

College of William & Mary Law School
William & Mary Law School Scholarship Repository

Faculty Exams: 1944-1973

Faculty and Deans

1972

Environmental Law: Final Examination (May 23, 1972)

William & Mary Law School

Repository Citation

William & Mary Law School, "Environmental Law: Final Examination (May 23, 1972)" (1972). *Faculty Exams: 1944-1973*. 326.
<https://scholarship.law.wm.edu/exams/326>

Copyright c 1972 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/exams>

May 23, 1972

FINAL EXAMINATION

ENVIRONMENTAL LAW

Professor Sullivan

40 points

1.

Part A

We have discussed at some length the character of what has been called (for want of a better term) the "environmental crisis." The capsule comments which follow - most of them extracted from Barry Commoner's book The Closing Circle - reflect something of the diversity of opinion which exists as to the causes of environmental degradation:

"The causal chain of deterioration is easily followed to its source. Too many cars, too many factories, too much detergent, too much pesticide, multiplying contrails, inadequate sewage treatment plants, too little water, too much carbon dioxide -- all can be traced easily to too many people."
Paul Ehrlich, biologist

"The affluent society has become the effluent society. The 6 percent of the world's population in the United States produces 70 percent or more of the world's solid waste."

Walter S. Howard, biologist

"Environmental rape is a fact of our national life only because it is more profitable than responsible stewardship of earth's limited resources."
Channing Phillips, minister

"A runaway technology, whose only law is profit, has for years poisoned our air, ravaged our soil, stripped our forests bare, and corrupted our water resources."

Vance Hartke, United State Senator

"There is a peculiar paralysis in our political branches of government, which are primarily responsible for legislating and executing the policies environmentalists are urging. Industries who profit by the rape of our environment see to it that legislators friendly to their attitudes are elected, and that bureaucrats of similar attitude are appointed."

R.A. Cameron, Environmental Defense Fund

"American industry is spending over three billion dollars a year to clean up the environment and additional billions to develop products that will keep it clean . . . the real danger is not from the free enterprise establishment that has made ours the most prosperous and powerful nation on earth. No, the danger today resides in the disaster lobby - those crepe hangers who for personal gain or out of sheer ignorance, are undermining the American system and threatening the lives and fortunes of the American people."

T.R. Shepard, publisher

Nature's first green is gold
Her hardest hue to hold.
Her early leaf's a flower;
But only so an hour.
Then leaf subsides to leaf.
So Eden sank to grief,
So down goes down to day
Nothing gold can stay.

Robert Frost

Part B

Just as the nature of the "environmental crisis" has been one of our continuing concerns, so has the question of whether and to what degree the law as embodied in administrative regulations, legislative enactments and judicial decisions can be a useful tool in dealing with the immensely complicated problems of environmental control and ecological balance. Mr. Justice Blackmun dissenting in *Sierra Club v. Morton* framed the problem nicely when he wrote:

"This case poses - if we only choose to acknowledge and reach them - significant aspects of a wide, growing and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"

Part C

This question contemplates a two part essay treating the issues raised in sections A & B. The first half of your answer should consist of your analysis of the sources and dimensions of the "environmental crisis" (if you concede that there is indeed a crisis); the second half of your answer should reflect your view of the utility of law in ameliorating the problems of environmental degradation. You should devote some space in the second part of your answer to explaining your ideas as to how power to resolve environmental questions should be apportioned among legislatures, courts and administrative agencies.

One final caveat: This question is not an invitation to polemical extravagance. Draw carefully on course materials, class discussion and your own well conceived ideas. Make every effort to organize and express your analysis in a disciplined fashion.

2.

35 points

Breakneck Creek is a meandering, non-navigable stream running through Meigs County in the State of New Utopia. Meigs County's economy is based largely upon agriculture - more particularly the growing of sugar beets and turnips. The largest non-agricultural employer in Meigs County had for many years been the Silo Buggy Whip Mfg. Co. which declared bankruptcy and closed its doors in 1965 owing to the sharp, irreversible decline in the demand for buggy whips since 1915. The market for sugar beets and turnips has also fallen off significantly in recent years. The result has been serious stagnation in the economy of Meigs County.

Since 1900 the State of New Utopia has owned nearly 20,000 acres of land in Meigs County, bordering Breakneck Creek on either side for approximately five miles. This state land remains almost entirely in its natural state and is used mainly by weekend visitors from Zenith (the state metropolis about 45 minutes away via the recently completed Interstate 13) as a hunting and hiking area.

In order to stimulate the lagging economy of Meigs County, the state Department of Parks and Natural Resources proposed, and the state legislature approved, the creation of the Meigs Recreation Area containing the entire 20,000 acre tract owned by the state along Breakneck Creek. The aim is to develop an extensive multi-purpose recreation area that will attract residents of surrounding urban areas and thus stimulate the local economy. The state plan calls for preserving half of the 20,000 acres in its natural state as a scenic semi-wilderness area. The other half of the tract is to be leased to Willy Dizzy Enterprises, Inc. for the development of an elaborate amusement and resort development, including an old fashioned

pleasure palace (the highlight of which is to be the world's largest ice cream cone rendered in styrofoam and plastic), as well as golf courses, tennis courts and resort hotel facilities. The residents of Meigs County are enthusiastically in favor of the proposed development, since it affords the prospect that they may be able to engage in activities substantially more remunerative than the raising of sugar beets and turnips. Legal problems have developed, however:

(A.) The New Utopia Conservation Society has filed suit in the circuit court at Nadir, the state capital to enjoin the state from leasing the 10,000 acres of scenic semi-wilderness to Willy Dizzy Enterprises. The New Utopia Conservation Society is a long established, highly respected environmental action group with members in most parts of the state.

(B.) The Perfection Packing Company, Inc. which operates a slaughter house on the banks of Breakneck Creek six miles upstream from the proposed recreation area, has filed suit in the Meigs County circuit court seeking declaratory and injunctive relief against the state. The company has for fifty years been dumping blood and entrails into the creek as a part of its packing operation. Agents of the state parks department have informed the company president that his firm must desist from dumping any and all foreign matter into the stream within six months, since continued dumping will detract from the standards of water purity desired to be maintained in the semi-wilderness area of the recreation tract.

(C.) The Meigs County Zoning Board has established a one mile wide strip around the 10,000 acre portion of the park which is to be preserved in its natural state within which (the one mile wide strip) no commercial retail or manufacturing development may be undertaken. Prior to this action, the land within the one-mile wide buffer strip had not been zoned. Indeed, even now the only zoned area within the county is the one-mile strip in question. Two farmers owning land in the buffer strip have filed suit in Meigs County Circuit Court contesting the legality of the Zoning Board's action.

You are a staff attorney concerned with environmental affairs in the office of the New Utopia Attorney General. The Attorney General has just received a phone call from the Commissioner of Parks describing the situation in Meigs County. The Attorney General wishes you to prepare a memorandum detailing the legal issues likely to be raised in each of the three suits above. He would also like you to evaluate the likely legal arguments on both sides in each of the three cases, and to give him your best judgment as to who will prevail in each case.

3. 25 points

The Whisker River, located in Arkansas, is a largely unspoiled, non-navigable tributary of the Mississippi River. It is used extensively by wild river enthusiasts for boating and allied activities. On July 16, 1970, the Chief of U.S. Army Engineers, Lt. Gen. F.W. King, issued a permit to the Whisker River Broom Company, Inc. to dump a chemical "soup" produced in the course of its manufacturing process into the Whisker River. In granting the permit, Gen. King purported to act under color of the Rivers and Harbors Act of 1899 (Section 13) (The Refuse Act) and by power delegated to him thereunder by the Secretary of the Army. The broom company had been discharging its chemical "soup" into the river for many years prior to the issuance of the permit in question.

On August 1, 1970 Jerome Rulak and Donald Small of Chicago, Illinois filed a class action in the U. S. District Court for the District of Columbia seeking declaratory judgment and injunctive relief against the action of the Chief of Engineers in granting the permit to the broom company. Both Rulak and Small had been boating in the Whisker River in the summer of 1969.

The plaintiffs' complaint alleged that the Chief of Engineers acted in excess of his legal authority and contrary to law in issuing the permit to Whisker Broom Co., Inc. for the following reasons:

(1) The Rivers and Harbors Act of 1899 (Section 13) (Refuse Act) does not give the Secretary of the Army authority to issue permits for the dumping of refuse in non-navigable tributaries of navigable waters.

(2) The National Environmental Policy Act (2) [4332(2)(c)] requires that federal agencies prepare an environmental impact statement under specific conditions, and that those conditions were operative here. The Chief of Engineer's failure to file an impact statement was thus violative of N.E.P.A.

The defendant Chief of Engineers filed an answer in which he asserted, in pertinent part that:

(1) He does have power to issue dumping permits for non-navigable tributaries of navigable waters.

(2) #4332(2)(c) of NEPA does not apply to the defendant's actions in this case.

What preliminary defenses and defenses on the merits are attorneys for the Chief of Engineer's likely to advance? Briefly evaluate each argument for the defense and indicate how you would rule and why if you were the sitting judge. In forming your answer consider carefully the extracts set out below:

A. U.S.C.A., Title 33 (#407) (Rivers and Harbors Act of 1899)

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged or deposited either from or out of any ship barge or other floating craft . . . or from the shore, . . . manufacturing establishment, . . . any refuse matter of any kind or description whatever . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable waters . . . Provided further, that the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him . . .

(B) NEPA #4332(2)(c):

"All agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

(1) The environmental impact of the proposed action.

(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented.

(3) alternatives to the proposed action . . .

(C) The Corps of Engineer's promulgated the following regulation as a means of defining the scope of its responsibility to apply the NEPA to the refuse permit program:

"Environmental impact statements will not be required in permit cases where it is likely that the proposed discharge will not have any significant impact on the human environment. Moreover, the Council on Environmental Quality has advised that such statements will not

be required where the only impact of proposed discharge or deposit will be on water quality and related water quality considerations. When water quality considerations are in issue, the Corps need not develop independent standards, but may apply standards developed by the Federal Water Quality Administration under the Federal Water Quality Act, as amended."