

**Administrative Process  
Final Examination**

Professor Field

Spring 2001

**General Instructions**

This is a three-hour, open-book exam. You may consult any written materials, but do not discuss the 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.

Federal law applies unless otherwise indicated.

**Part I**

[80 points]

Answer any *20 of 24*. If you answer more, I can count only the first 20.

Background for Questions 1-11.

The Water Permit Act (WPA) creates the Water Permit Office (WPO). WPO's job is to evaluate water pollution applications, and permits are signed by the WP Chair. Examiners consider permits *ex parte* and are told to resolve doubts in favor of applicants. Those denied may appeal the merits to a WP Board (WPB). Challenges to WPO procedures are taken to the Chair. Decisions of the WPB are explicitly reviewable in the Water Control Court of Appeals (WCCA). The WPA addresses neither standards of review nor review of Chair decisions.

1. Downstream users may challenge WPO permits in the WCCA. When evidentiary doubts are resolved in favor of applicants, a Presidential Commission has suggested that:
  - a. challengers are entitled to *de novo* review.
  - b. agency action is entitled to a strong presumption of correctness.
  - c. agency action is not entitled to a strong presumption of correctness.
  - d. review should address only legal issues.
  
2. Alpha's application was refused as incomplete, and the Chair affirmed. Despite the lack of WPA reference to court challenges to Chair's decisions, Alpha:
  - a. is presumptively entitled to review in the WCCA.
  - b. is probably entitled to substantial evidence review.
  - c. is likely to encounter a presumption against review.
  - d. is likely to secure court review for abuse of discretion.
  
3. An Examiner allowed Beta's application to discharge X, but refused it for Y, an almost identical material. She insisted on a second application. After Chair ruled that the issue was substantive and should be resolved by the WPB, the Board affirmed the Examiner. When Beta sought review in the WCCA, the Court raised the issue of jurisdiction, *sua sponte*. The WCCA:
  - a. probably has jurisdiction; both Chair and WPB regard the issue as appealable.
  - b. may not consider the issue if the WPO Solicitor did not raise it.
  - c. has jurisdiction under the law of the case.
  - d. should reverse the Chair's decision.

4. Without careful analysis or reasoning, the WCCA (Q3) concluded that it did not have jurisdiction. It transferred Beta's challenge to the D.C. Circuit. Under the law of the case, that Court must:
  - a. certify the case to the U.S. Supreme Court.
  - b. take the case if its jurisdiction is plausible.
  - c. take the case only if its jurisdiction is clear.
  - d. send the case back if it concludes that the WCCA is clearly wrong.
  
5. Beta also tried to register a trademark, but materials enclosed with its application led the PTO Examiner to believe that Beta might be violating the WPA. Based on cases we read, he:
  - a. would have no basis for raising the issue.
  - b. must contact the WPA for an expert opinion.
  - c. could ask Beta for a statement of compliance.
  - d. could simply reject that application based on her view of the WPA.
  
6. The WPA allows the WPO to reconsider any permit that it believes to have been mistakenly issued. The Granite State Pond Ass'n (GPSA) recently accused Crudco of being a major polluter. For support, GPSA asked the WPO to give it copies of all documents that Crudco had submitted. WPO then indicated an intent to grant the request. Crudco's best basis for opposing the release of its trade secrets is to file an action:
  - a. for review under the APA.
  - b. to enforce 18 U.S.C. § 1905.
  - c. to enforce its rights under 5 U.S.C. § 552(b).
  - d. None of the above. Crudco cannot prevent the release of public documents.
  
7. Assume that some documents requested by GPSA (Q6) are, under the WPA, specifically exempt from release except as provided by WPO rules. Concerning only those documents:
  - a. If the WPO does not release them, they are clearly unavailable.
  - b. If the WPO does not release them, they are clearly unavailable under FOIA.
  - c. WPO's refusal to release them is reviewable under 5 U.S.C. § 706(2)(E).
  - d. WPO's refusal to release them is reviewable under 18 U.S.C. § 1905.
  
8. Senator Jones, who chairs an environmental committee, has high regard for GSPA and asked the WPO to review Crudco's permits. When it began to do so, Crudco filed an action in NH District Court challenging WPO's review as unwarranted. That court should:
  - a. transfer the case to the WCCA.
  - b. find the matter unreviewable for lack of finality.
  - c. find the matter unreviewable for lack of standing.
  - d. enjoin Senator Jones' politically-motivated meddling.
  
9. Crudco ultimately lost its (Q8) challenge. Not only were several of its permits adjusted, but WPO also ordered it to publish notices about alterations of its permits and apologize in NH newspapers for giving the WPO misleading data. Courts doubting the adequacy of support for that order are most likely to:
  - a. nevertheless affirm.
  - b. strike it altogether.
  - c. order WPB members to testify in support.
  - d. strike the apology requirement.

10. After Gamma used a form it found in the WPO employees' handbook, the WPO asked Gamma to refile using a different form. Gamma's need to comply is most likely to depend on:
  - a. which, if either, form appears in the C.F.R.
  - b. whether it is prejudiced by having to refile.
  - c. whether either form was ever published for comment.
  - d. the fact that policy statements are exempt from some rulemaking requirements.
  
11. Despite statutory silence, the WCCA has always reviewed WPB decisions for "clear error." The WPO now insists that the WPB can be reversed only if its decisions lack a rational basis.
  - a. The APA literally supports neither the WCCA nor the WPO.
  - b. The APA literally supports both the WCCA and the WPO.
  - c. Because the statute is silent the WCCA can apply any standard it wishes.
  - d. Because the WPO is entitled to *Chevron* deference, its view must prevail.

*Background for Questions 12-22.*

The e-Commerce Commission (eCC) oversees generic top-level domains (gTLDs) and registrations such as FPLC.edu. It resides within the Department of Commerce. Its adjudications are informal. Those adversely affected by initial adjudications may seek review by the eCC Commissioner. The eCC Act (eCCA) makes final decisions directly reviewable in the Federal Circuit (on the eCC record) or in the D.C. District Court, where new evidence may be introduced. (In the latter, instance, either party may then appeal to the CAFC.)

12. Franklin Pierce Law Center requested that the eCC transfer FPLC.com to it. Afterward, FoPo Lamp Corp., the prior registrant, sought review in District Court. However, when the eCC Solicitor noticed a factual error in the eCC opinion, she asked the District Court to dismiss (for eCC reconsideration). Because that has not been prior practice, the Court should:
  - a. reverse and remand for the Commissioner to correct the error.
  - b. dismiss as requested.
  - c. given the error, order the Commissioner to approve the new gTLD.
  - d. reverse and remand only if the Commissioner's error precludes affirmance.
  
13. FoPo (Q12) considered seeking review by the Secretary of Commerce. Had it done so, the Secretary would likely have:
  - a. reversed unless the decision is supported by substantial evidence.
  - b. found that she may not review merely because the Commissioner reports to her.
  - c. concluded that she may review de novo in accordance with 5 U.S.C. § 557(b).
  - d. reviewed for arbitrariness because the Commissioner reports to her.
  
14. While FoPo's case (Q12) had been pending, the then-Secretary and then-Commissioner were each questioned about FoPo in a hostile House hearing. The Commissioner and Secretary both resigned before FoPo's case was decided. The best ground for reversal is that the House Committee:
  - a. essentially told the Commissioner to transfer FoPo's registration.
  - b. essentially told the Secretary to transfer FoPo's registration.
  - c. staff attorney is the new Commissioner.
  - d. staff attorney is the new Secretary.

15. Eventually, FoPo (Q12) got a two-day trial in District Court. It conducted fully de novo review, but the eCC was affirmed. FoPo then appealed. The CAFC is apt to:
- affirm.
  - again review de novo.
  - remand for review under 5 U.S.C. § 706(2)(A).
  - remand for review under the substantial evidence standard.
16. One of FoPo's (Q15) complaints was that much information considered by the eCC was hearsay. In that regard, the CAFC should find that:
- FoPo lacks standing to raise this issue.
  - any process deficiencies were cured in district court.
  - eCC adjudications cannot be based on incompetent evidence.
  - all eCC adjudications must be entirely supported by competent evidence.
17. One of FoPo's (Q12) complaints was that the eCC decision was based largely on an incorrect reading of *trademark* law. A court that agrees with FoPo:
- should nevertheless defer to the eCC's expertise.
  - must remand, directing that FoPo's FPLC.com registration be reinstated.
  - should remand.
  - must reverse.
18. Ooh, Inc. petitioned the eCC to adopt "dot-sex" as a new gTLD (so it could have, e.g., the address "Ooh.sex"). After its petition caught the attention of the news media, a political firestorm was generated. Later, following the Commissioner's being summoned to meetings with high-level White House personnel and various members of Congress, Ooh's rulemaking petition was dismissed. On review, the D.C. District Court should:
- dismiss because such decisions are essentially unreviewable.
  - dismiss because the eCCA confers no jurisdiction.
  - reverse because of strong evidence of political pressure.
  - reverse if the eCC decided using factors not set forth in the eCCA.
19. Assume that Ooh (Q18) sought review in the CAFC instead of the District Court. The CAFC should:
- dismiss because such decisions are usually unreviewable.
  - dismiss because it has no jurisdiction under the CCA.
  - reverse because of compelling evidence of political pressure.
  - reverse if the eCC decided using factors not set forth in the eCCA.
20. The ACLU petitioned the eCC to adopt "dot-sucks" as a forum for social commentary. Its petition was granted, and the new gTLD was eventually adopted, despite strong opposition by various organizations. One sought review in the D.C. District Court complaining of not being afforded the opportunity to cross-examine witnesses. On that issue, the Court should:
- remand for formal hearings if eCC rules can only be made after "hearing".
  - remand for formal hearings if such eCC determinations are called "orders".
  - affirm the eCC.
  - order the eCC to eliminate the "dot-sucks" gTLD.

21. Mothers Against Smut (MAS) not only opposed the “dot-sucks” gTLD (Q20), but it also petitioned for adoption of a rule forbidding renewal of “so-and-so-sucks.com” and similar domain names. The eCC responded to their petition and detailed consideration of their other points to be simply “inexpedient”. A court considering a MAS challenge is apt to:

- a. look more favorably on denial of their petition than on their challenge to dot-sucks.
- b. look less favorably on denial of their petition than on their challenge to dot-sucks.
- c. remand for closer consideration of their petition.
- d. order cancellation of the dot-sucks gTLD.

22. Sons of Liberty (SOL) also appeared in the “dot-sucks” proceeding (Q20). It ultimately prevailed on one narrow issue. Should SOL seek to be reimbursed for attorney fees, it will find:

- a. that most organic legislation allows such recovery.
- b. virtually no statutory basis, given sovereign immunity.
- c. that most enabling agency legislation allows such fee recovery.
- d. one general statute that may allow recovery, despite sovereign immunity.

23. After a time, the eCC decided to act on the MAS petition (Q21). The rule eventually adopted has very limited scope and is procedurally intricate. If the owner of Bush-sucks.com bought a facial challenge on due process grounds, a court of competent jurisdiction should:

- a. dismiss for mootness.
- b. dismiss for lack of ripeness.
- c. dismiss for lack of standing.
- d. invalidate the rule because of MAS’s ex parte communications.

24. The owner of Coke-sucks.com did not participate in the “so-and-so-sucks” rule making (Q23), but it nevertheless decided to seek facial review based on scope of the eCCA and interference with its First Amendment rights. If others raised those issues but have not challenged eCC, a reviewing court is nevertheless apt to:

- a. dismiss for lack of standing.
- b. require testimony from the Commissioner.
- c. consider the scope of the eCCA.
- d. require the eCC to conduct formal hearings on the First Amendment issues.

**Part II**  
[20 Points]

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

- |                           |                                      |
|---------------------------|--------------------------------------|
| 1. Collateral litigation  | 13. Legislative deadlines            |
| 2. Rule of harmless error | 14. Interested persons               |
| 3. Litigation costs       | 15. ALJs                             |
| 4. Intramural review      | 16. Dependent agency personnel       |
| 5. Reversal rate          | 17. Parties                          |
| 6. Litigation affidavits  | 18. Ex parte contacts                |
| 7. Primary jurisdiction   | 19. Policy bias                      |
| 8. Exhaustion             | 20. Non-statutory                    |
| 9. Retroactivity          | 21. Statutory                        |
| 10. Savings clauses       | 22. Rule of necessity                |
| 11. Legislative vetoes    | 23. Interpretive or procedural rules |
| 12. Severability clauses  | 24. Residuum rules                   |

- A. Inadequate, alone, to support agency action.
- B. Limits a decision maker's recusal obligations.
- C. Served the end now served by APA Ch. 8.
- D. A poor empirical measure of procedural fairness.
- E. Its antonym appears limits APA § 706.
- F. Concerns the respective competence of different legal fora.
- G. More tolerable in curative legislation.
- H. May challenge the legitimacy of agency adjudications.
- I. Need no opportunity for public comment.
- J. Contemplate possible alternative solutions for problems.
- K. Often de novo.
- L. Generally tolerable in all legal proceedings.
- M. Persons subject to some political influence.
- N. Governed by statutes of general applicability.
- O. Governed by organic or enabling legislation.
- P. Intolerable in formal, but not informal, proceedings.
- Q. Persons isolated from political influence.
- R. Express a need for competent evidence to support adjudications.
- S. Conformance is unnecessary for valid rules.
- T. Sometimes required before courts will review.
- U. Persons bound by adjudications.
- V. Participants in rule making.
- W. Preserve whatever may be found constitutional.
- X. A factor not considered in evaluating the process due.

**Answer Sheet**

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

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

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