Administrative Process
Final Examination

Professor Field Spring 2002

General Instructions

This is a three-hour, open-book exam. You may consult any written materials, but do not discuss your exam with others. **Answer on the sheet provided**. Please note that questions in Part I are worth four times as much as those in Part II and that not all questions are to be answered.

Part I
[80 points]
Answer any *20 of 24.* If you answer more, I can count only the first 20.

Background for Questions 1-9.

The Federal Air Quality Act (FAQA) creates the AQ Office (AQO). AQO's job is to evaluate air pollution applications, and permits are signed by its Director. Applications are first considered ex parte. Those denied permits may appeal the merits to an AQ Board (AQB) whose members are appointed by the Director. Intramural challenges to procedures are reviewed by the Director. Decisions of the AQB are explicitly reviewable in the Federal Circuit. The FAQA says nothing about reviewing Director's decisions or standards for reviewing AQB decisions.

1. Citizens may challenge AQO permits in collateral proceedings. Their challenges succeed about 50% of the time; this most strongly suggests that:
   A. the AQB is too lenient.
   B. only doubtful cases are litigated.
   C. the Federal Circuit is too lenient.
   D. the Director's decisions are not presumed correct.

2. SmogCo was found to have submitted an inadequate filing fee, and the Director affirmed. Court review of her decision is presumptively:
   A. available.
   B. de novo.
   C. unavailable.
   D. under F.R.C.P. Rule 52(a).

3. The AQB eventually allowed SmogCo (Q2) to emit 50 ppm of a toxic substance, but the Director refused to sign the permit. If SmogCo challenges that action in the Federal Circuit, it:
   A. should remand.
   B. would have jurisdiction.
   C. could transfer the case after the time for challenge expires.
   D. should transfer the case to a more appropriate court of appeal.

4. Pending resolution of its dispute with the AQO (Q3), a court allowed SmogCo to emit under conditions approved by the AQB. If neighbors meanwhile brought a private tort (nuisance) suit, it would:

A. clearly not be preempted if the FAQA contains a savings clause.
B. probably be stayed under the primary jurisdiction doctrine.
C. clearly be preempted if the FAQA contains a savings clause.
D. probably be dismissed for lack of jurisdiction.

5. Later, the Director's refusal to sign (Q3) SmogCo's permit was found to be ultra vires. An expanded AQB (containing the Director) thereafter reconsidered its decision and reversed itself. The Federal Circuit:

A. in light of precedent, should take the appeal.
B. in light of precedent, will refuse jurisdiction.
C. clearly lacks jurisdiction to review that decision.
D. must transfer the appeal to the D.C. District Court under 28 U.S.C. § 1631.

6. SmogCo learned of the Director's scheme (Q5) and immediately challenged her participation. A court:

A. must require the Director to recuse herself because of clear partiality.
B. could dismiss for lack of finality.
C. could dismiss for lack of standing.
D. must review despite lack of finality.

7. Before being allowed, some AQO permits are published for comment. Under the FAQA, "any person" may intervene. The FAQA also provides that "any person" harmed by an issued permit, may challenge it collaterally. Identical language in those provisions:

A. means that collateral challengers must show likely harm.
B. requires intervenors to show likely harm to themselves or their property.
C. requires intervenors and collateral challengers to have the same characteristics.
D. does not require intervenors and collateral challengers to have the same characteristics.

8. As suggested by the Supreme Court, the Federal Circuit should:

A. not uphold AQB decisions that are clearly erroneous.
B. not uphold the AQB when its reasons do not support its decisions.
C. uphold AQB decisions if it can conceive of any legal support for them.
D. uphold AQB decisions if AQO counsel gives reasons adequate to support them.

9. The AQB allowed SulfCo to emit 25 ppm but later allowed Mercapta to emit only 8 ppm of a gas. Its decision is supported by substantial evidence, but the Board did not explain why SulfCo was allowed a higher limit. If Mercapta appeals, the Court should:

A. order Mercapta's limit to be raised to at least 20 ppm under APA § 706(2)(A).
B. order SulfCo's permit to be reduced to 8 ppm under APA § 706(2)(A).
C. remand; the AQB's decision is unsupportable under APA § 706(2)(A).
D. affirm; the AQB's decision is supportable under APA § 706(2)(E).

Background for Questions 10-22.

Because of increased concern about air quality, Congress amended the FAQA (above). Little of substance has changed, but the agency was moved into legislative buildings and obligated to prepare reports for Congress. Now called the Air Quality Commission (AQC), it is headed by three Presidential appointees. Applicants dissatisfied with ex parte treatment are entitled to a hearing before an ALJ, but intervenors are limited to filing briefs before the AQC if ALJ decisions are challenged. AQC decisions are reviewed by the Federal Circuit.

10. Given an opportunity, most courts would find:
    A. this scheme to violate the appointments clause.
    B. AQC decisions to be reviewed under APA § 706(2)(E).
    C. AQC decisions to be reviewed under APA § 706(2)(A).
    D. this scheme clearly to violate requirements for separation of functions.

11. If the AQC tries to supervise its ALJs "too closely", they will be:
    A. found to have standing to assert their constitutional right to independence.
    B. found to have standing to assert their statutory right to independence.
    C. obligated to seek review in the Federal Circuit.
    D. found to lack standing.

12. An ALJ refused to issue a permit for PSHN's power plant and was affirmed by the AQC. Refusal was based largely on the report of an expert despite his not being subpoenaed by PSHN or the agency. If PSHN seeks reversal for the agency's use of hearsay, the Court will probably:
    A. affirm.
    B. affirm, but only if the residuum rule was followed.
    C. given its serious error, order the AQC to issue the permit.
    D. remand, ordering all incompetent evidence to be excluded.

13. In an opinion, the AQC ruled that it would henceforth tie emission permits to new standards established by an association of chemists. It, however, did not require the applicant to refile. If challenged, the new agency position is most likely to:
    A. be disapproved for failure to follow APA §§ 556-57.
    B. fall for failure to follow APA § 553.
    C. fall because it is retroactive.
    D. be upheld.

14. The AQC used § 553 rule making to allow cancellation of existing permits that exceed newly promulgated limits. This will dispense with the need for many individual hearings otherwise conducted by an ALJ. A court will probably find the new limits to be:
    A. facially valid.
    B. beyond review.
    C. inconsistent with statutory hearing rights.
    D. invalid as exceeding permissibly delegated agency authority.

15. The FAQA provides that the AQC may "from time to time make rules and regulations for the purpose of carrying out its responsibilities under the Act." If its rule (Q14) is challenged for lack of explicit rulemaking authority, a court is most likely to:

A. review under the substantial evidence standard.
B. uphold the AQC; its "formal" rulemaking authority is at least implicit.
C. not uphold the AQC; "ad hoc rule making" allows broader participation.
D. uphold the AQC; its "informal" rulemaking authority is at least implicit.

16. Prior to promulgating its rule (Q14), the AQC Chair gave a speech stating that prior tolerances allowed companies "literally to get away with murder." If her participation is challenged, a court would be most likely to:

A. permit the Chair to sit under the "rule of necessity."
B. require strong evidence of an unalterably closed mind.
C. require the Chair to recuse herself for clear party bias.
D. refuse any protest before the rule making is complete.

17. The AQC *announced* new procedures designed to accelerate the permitting process. If those rules are challenged, a court is most likely to:

A. invalidate them for failure to follow APA § 556-57.
B. invalidate them for failure to follow APA § 553.
C. invalidate them under APA § 706(2)(B).
D. find them valid.

18. An examiner rejected a requested permit for one reason; an ALJ, for another. The AQC's published opinion gave yet another reason! In such circumstances, a court would be most apt to:

A. reverse and remand.
B. require rulemaking.
C. uphold the agency.
D. find that Congress delegated too much authority to the AQC.

19. In its opinion (Q18), the AQC relied in part on an intervenor's brief, but the intervenor was not fully satisfied. If it challenges the decision, the Court is most likely to:

A. reverse.
B. evaluate the intervenor's statutory standing.
C. remand for a better explanation of the AQC's decision.
D. allow the challenge in light of intervenor's participation.

20. The FAQA excludes intervenor participation in ALJ hearings. The AQC, offering truly compelling reasons in support, adopted rules to permit very limited intervention. Should those rules be challenged, the Court should:

A. disapprove the rules if it finds public participation to prejudice speedy action.
B. uphold the AQC, if it sees public benefits and no evidence of harm.
C. uphold the AQC; it cannot disapprove these procedural rules.
D. disapprove the rules.

21. The same rules (Q20) also provide for grants so that impecunious intervenors are able to file the AQC briefs contemplated by the Act. A challenge to such rules:
    A. is apt to be welcomed by no judge.
    B. is apt to be welcomed by all judges.
    C. probably should be reviewed under APA § 706(2)(C).
    D. probably could not be filed by privately-funded intervenors.

22. The binding effect of AQC rules is most affected by whether they are reasonable and:
    A. consistent with judicial views of sound policy.
    B. within authority delegated to the AQC.
    C. were promulgated under APA § 553.
    D. supported by substantial evidence.

Background for Questions 23-24.

Obtaining an AQC air emission permit sometimes requires applicants to collect and submit technical data. Under the FAQA, most such data is publicly available. Later applicants, however, may not use another's data without a license. Lacking a license, they must prove that they have independently collected all submitted data.

23. SulfCo apparently intends to use Mercapta's AQC data to avoid the cost of a license or independent collection. Should AQC seem inclined to allow that, Mercapta's best source of a cause of action against *SulfCo* is provided by:
    A. 5 U.S.C. § 702.
    B. 8 U.S.C. § 1905.
    C. 5 U.S.C. § 552(b)(4).
    D. none of the above

24. Mercapta's (Q23) best source of a cause of action against the *AQC* is:
    A. 5 U.S.C. § 702.
    B. 8 U.S.C. § 1905.
    C. 5 U.S.C. § 552(b)(3).
    D. all of the above.

Part II

[20 Points]

Answer any *20 of 24*. If you answer more, I will grade the first 20.

1. Collateral review
2. Prejudicial error
3. Formal action
4. Informal action
5. Permissible delegation
6. Litigation affidavit
7. Exemption 3
8. Finality
9. Retroactive
10. Ex parte
11. Legislative veto
12. Ripeness
13. Exceeding a statutory deadline
14. Equal Access to Justice Act
15. Agency Practice Act
16. Federal Advisory Committee Act
17. Mootness
18. Non-statutory
19. Policy
20. Prosecutorial discretion
21. Non-precedential
22. Rule
23. Order
24. Fifth Amendment

A. An unconstitutional device for Congressional oversight of agencies.
B. Inadequate to support agency decisions.
C. Tends to bar more than facial review of rules or statutes.
D. Typically characteristic of rules "declared" in the context of adjudication.
E. May permit recovery of attorney fees from the government.
F. Nearly unreviewable.
G. The product of adjudication.
H. The government is unlikely to participate in such an action.
I. Applies when APA § 554 does not.
J. Governed by APA §§ 556-57.
K. Forbids all but the PTO from requiring an agency bar examination.
L. Permissible despite being in derogation of Congressional requirements.
M. A general limitation within APA § 706.
N. Not governed by APA §§ 556-57.
O. Limits the Freedom of Information Act.
P. A type of contact far more tolerable in rulemaking than in adjudication.
Q. Requires public hearings.
R. Perhaps the most tolerable type of bias.
S. Unsatisfied when decisions to initiate action are challenged.
T. Tends to be synonymous with "unpublished".
U. Judicial review under generic statutes.
V. Requires articulation of an "intelligible principle".
W. Prospectively binds an open class.
X. Not a bar to judicial review of rules or statutes.

Examination No. _____

Answer Sheet

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Part I — 80%
Answer *only* 20 of 24 (4% each)

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

Part II — 20%
Answer *only* 20 of 24 (1% each)

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