Introduction to Administrative Process

Final Examination

Professor Field Spring 2005

General Instructions

This is a three-hour, open-book exam; you may consult any printed materials.

Section references, unless otherwise indicated, refer to the APA or to FOIA. References to, e.g., "Agency" or "Statute" are to a *specific* entity or document; "agency" or "statute" are not.

• Use the answer sheet provided; be sure to include your exam number.

• Questions in Part I are worth four times as much as those in Part II; in both, answer only 20 of 24 questions.

Part I: Multiple choice

[80 points]

Please choose the letter corresponding to the most correct concluding phrase or statement.

1. When Statute provides for review of Agency actions:
   A. all such actions are reviewable by anyone interested.
   B. only procedural issues are reviewable under the APA.
   C. only substantive issues are reviewable under the APA.
   D. any matters not addressed there are governed by the APA.

2. When Statute says that specific Agency Action "may" be reviewed in a particular court:
   A. APA § 702 clearly permits general review in any court of competent jurisdiction.
   B. APA § 703 is unlikely to foreclose review of Agency Action in another court.
   C. APA § 703 is likely to foreclose review of Agency Action in another court.
   D. APA § 703 will foreclose review of all Agency action in another court.

3. When two or more agencies have conflicting views of the same subject matter:
   A. the first agency to take jurisdiction is apt to control.
   B. the agency with the most specific jurisdiction is apt to control.
   C. the Department of Justice is powerless to do anything about it.
   D. parties may enforce interagency memoranda of understanding.

4. When agency rule making is allegedly being influenced by Congressional pressure, courts:
   A. uphold rules unless they are based on considerations made irrelevant under Statute.
   B. review as soon as possible to avoid potentially unnecessary litigation expenses.
   C. apply the same standards as when such pressure influences adjudication.
   D. do not hesitate to enjoin unduly vocal politicians.

5. When parties challenge agency adjudication outcomes, courts:
   A. have jurisdiction under APA § 704 only if all intramural appeals have been taken.
   B. never entertain collateral challenges until available intramural review is complete.
   C. cannot act until agency heads approve any proposed order under APA § 557(b).
   D. need not await intramural review unless that is required by a statute or rule.

6. If Statute requires final Agency rules to be challenged within 30 days:
   A. participants may raise issues addressed by other participants if not by themselves.
   B. courts will entertain APA § 706(2)(D) challenges in enforcement proceedings.
   C. participants may raise only issues that they, themselves, have clearly raised.
   D. courts may entertain challenges by any clearly affected person.

7. Some, but not all, informal Agency adjudications may be reviewed in either circuit or district courts. Only the latter allows the record to be supplemented. Typically, such review in:
   A. all courts would be under F.R.C.R 52(a).
   B. appeal courts would be under § 706(2)(A).
   C. appeal courts would be under § 706(2)(E).
   D. district courts would be under § 706(2)(F) absent supplementation.

8. Explaining why it now regards certain conduct as more "egregious," Agency doubled a license suspension compared to previous ones. On review, a court is likely to:
   A. allow application of the stiffer penalty in this and later cases.
   B. allow Agency counsel to supply reasons for stiffer penalties.
   C. disapprove application of the stiffer penalty in this case.
   D. allow application of the stiffer penalty in only this case.

9. Secretary, who appoints Director, may review any decision of Director:
   A. that courts review in the name of Director.
   B. that courts review in the name of Secretary.
   C. as the President may review decisions of either.
   D. because, as Director 's supervisor, Secretary has apparent authority.

10. Per a C.F.R. provision, Agency allows 60 days to supply certain requested information. If Client gets a request requiring a response within 45 days, a court would hold that the APA:
   A. permits such changes only after notice and comment rule making.
   B. requires 60 days notice before such changes can be implemented.
   C. requires 30 days notice before such changes can be implemented.
   D. permits imposing the shortened period without further notice.

11. Board relied heavily on hearsay evidence in ruling against Client. Its decision is apt to be:
   A. upheld despite that reliance.
   B. reversed if Client had no opportunity to cross examine the source.
   C. upheld only if its decision would be supported without that evidence.
   D. reversed because subpoenas are generally unavailable to parties in formal adjudications.

12. Some Agency adjudications do not conform to APA §§ 556-57. If subjected to a facial challenge, governing rules would most likely fail:
   A. if the relevant statute says that orders must follow a "public hearing."
   B. if the relevant statute calls for a "hearing on the record."
   C. for lack of APA compliance.
   D. under the 5th Amendment.

13. If Board's enabling statute does not define "emission," Board may:
A. not devise and apply a definition retrospectively in a party-specific proceeding.
B. define it in a party-specific proceeding, but only for prospective application.
C. define it for the first time in a party-specific proceeding.
D. not define it in a party-specific proceeding.

14. In Statute, enacted in 2002, Congress gave Board one year to adopt, after "hearing," "safety" standards for "glazed ceramics". To conserve resources and avoid § 706(2)(D) problems, Board should:
A. use formal rule making to set standards.
B. set standards in party-specific proceedings.
C. publish those standards as interpretive rules.
D. use notice-and-comment rule making to set standards.

15. See Q 14. Eighteen months later, Board adopted a set of rules. Statute does not address review of Board's rules. If Potters Ass'n nevertheless seeks review as soon as Board's rules became final, a U.S. Court of Appeals:
A. is likely to invalidate the rules for failure to adopt within the Congressional deadline.
B. lacking jurisdiction, might transfer the case to a district court.
C. is apt to dismiss because Statute does not provide for review.
D. must dismiss because the challenge is not ripe.

16. See Q 15. Board later found Parker's (P) pots not to conform. P then filed substantive and procedural challenges to the rules as well as to their application to his products. If Board reverses itself and affirmatively approves P's pots, a reviewing court:
A. must dismiss for mootness.
B. may resolve the remaining dispute.
C. is apt to dismiss for lack of finality.
D. lacks jurisdiction under APA § 701(a)(1).

17. See Q 16. After Board approved its pots, P filed an APA § 553(e) petition demanding an investigation into whether Jerry's pots conform. If Board refuses, citing the press of more important business, a court is most likely to dispose of a challenge by holding that:
A. Board must, under § 555(e), supply better reasons.
B. P lacks standing to challenge Board's decision.
C. the matter is not ripe for disposition.
D. APA § 701(a)(2) applies.

18. See Q 17. As an incidental beneficiary under Statute, P also filed suit asking a court to order Jerry's to obtain explicit Board approval for its pots. In such circumstances, courts usually:
A. dismiss on the basis of primary jurisdiction.
B. hold that statutes do not create private causes of action.
C. regard regulatory statutes as creating private causes of action.
D. regard that type of suit as appropriate for seeking collateral review.

19. See Q 17. After, acting on it own, Jerry's later labeled its pots as "Board Certified," P filed suit under the Lanham Act. (Under that Act, courts may enjoin false statements or require disclaimers.) A Board guideline states that to be "certified," goods need only conform to its rules. A court may apply Board's definition to determine the falsity of Jerry's claim:

A. if Statute does not provide otherwise.
B. if Board's guideline qualifies as procedural.
C. only if Statute says essentially the same thing.
D. despite contrary indications in the statute (or legislative history).

20. See Q 15. Statute also calls for labeling of internal composition. But after experts found only glazes to affect safety, the challenged rules require only those to be labeled. A court:

A. is apt to hold that Congress cannot delegate its obligation to determine "safety."
B. should uphold the rules only if the expert assessment has been published.
C. must consider whether litigation affidavits support the rules.
D. should require an addition to Board's requirements.

21. See Q 14. Board's Chair had lobbied hard for Statute. Once it passed, she gave several speeches saying, e.g., "We need move swiftly. Too many eyes have already been lost to brittle ceramics." Industry associations immediately asked her to recuse herself, but other Board members decided that she need not do so. Courts following SOCAL are most likely to:

A. reverse her decision.
B. affirm the Board's decision.
C. not review for lack of finality.
D. not review for failure to exhaust.

22. See Q 21. If Board's Chair later rubs a new President the wrong way, and she wants to replace her with a political crony, the President may appoint him to Chair's position:

A. if any Board-related legislation confers explicit presidential authority to appoint.
B. if Board's organic legislation confers explicit presidential authority to remove.
C. unless Board is an independent agency.
D. under no circumstances.

23. See Qs 16 and 17. Under Statute, Board may choose not to disclose to Parker (P) certain information supplied by Jerry's. If P seeks that information, and Board refuses to supply it, a court, with regard only to Board's underlying rule:

A. should defer to Board's interpretation of Statute.
B. must defer to Board's interpretation of FOIA exemption 3.
C. must defer to Board's interpretation of FOIA exemption 4.
D. should review de novo because it need not defer under FOIA.

24 See Q 23. P may also be able to challenge the Board's ultimate decision under:

A. APA § 706(2)(B).
B. APA § 706(2)(C) & (D).
C. APA § 706(2)(C) & (E).
D. APA § 706(2)(D) & (E).

Part II: Matching
[20 points]

Please **match only 20** (of 24) definitions that best correspond to numbered items.

1. Substantial evidence
2. Clearly erroneous
3. Arbitrary, capricious...
4. Clear and convincing
5. De novo
6. Rule of doubt
7. Intervenor
8. Interested person
9. ALJ
10. *Vermont Yankee*
11. *Mead*
12. Equal Access to Justice Act
13. NAS-NRC deliberations
14. Pre-trial discovery
15. Procedural rule making
16. Informal adjudication
17. Unacceptable bias
18. Congressional interference
19. Prosecutorial discretion
20. Prejudice
21. Sound reasoning
22. Post hoc rationalization
23. Personnel manual
24. Opinion ordering private action

A. Essentially unreviewable
B. Rule making participant
C. Exempt from FACA requirements
D. May be hindered by FOIA exemption 7
E. Typically needed for formal adjudication
F. Exempt from APA § 553(b) requirements
G. Typical burden of proof to establish fraud
H. One basis for limited attorney fee recovery
I. Possible participant in informal adjudication
J. Does not include preconceived policy notions
K. Inadequate to support agency action on review
L. More tolerable in rulemaking than adjudication
M. Rarely a source of rules applied only prospectively
N. Typical standard of review for informal proceedings
O. Intramural standard of review for formal adjudication
P. Includes copyright, trademark and patent examination
Q. F.R.C.P. 52(a) standard that does not appear in the APA
R. An administrative review standard derived from jury trials
S. Said to be applied in copyright but not patent examination
T. Sole source of rules for intramural Copyright Office review
U. Concerns judicial deference for agencies' substantive choices
V. The primary requirement before courts can sustain agency action
W. Concerns the judicial deference due to administrative process choices
X. The overarching requirement before courts can disapprove agency action

Examination No. _____KEY_____

Answer Sheet

Part I — 80%

*Answer **only** 20 of 24* (4% each)

1. __D__
2. __C__
3. __B__
4. __A__
5. __D__
6. __A__
7. __B__
8. __C__
9. __B__
10. __D__
11. __A__
12. __B__
13. __C__
14. __D__
15. __B__
16. __B__
17. __D__
18. __B__
19. __A__
20. __D__
21. __C__
22. __C__
23. __A__
24. __B__

Part II — 20%

*Answer **only** 20 of 24* (1% each)

1. __R__
2. __Q__
3. __N__
4. __G__
5. __O__
6. __S__
7. __I__
8. __B__
9. __E__
10. __W__
11. __U__
12. __H__
13. __C__
14. __D__
15. __F__
16. __P__
17. __J__
18. __L__
19. __A__
20. __X__
21. __V__
22. __K__
23. __T__
24. __M__