

Final Examination
Toxics Law & Policy
Professor Rechtschaffen
Spring 2006

1. You have **two (2)** hours to complete this exam.
2. This is a **closed book** exam. Students may not use any outside materials or confer with each other during the exam.
3. This exam consists of two (2) essay questions, including subparts. Please make sure to fully answer all parts of each question
4. Please take your time to think about each 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 or subparts). 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.
5. 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.
6. Write your exam number on your exam envelope. Put your 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.
7. 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 be graded.

GOOD LUCK!

Question I

(One Hour)

From 1970 to 1985, Minerals, Inc. operated a mercury processing plant on a 10 acre parcel of land. During that time, Minerals dumped untreated mercury waste onto the ground, where it seeped into the soil on site.

From 1975 to 1978, Jones, a scrap metal processing facility, shipped spent scrap metal containing mercury to Minerals to be recycled. Minerals had contractually promised Jones that the scrap metal would be handled carefully and recycled for use in Minerals' own operations. Shortly thereafter, however, the market for scrap metal declined sharply, making recycling of the scrap metal unprofitable for Minerals. As a result, about 75% of the scrap metal sent by Jones to Minerals was dumped, untreated, onto Minerals' property, where mercury from the metal seeped into the soil on site.

The spent scrap metal from Jones' facility was taken to Minerals' facility by Tom Trucker. In the transportation contract between the parties, Jones specified that all the spent scrap metal was to be sent to the Minerals facility.

In 1985, Minerals closed the facility and sold eight of the ten acres to Wood Ridge, Inc. It sold the remaining two acres of the property to the company president. (Minerals has long since gone out of business.)

When Wood Ridge purchased the property in 1985, it was aware of Mineral's prior business activities. It considered restarting operations at the facility, but decided not to do so, and instead left the property unused. In 1990, EPA conducted tests on the property and found that the mercury contamination was slowly moving through the soil toward a local creek, at the rate of four feet per year. Shortly thereafter, Wood Ridge installed a containment system on the property that dramatically slowed down, but did not completely stop, the flow of the mercury toward the creek.

In 1992, the company president died, leaving the property to his daughter, Diana. Diana never lived on the property or used it, and has left it completely as is since her father's death.

In 2004, Rob, a commercial real estate developer, purchased the 8-acre parcel from Wood Ridge. Rob plans to construct a shopping center on site. Prior to purchasing the property, he hired an environmental consulting firm and reviewed all prior known uses of the site, and obtained a copy of the previous EPA testing of the site. Rob has begun work on a treatment system for removing and cleaning up the contaminated soil. He also has constructed a chain link fence around the boundaries of the property. After EPA conducted some additional recent sampling, Rob has been unwilling to allow EPA further access to site because of fear that EPA's involvement will stigmatize the property and make redevelopment more difficult.

Mercury is listed as a hazardous substance under CERCLA. The recent testing by EPA found mercury contamination on the parcels owned by both Rob and Diana.

EPA is considering filing a cost recovery suit against the parties. Please evaluate whether EPA will be able to recover its costs against Jones, Trucker, Wood Ridge, Diana, and Rob. Please explain why or why not.

Question II

(60 Minutes)

This question has two parts, A & B, each 30 minutes. Be sure to answer each fully.

Question A (30 Minutes)

Company is the producer of pesticide P. The pesticide has been registered with and approved by EPA under FIFRA. The label for the pesticide approved by EPA states that the pesticide should not be ingested and should be kept out of the reach of children. EPA has been seriously considering requiring additional information on the label stating: Caution: This product contains a chemical which has been shown to cause cancer in laboratory animals.

Pesticide P has been listed by the State of California under Proposition 65 as a chemical known to cause cancer. Plaintiff plans to file suit under Proposition 65, alleging that Company has failed to provide a warning to persons in California exposed to pesticide P. Company's response is that Proposition 65's warning requirements as applied to pesticide P are preempted by FIFRA's labeling requirements.

Under FIFRA, labeling is defined as all labels and all other written, printed or graphic matter accompanying the pesticide or device at any time. Under Proposition 65, warnings required for exposures from consumer products, including pesticides, can be provided by a label on the consumer products, or by posting shelf signs or other signs in a retail store. Proposition 65's implementing regulations provide that a warning which states: Warning: This product contains a chemical known to the State of California to cause cancer, is legally sufficient. The regulations also provide that other warning language is sufficient if it provides a clear and reasonable warning to consumers.

Please analyze whether FIFRA would preempt plaintiff's claim alleging that Company must provide a warning for pesticide P under Proposition 65. ♦

Question B (30 minutes)

EPA is considering whether to initiate cancellation proceedings under FIFRA for pesticide P, which originally was registered with EPA in the 1960's. Pesticide P is used to promote the faster growth of peanuts. Recent testing, as noted above, has shown that pesticide P causes cancer in laboratory animals. Residues of the pesticide remain on peanuts and products such as peanut butter at levels that according to EPA's recent risk assessment result in cancer risks of between 4 and 10 in one million (the risk levels differ based on whether one assumes that the risk of a given dose of a carcinogen is greater if the person exposed to the carcinogen is a child as opposed to an adult). One recent study, moreover, suggests that the synergistic risks of pesticide P in combination with other pesticides used on food products may be tenfold as great as the risks from pesticide P alone. The costs of canceling the pesticide are estimated at \$150 million per year in reduced crop yields and peanut industry profits, at least until an effective alternative is developed. EPA estimates that canceling the pesticide will save approximately 15 lives per year.

Under FIFRA, can EPA cancel the registration of the pesticide? Please explain.

END OF EXAM