Institution **Harvard Law School**
Course **F15 Freeman - Environmental Law**

Event **NA**

Exam Mode **TAKEHOME**

Exam ID **515756**

Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**2680**	**13253**	**15896**
Section 2	**1108**	**5578**	**6676**
Total	**3788**	**18831**	**22572**

Answer-to-Question-_1_

Ms. CEO Freeman,

Below I have laid out the (many) potential legal concerns that New Age Energy ("NAE") may face due to its considered action and how to minimize such concerns.

A.

~Are Playa Lakes WotUS?~

The definition of WotUS is currently in flux (*Rapanos*; WotUS Rule) and the outcome will depend on whether the *Rapanos* plurality opinion or Justice Kennedy's concurrence is determined to be controlling. If the Plurality controls, the Court will likely strike the new EPA rule. This would be a positive business outcome for NAE. The playa lakes ("PL") are not "relatively permanent, standing or continuous flowing bodies of water" as they go through unpredictable wet/dry cycles and probably would not be "described in ordinary parlance as streams...rivers [or] lakes." Nor would they be considered adjacent to WotUS because they are neither "relatively permanent" nor have a continuous surface connection to WotUS. This determination would remove the PLs from the jurisdiction of the CWA, preventing possible regulation as PS or even NPS (TMDLs, BMPs) and the requirement of a §404 permit, leaving just RCRA/CERCLA (see below).

Yet, it is more likely, given the composition of the Court, that it will approve the WotUS Rule's use of Justice Kennedy's "Significant Nexus" test which the PLs might just meet. The PLs are likely "other waters" whose significant nexus will be determined on a case-by-base basis. Here, the PLs are hydrologically connected to the Ogallala Aquifer, an interstate body of water (under eight states). Additionally, the lakes can run

off into streams that even by Justice Scalia's definition could be considered tributaries into WotUS; though they slow to a trickle they "continuous[ly] flow[]."

Though Justice Kennedy's test is functional not hydrological, given the amount of drinking water (as well as water for other uses) affected, NAE should assume that the CWA will apply to its use the of PLs.

~PS/NPS and §404~

Assuming the use of the PLs is subject to CWA regulation, they could be considered PSs because NAE has collected the produced water and it is likely foreseeable that such water will flow into WotUS. The fact that the conveyances in this case are naturally occurring fissures is no escape so long as a court finds that the deposit of the pollutants in WotUS was foreseeable (*Abston*). As a PS, the lakes would have to meet Effluent Limitations ("EL") with different standards depending on the pollutant. If the fracking chemicals are non-conventional/toxic (as carcinogens they likely are) such ELs could be very strict(BAT).

Even if the lakes are found to be NPSs the state that controls to bodies of waters into which the lacks flow could regulate us via TMDLs if EL are found not to be stringent enough to meet WQS (§303(d)) and such state can always require NPS to meet BMP.

Moreover, an attempt to fill any of the lakes will requires a §404 permit from ACE. This may not be too difficult by itself but it would likely be considered Major Federal Action under NEPA and would require ACE to do and EA, possibly an EIS. While there

---

is no substantive requirement that unfavorable finding on the EIS will prevent us from getting a permit (M*ethow Valley*), it opens NAE up to citizen challenges which could delay the process or put political pressure on the agency to deny us a permit.

A §404 permit could also require an ESA §7 consultation if any of the migratory birds or other plants or wildlife that are supported by the PLs are listed. More information is needed to assess this concern.

~RCRA and CERCLA~

Even if the lakes are not considered WotUS, there could be RCRA or, eventually, CERCLA liability. If the chemicals in produced water are considered "discarded" and not part of an "ongoing process" in which the chemicals can be reused or stored onsite (*AMC*), the produced water will likely be considered Solid Waste ("SW") (though liquid). Here, in contrast to *AMC*, the chemicals are not being kept onsite but have been transported and stored, creating a strong argument that they have been discarded, becoming "part of the waste disposal problem." This opens NAE up to contributor liability as a transporter (NAE brought the produced water to the lakes) and potentially a TSD facility (not good), if there is a finding of imminent and substantial endangerment to health or the environment. Such a finding seems likely because the playa lakes of are unlined and there is a high probability of getting in to the aquifer. Even if there is no such finding now, there could be CERCLA liability in the future (though not for any petroleum in the water) for the release of these chemicals into the soil and ground water. As the owners at the time of disposal (107(a)(2)) it would strict, (likely) joint and several liability for the cleanup.

~Conclusion~

There is too much potential liability to justify the use the PLs for storage, I recommend that they not be used. If NAE uses them anyway, the PLs should be lined and should meet other RCRA-type standards for SW to ameliorate the potential for CERLCA liability.

B.

The potential listing of the Black-Tailed Prairie Dog ("BTPD") implicate §§ 9 and 10 of the ESA. §9 take prohibition could leave NAE legally vulnerable because the fracking need not kill or harm BTPDs directly, only significantly modify their habitat such that it actually kills of injures a BTPD (*Babbitt*). Fracking will likely have this effect as wells will dot the landscape burrowing through the long intricate tunnels BTPDs create; tunnels that seem particularly vulnerable to the vibrations caused by underground explosions.

Therefore, NAE should either seek a §10 ITP to allow NAE to take BTPD's in the course of fracking. This will require that NAE put forward a conservation plan that will preserve BTPD even if some are taken by this activity. This will be difficult because of the scope of NAE's fracking operation. The other alternative, which I recommend, is to go to DOI now and ask the FWS not to list by offering a conservation plan upfront, as has been done recently with the Sage Grouse. This will require NAE to purchase and set aside land for BTPD but it could prevent the listing (and how much does land in Texas and New Mexico cost anyway).

Be aware that the decision not to list can be challenged via citizen suits (*Northern Spotted Owl*) and while offering a conservation plan may prevent regulation, it may not

maintain the fragile plains ecosystem to which BTPDs are vital. NAE may have problem with other species like the Burrowing Owls and Swift Foxes in the future.

C.

If NAE seeks federal BLM permits it will require at least two main federal regulations; an EIS and (if the BTPD is listed) a §7 consultation.

Fracking, by its nature, will likely be found to substantially affect the quality of the human environment, which is read broadly (*Strycker Bay*) and a BLM permit to frack on federal land will likely be considered a major federal action (§102(c)). As with the §404 above, the EIS process, whether it results in a FONSI or an EIS will delay things by opening the project up to litigation and publicity (as the EIS, at least in part, is about making information available to the public - *Methow Valley*). A finding either way does not derail drilling but it is a cost to consider.

§7 consultations also requires a potentially long process. If BTPD's are not listed and no other listed species are in the area then no problem. If BTPDs are listed or some other listed species is present BLM will need to perform a biological assessment. If the listed species are likely to be affected, it is unlikely that there will be a jeopardy finding that prevents NAE from drilling (it is rare since *TVA*) but NAE could be required to carry out "reasonable and prudent measures" to avoid jeopardy (§7(c)). This whole process (biological assessment, BiOp) is also amenable to citizen suits and slow downs.

If a jeopardy finding is handed down and the permit stopped, NAE could seek an exemption from the God Squad (§7(e-h)) but such a finding is rare and so is an exemption from the God Squad.

Unless drilling on Federal lands worth the additional cost and hassle, NAE should try to avoid seeking a federal permit.

D.

While the DOJ is not enforcing noncompliance with the FDA, NAE should comply, not just because it is the responsible thing to do, but because a citizen suit to enforce the FDA is not out of the question. There is no express citizen suit provision in FDA so a suing party must satisfy the Zone of Interest (ZoI) test in addition to Art. III standing.

The ZoI test requires the court to look at the specific provision violated, not the overall statutory purpose (*Bennett v. Spear*; *Morton*). Here, FDA §1 requires that the the fracking companies publicly disclose their chemical constituents onto a public website that *anyone* can access. Thus the ZoI may fairly be understood to have a broad scope. While §2 does not necessarily illuminate the courts inquiry as it states the overall purpose of the statute and is not contained in the violated provision, it, notably, does not narrow the scope of the ZoI, indicating that "transparency [to the] public" is the concern. §5, though, again, not dispositive could be read, via expressio unius to preclude a citizen suit because it expressly indicates that enforcement actions are to be brought by the AG. In the end it is a close call but because the Court has held that the violated provision dictates the ZoI, it is likely that the Court will read §1 to go to the limits of the Constitution (Art. III will be the limiting principle). It is also important to note that while the AG could take over this suit from the potential plaintiff, she can hardly make the argument that she is diligently prosecuting the case. Either she would have to start doing so, contrary to the President's stated policy, or allow the citizen suit to go forward.

Art. III standing is difficult when, as here the plaintiff is asserting a procedural injury (fracking certainly creates an aesthetic injury but the violation in this case is not the drilling itself but the failure to disclose) (*Lujan*), which must be tied to some concrete interest (*Lujan*; *Summers*). Fear that prevents the use of the area near the drilling or of drinking the water that may be contaminated with unknown chemicals could potentially be considered an injury-in-fact on its own (*Laidlaw*) and thus may properly serve as a concrete interest. If it does, it is the lack of disclosure that is causing the fear and disclosure of the chemicals could certainly redress those fears (if the chemicals aren't toxic or otherwise harmful, the plaintiff have nothing to fear). NAE could argue that knowing what chemicals are used does not address the question of whether the they have entered the water but this would be a bad move for publicity because it implies that such chemicals may be getting into the water. In the end, NAE should simply argue, as in *Laidlaw*, that the fears are unreasonable. It may not be enough but it may be the best argument.

NAE could also employ Scalia-esque policy arguments, claiming this to be precisely the kind of case that raises separation of powers concerns (see *Lujan*). The Executive is using his prosecutorial discretion not to enforce FDA, an individual citizen should not be permitted to interfere with his responsibility to "take care that the law be faithfully executed." But it is just that concern, that the laws are not being faithfully enforced by the executive, that may justify a citizen suit.

In the end, I recommend that we comply with the FDA and avoid the potential for litigation as there is too much uncertainty regarding standing questions in this case.

E.

The new Ozone NAAQS will likely change the emissions standard that any NAE processing facility must meet. The NAE project would already be subject to two SIPs, but in addition, where as new NAE processing plants would have been required to meet BACT, they will now be required to meet the stricter (read: strictest) LAER **and** find off-sets for the Ozone-contributing pollutants that such plants emit (§§171(3), 173(a)(2)). Moreover, in nonattainment zones, there is no way of working with states to "distribute the pain" differently because EPA regulates the source directly (also true for NSR in PSD but see suggestion to purchase existing sources below). All of that will be required on top of meeting MACT for hazardous pollutants, at least BACT (if PSD) for particulate matter and being regulated for GHG's as "anyway sources" (*UARG*), which will likely require that the methane leaks and flares be dealt with.

To avoid this regulations, NAE may want to purchase any existing processing plants available. Even in a nonattainment zone these sources would only be required to meet RACT. Even if NAE decides to build new plants anyway, it should look into buying up these old plants as they are prime off-set options because they are more likely to be big polluters. NAE may also challenge the change in the NAAQS as A/C. As a regulated party, NAE will almost surely have standing as long as there are already plans for fracking (the purchase of the land alone may suffice as evidence).

F.

Richy Lazarus is right, an internal recycling process would almost surely obviate RCRA concerns. Using unlined drill sites (or the PLs) as storage could be seen as

discarding the produced water (as mentioned in Part A) which would likely then qualify as SW and could leave NAE open to contributor liability. *AMC* stands for the proposition that spent material that is destined for reuse/recycling is not considered discarded and thus does not come under the purview of RCRA. By maintaining the whole process within the processing facility it clearly signals to the courts that the produced water is destined for subsequent use as "beneficial chemicals". Even if the *AMC* holding is overturned or distinguished (which I find unlikely), RCRA will simply require certain prevention methods. These will improve the chance of preventing a release (the purpose of RCRA) which mitigates concerns about CERCLA's strict and joint and several liability. If this precaution is economically feasible, I strongly recommend taking Richy Lazarus's advice.

G.

The Federal Government has authority to regulate fracking because Congress has expansive commerce clause powers and fracking has a substantial effect on interstate commerce. The immediate environmental effect are (alas) not what Congress is regulating when it passes laws about fracking. What matters is not the immediate effect but the nature of the activity. Fracking is done to produce oil and gas to sell, it is, itself an activity that "has...to do with commerce," an "economic enterprise, however broadly one might define those terms." (*Rancho Viejo*). Additionally, the relationship between fracking and interstate commerce is substantial. It has made the US one of the worlds largest producers of oil and natural gas over the last five years. Oil is practically an inelastic commodity because the US and other developed countries are so dependent on it; consumers will pay almost any price because they have few alternatives. Such

commercial activity is the poster child for activities that substantially affect interstate commerce.

There are no facts given about the congressional finding but as in *Rancho Viejo*, the "naked eye [would] require[] no assistance" to find that fracking affects interstate commerce. Nor is a jurisdictional element necessary because, viewed in the aggregate, a court could "determine independently" that fracking substantially affect interstate commerce.

While a scenario in which fracking is purely local; the effects, the processing, refining, transport, and sale, these are not the facts for NAE which is carrying out a fracking project across state lines (but even if the local fact scenario was the case for NAE, it would lose either on *Wickard* or *Raich*).

Answer-to-Question-_2_

I agree. There is no question that congressional involvement in environmental law is at a low ebb and that the Court has been less than charitable to environmental causes. NEPA has been nearly wholly defanged, standing doctrine has made no significant progress since *Morton*, Chevron deference may be on the ropes, and many of the small victories for environmentalist have been turned into defeats. Yet, even though there are dark clouds on the horizon, there may be a silver lining.

~NEPA~

The NEPA line of cases may be the paradigmatic example of the decline of environmental law. Judge Skelly-Wright in *Calvert Cliffs* seemed to immediately see NEPA's potential. Not only was the EIS requirement a powerful procedural mechanism, it could be the basis for a substantive check on agency decsion-making. It provided a record by which the courts could determine if there was a rational connection between the decision made and the facts found. Yet, what followed was a string of defeats in the High Court; NEPA lost every time. In *Methow Valley*, written by Justice Stevens, perhaps the most environmentally sympathetic Justice of his time, the Court held that is was well settled that NEPA was procedural only. Then, in *Public Citizen*, Justice Thomas narrowed even the procedural requirement by predicating it on agency discretion (in a case where there seemed to be a lot of potential for discretion). Finally, in *Winter*, Chief

Justice Roberts subjected injunctions to meet the EIS requirement to a balancing of the equities which he said heavily favored the military (as it often does). While the EIS requirement still has some power and value (as indicated in Q.1), NEPA is probably the best example of a missed opportunity among environmental statutes.

~Standing~

Morton was a big victory in environmental law, and perhaps for access to justice generally. But that was in 1972. Since then the Supreme Court has consistently narrowed the scope of standing. In *Lujan* the Court held that the plaintiffs had no standing because they didn't buy a plane ticket, a formalist holding that did little to advance the question of injury-in-fact. Yet, Justice Kennedy's concurrence created hope, if Congress got involved it could create injuries and chains of causation. *MA v. EPA* seemed to be a game changer, it included Justice Kennedy's concurrence in the majority and it changed the standing analysis to be much more favorable to plaintiffs. Redressibility required only "some possibility" not that it be "likely". Causation didn't require that the injury be "fairly traceable" to the challenged action, just that the action make a "meaningful contribution" to the injury. There was some fear that the holding would be limited by "special solicitude" to States as plaintiffs. This fear appears to have been realized in *Summers* where the Court applied a strict, pre-*MA v. EPA* standing test and frankly reserved injury to the purview of the Court with Justice Kennedy joining in full. It appears the Chief Justice Roberts may be right, we may see problems soon where no one has standing.

~*Chevron* Deference or Lack Thereof~

In *Entergy*, *UARG* and *Michigan*, the Court decided the issue at step two of

Chevron. *Entergy*, in the end resulted in deference to the agency but the latter two did not. The fact that *UARG* was decided at step two was itself problematic (see below) but then the Court did not defer to the agency interpretation, calling it unreasonable. *Michigan* went even further, calling the interpretation unreasonable by reading into the ambiguity an affirmative duty. The fact that the duty was to consider cost only made it more quizzical (see below). A lack of deference to agency interpretation at any stage, step one or step two may be concerning to environmental law enthusiasts but this was made worse by *King v. Burwell*, handed down the same term. Here the Court simply stated that Congress did not delegate to the IRS the power to interpret the ACA and reserved that responsibility to itself. These cases indicate that even if *Chevron* is not on its deathbed, deference to agency interpretation is certainly in trouble and in a world where Congress has not amended an environmental statute since 1990, environmental law needs deference to agencies.

~Victories and Defeats~

There have also been examples of small victories being turned on their head. Much like what *Casey* did to *Roe*, *UARG* may have started the unravelling of *MA v. EPA*. The Court got to step two of *Chevron* by determining that “pollutant”, which was read to include GHGs in *MA v. EPA* was ambiguous and that the meaning of pollutant would need to be defined for each section of the CAA. *Whitman* and *Michigan* have a similar relationship. In *Whitman*, Justice Scalia, writing for the Court, held that there must be a textual commitment for agencies to consider costs and further held that EPA could not consider cost when setting NAAQS. The Court said, in essence, “Congress knows how to tell agencies to consider cost, it has done so before and can do so again”. While a

requirement of a textual commitment was in question before *Michigan*, its holding settled the matter. Not only was there no such requirement, there was an imperative to consider cost in congressional silence. This looked bad but it was potentially distinguishable on the grounds that *Whitman*, *Entergy*, and *EME Homer* all concerned areas that Congress had already determined to regulate, it was just a question of how much. In *Michigan* the question was whether to regulate at all. Yet, this distinguishing feature was made of little effect by the dissent's assertion (and therefore unanimous approval) that the disagreement was not about whether costs should be considered but when.

~A Silver Lining~

As I said above, I agree that things have digressed and look bleak now but I maintain that there is hope for the future. Every victory that has turned into defeat, if not explicitly overturned leaves some precedent from which future advocates can argue. Additionally, the Clean Power Plan, while it may be endangered by the concerns discussed above, in an example creative solutions to complex problems. The recent global GHG agreement is another silver lining, indicating that there is an increased interest in solving the problem of global warming now. This in turn is creating increased awareness here in the United States. "Climate Change Deniers" are slowly becoming less prevalent and better and better information is being disseminated that will only speed up this process. As such deniers become extinct I am hopeful that there will be real political weal for Congress to act and that environmental law's next heyday in in the near future.