

Final 2007, Outline of Answer

[This model answer covers more issues than I would expect any single student to answer in the exam, especially given the word limit.]

1. Env'tl group: Why EPA should take action & what action to take? (11 points)

Under section 6 of TSCA, EPA shall regulate any chemical substance if there is a "reasonable basis" for concluding that manuf., processing, distribution of substance will present an "unreasonable risk of injury to health or environment." EPA is authorized to regulate "to the extent necessary" using "least burdensome requirements," including labeling, notification, limits on use, limits on exposure, bans. Section 6(c)(1) requires EPA to make findings about health & env'tl effects of substance, benefits & availability of substitutes & economic effects of regulation.

a. Why EPA should act?

This admittedly is a somewhat difficult argument to make. The environmental group will argue that there is sufficient evidence to show that there are or are likely to be significant health effects from PFOA, one of the required findings under section 6(c)(1)(A). This evidence includes animal studies showing a variety of adverse developmental effects (and animal studies are an adequate basis for proceeding); epidemiological studies showing an association with prostate cancer and PFOA among workers; and evidence indicating that PFOA exposure results in elevated levels of human hormones. TSCA does not require absolute scientific certainty, just that the agency decision be supported by "substantial evidence." *Corrosion Pipe Fittings*. While the costs of these harms have not yet been quantified, they could be very high, considering that there is widespread exposure to PFOA throughout the population; there is no "safe" level of exposure, and the chemical is long lasting. Unquantified costs can be factored into the agency's determination of "unreasonable risk." On the cost side, the environmental group will argue that costs often are overstated by industry, and that regulation of PFOA can force technological improvements and the development of alternatives.

b. Which action should EPA take? (11 points)

Under *Corrosion Pipe Fittings*, EPA must calculate the costs/benefits of each regulatory option & compare them to the costs/benefits of other alternatives. When EPA proposes ban on product for which no substitutes presently available, burden on agency is particularly great to demonstrate that action is least burdensome approach.

Here, given that the facts do not discuss any available substitutes, and given the lack of information about exposure outside the workplace, there probably is insufficient evidence to support a product ban, or limits on the commercial use of the product. The most justifiable actions likely are requirements that do not eliminate use of the product (and thus avoid the need to demonstrate the availability of substitutes) such as

Pros:

Employs precautionary approach
Prevents harm to environment from PFOA before the fact
Shifts burden of proof (and costs of testing) to producers
TSCA framework led to very little regulation
Reverses incentives for "toxic ignorance," we currently lack toxicity data on large percentage of toxic chemicals
Old chemicals largely unregulated; REACH eliminates disparity (& PFOA is older chemical)
Creates incentives to develop safer alternatives or "adequate controls" to allow continued use
Avoids cost/benefit analysis & problems associated with it, such as discounting, uncertainties in risk assessment, putting a price tag on human lives & injuries, dealing with unquantifiable benefits, often overstated industry costs of compliance

Cons:

Increase costs of products, including those very beneficial to society
Still relies on risk assessment to evaluate safety of substances
Likely lead to additional animal toxicity testing
Imposes administrative burdens on EPA
Could threaten trade secrets

B. Information Disclosure Approach

Pros:

Cheaper than command & control
May trigger alternatives
Reporting can create incentives to be more careful

Cons:

Exposures may still occur despite warnings
Warnings may be ignored. Consumers have been using Teflon & other PFOA products for years, may be complacent about these products & disregard warnings. Products are popular, consumers may not want to give them up. B/c so many PFOA-based products, may lead to too many warnings that consumers will tune out.
May be that consumer products are not significant source of PFOA exposure, most related to manufacturing processes
May not be available substitutes.
May cause switch to equally harmful products
May not generate enough pressure to shift from very desirable uses, i.e. aid in fuel efficient cars, Gore-Tex products

[Some students pointed out that National divested itself of the property before the metals were disposed of. This is correct, but it may not be of any practical help in limiting National's liability as a PRP (although it will help in a contribution action) because the metals and pesticides later co-mingled in the soil, so National probably would be jointly and severally liable for cleaning up both the soil and the groundwater.]

Blackhawk

Question is whether it is liable as owner at time of disposal under 107(a)(2). Courts are split as to when liability attaches to interim owners like Blackhawk-- some limit it to parties who actively dispose of waste, while others provide for liability for any passive migration that occurs while the party owns the site. In *Carson Harbor*, 9th Circuit took middle position, holding that there is liability where there is some type of "spilling," "leaking," "dumping," (like spilling of a barrel or spilling over of holding pond) but that disposal means more than very gradual movement of tar like material. Here, Blackhawk took no activities on site & took no measures to clean up contamination (that would have triggered leaking, etc), although chemicals did move through soil & groundwater (rather rapidly, given that found as far as one mile away from distribution facility), so plausible argument that it is liable (although a court certainly could rule the other way).

Blackhawk would not qualify as an "innocent landowner," because it purchased the property with knowledge of the hazardous waste contamination. Likewise, it would not qualify as a bona-fide prospective purchaser, because (1) it purchased the land before 2002; (2) is not the current owner of the land; and (3) it did not take any steps to limit the contamination.

Plater & Metals

Both liable as generators. There is no "innocent generator" defense available to them. Question is whether liability is divisible. CERCLA provides for joint & several liability, unless a PRP can demonstrate that harm caused is distinct or there is a reasonable basis for apportionment.

Plater & Metals have strong argument for apportionment, at least w/respect to the groundwater remedy. They both disposed of heavy metals which were relatively immobile and did not migrate to groundwater underneath or adjacent to soil. EPA spent only \$300,000 on contaminated soil, and \$3 million cleaning up the pesticides in the groundwater. Arguably, they should only have to pay a share of the \$300,000 to cleanup the contaminated soil, and not the \$3 million to clean up the groundwater. As for the \$300,000, probably impossible to divide up liability among Plater, Metals, and the other PRPs.