following questions:

1. Is the Corps' determination that it has jurisdiction over Company's wetlands correct? Please explain your answer.
2. Is the court's decision that both plaintiffs have standing to sue to challenge the Corps' decision correct? Please explain your answer.
3. Is the court's ruling that the Corps adequately evaluated alternatives under NEPA and the CWA correct? Please explain your answer.
4. Would plaintiffs be successful in suing the Gun Club for violating the ESA by supplying lead shot to its patrons and allowing its dogs to dig up areas that could be used in the future as breeding sites by the Swansons hawk? Would plaintiffs be successful in suing the California Dept of Fish & Game for violating the ESA by approving the shooting program of the Gun Club? Please explain your answers.

END OF EXAM