

Environmental Law

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Final Examination

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Instructions

1. This is a closed book examination. While taking it, you may not consult any sources of information or analysis outside your own mind, and you may not use a computer unless you have a special need to do so. Even after the exam is over, be careful in discussing it with others, since some students may have received permission to take the exam later due to illness or other problems. You are on your honor and are subject to the rules of the Law School Honor Code.
2. The exam consists of 10 pages numbered consecutively. Make sure no pages are missing.
3. The exam consists of 12 questions, several of which have separate sub-parts, each worth 5 to 20 points, for a total of 160. There are several relatively detailed "issue spotter" questions and a larger number of short answer and true-false questions. Some of the shorter questions are based on the issue spotters, so it will be necessary to read the detailed questions carefully before answering the shorter ones.
4. When a question calls for a true-false, yes-no, or agree-disagree response, you must choose one or the other and include it in your answer. You can then justify or qualify your choice in the explanatory part of your answer. As usual, your reasoning and analysis in reaching a conclusion are more important than the conclusion itself.
5. Write legibly. You should write on each line of one side of each page of your bluebooks. We anticipate that your answers will fill approximately two blue books, and in no event more than three.
6. You have 4 hours to complete the exam.
7. Good luck!

Questions

Question 1. Russ Savino is a successful developer of industrial and commercial properties in Western New York through his family-owned company, Buildco, Inc. Both Russ and the company are clients of the law firm where you work. None of the other partners and associates in the firm is familiar with the kinds of issues Savino is discussing, so you have been invited to come to a meeting with Savino and the law firm's senior partners. After the introductory pleasantries, Savino recounts (in somewhat more colorful language) the following narrative:

Last spring when his mother passed away, Russ inherited the family house and land in West Seneca where he had grown up. The house was not much to write home about, consisting of a modest three-bedroom bungalow built shortly after World War II and in need of some serious maintenance. But the land itself captured Russ' imagination as he began to look at it as an asset of the estate, rather than as a family home. The land comprised about three and a half acres, on a nice residential street, backing up to the gorge of Cazenovia Creek. Russ' first idea was to bulldoze the old family house and build a big, fancy "trophy house" on the land, and then sell it for a large sum. He began working on this idea, getting an architect to draw up plans, discussing the project with contractors, and so on. But as he spent more time on the property, looking at it with his adult developer's vision, he began to see a new possibility.

Russ found himself drawn to the creek gorge as he had been when he was a boy, frequently walking down the steep trail to the creekside and exploring along the banks. One day, as he absently watched canoeists and fishermen in boats drift by, the thought occurred to him: "If I could build a dam down here, I could generate some electricity and sell it to the utilities. There's a big power line running near here, and hooking up would be easy." He also did some preliminary checking into his ability to market the electricity, and found that there was a federal law that required public utilities to purchase electricity from small generators at market rates. So he began to re-think his plans, and he got one of the engineers in his company to do an evaluation of the gorge. The engineer reported that it was definitely feasible to generate electricity there—the gorge was about 100 feet deep at that point, and geologically stable so that a simple concrete dam could be constructed there. As luck would have it, while Russ was mulling over the report, the parcel of land on the other side of the creek from his property came on the market, and Russ promptly bought it up so that nobody else would be able to block his plan. He thus owned approximately two hundred yards of land on each side of the creek.

Since Russ has had to deal with a variety of environmental regulations in his work as a developer, he thought that he had better get some input from the New York State Department of Environmental Conservation. In some of his prior construction projects, he had had dealings with engineers in the Division

of Water of the Buffalo Regional Office of DEC, and he called Beth Martin, a DEC engineer whom he had come to respect as “a competent person and a real straight-shooter.” According to Russ, when he described the project, Martin replied, “We don’t know much about dams in this regional office, because all of that is very specialized and it has to be referred to headquarters in Albany. So I can’t really tell you anything about regulatory requirements. From what I know about Cazenovia Creek, there are a couple of concerns I would have, just off the top of my head. I know that our fisheries people have been stocking Coho salmon from the Pacific Northwest in this stream since the 1970s, and I believe that the coos have started reproducing naturally around there. The sport fishermen really love to go after coos, both in Lake Erie and in the tributaries, so if this dam would cause problems for the Coho populations in this area, you’d probably get some opposition.”

“Also, just three or four miles downstream from your property, Cazenovia Creek flows into the Buffalo River. That river junction is in the City of Buffalo, and Buffalo has a combined sewer system. Every time it rains, the sewers overflow into the Buffalo River, and the water quality standards are violated. That’s a Class C—Fish Propagation waterway, and the sewers bring in raw sewage, sediment, bacteria, and some chemical contaminants. Buffalo has been working on long-term control plans as required in EPA’s minimum control strategies—most of us in this office have been involved in one way or another—but we really don’t have a good technical handle on how to prevent the overflows yet. Buffalo recently began a big study of CSO overflows, but we won’t see final results for a couple of years, at least. What I can say at this point is that any reduction in the flow coming off of the watershed into the city would be troublesome, because reduced flow means more concentration of pollutants and more difficulties meeting water quality standards. At some point, we’re probably going to have to do a TMDL for that waterway, and I’m not sure how that might affect the project you are considering.”

Savino concludes his narrative with the observation, “I’m not sure what to make of this—it’s not like anything I’ve ever worked on before, and I really didn’t understand what she was talking about. The only reason I can repeat it now is because I’ve gotten in the habit of taking detailed notes of my conversations. Can you tell me in plain English what I would have to do to keep government off my back with this dam project?”

(a) The room grows uncomfortably silent, because none of the partners has ever encountered this type of problem before. Finally the managing partner says, “That would require a federal permit, I believe, but offhand I’m not sure what you have to show, or to whom, in order to get such a permit.” Turning to you, he asks, “Can you enlighten us?” Respond. (15 points)

(b) Another senior partner in the room, who has done considerable real estate development work, remarks: “That situation with the sewers could be a deal-breaker. I’ve worked on a lot of projects in and around Buffalo, and it’s a royal pain when you have to deal with the Department of Environmental Conservation over permits to discharge directly into a waterway. But nobody has hassled us before regarding sewers—you just ask for a permit to hook up your waste line to the sewer, pay a small fee, and they routinely grant it. It sounds like the feds are leaning on the Buffalo Sewer Authority to clean up their act, and that could mean they’ll be holding new development projects hostage to extract whatever money they can from developers. I must admit that this TMDL stuff is new to me, too.” Perhaps because you had done so well in responding to the first question, she turns to you and asks, “What can you tell us about regulation of CSOs, TMDLs, and how that might affect this project?” (15 points)

Question 2. Russ is thinking strategically about how he might counter attack if the agencies deny him permission to erect his dream dam. What kinds of facts would he have to establish to make a plausible claim that the denial of a hydropower license would be a taking of his property without just compensation? (10 points)

Question 3. It took some time, but Russ eventually managed to obtain the necessary hydropower and water permits. Construction of the dam began in mid-November and ended last week. Russ had everything ready to go when the permits came through, and his crews worked long hours to finish the work in the shortest possible time. The dam, of course, is changing the flow of the creek. Russ made arrangements with his upstream neighbors to accept the flooding of minor portions of their land resulting from the creek backing up behind the dam. But he did not make any arrangements with his downstream neighbors. The main change for them is that the flow of the creek will be much more regulated, and more consistent for the most part – a bit more water than usual in dry times, and a bit less in wet times. Sometimes, however, the dam might also result in sudden bursts of water. This can happen in times of very heavy and continuous precipitation when the backup behind the dam grows too large and the excess water must be quickly discharged.

Russ' immediate downstream neighbor is a guy named Les, whom Russ describes as a "classic tree hugging, granola eating hippie." Les is seriously upset about the dam. He has made it known to Russ that he considers the changed flow of the stream a major detriment to his property. "You transformed a beautiful, ever changing marvel of nature into a mechanical toy – an abomination!" he fumed at Russ. "My beautiful retreat is a shambles compared to what it once was, and solely due to your mindless pursuit of the almighty buck. And not only that, but you completely blocked off the creek. I've always loved canoeing up it and picnicking in the town park. Now you've made that impossible. I'm going to use every legal tool at my disposal to make you rip that monstrosity out. And if I can't make you rip it out, by God I'll make you pay for it, and pay plenty. You can bet on that."

(a) Russ reports the conversation to you and wants your assessment of what legal avenues Les could use to try to force removal of the dam, or failing that, payment of damages. Review the legal claims that Les could pursue outside the hydropower licensing and Clean Water Act contexts and assess their chances of success. (15 points)

(b) How would your answer change, if at all, if the events described above occurred in a prior appropriation state? Explain. (5 points)

Question 4. Lily Waters bought a small, family operated logging company from her grandfather last year. She has lived in Florence, Oregon all her life and is now raising her children there with her husband who is a local artist. She hopes to make her new company, Waters Environmental Stewards, a modest economic success that can help support her family now and into the future. Florence is surrounded by the Siuslaw National Forest. After the Northwest Forest Plan in 1994, timber harvest on the Siuslaw plummeted. Most of the national forest is now designated as old growth reserves to improve habitat for the Marbled Murrelet, Northern Spotted Owl, and species of anadromous salmon as well as to sustain the old growth ecosystem itself. On much of the land, the trees are still fairly small, but the idea is to manage these forests so that as they grow older over the next century they will develop the ecological characteristics of an old growth forest – large trees,

lots of down trees to serve as “nursery logs” for seedlings, soil that is deep and spongy, dead trees to serve as nesting habitat, and so on.

Lily sees a great opportunity for her small company to specialize in harvesting aimed at protecting and restoring these qualities in previously logged land. Her small company has 5 logging trucks with self-loaders. She can organize logging crews as needed, including two crews that work with mules and can access steep, fragile terrain.

She learned at the grocery store that the Forest Service is planning to put three small timber sales up for bid soon in the old growth reserves. Lily has hired a professional forester, Alice Long, to help her respond to the bid requirements so that she can clearly demonstrate how her methods would result in enhancing old growth qualities as well as providing an economic benefit to her and the community. She hopes that Alice can help her understand some of the scientific and technical aspects of the bid requirements so that she can demonstrate how she would protect soil, water, and habitat values while improving the forest by removing small, crowded understory trees for use as wood products. A local business that takes only very small – 3 to 5 inch in diameter trees – is just starting up and Lily sees this as her big chance.

Over in the Florence Ranger District Offices¹, Mary Woods is working on the harvest plans for these small sales. Mary was hired recently to develop timber sales for old growth forest improvement on the Siuslaw National Forests. While the primary goals of these timber sales are new under the NWFP, these areas have been analyzed for timber harvest by Mary’s predecessor, John Tubbs, prior to the NWFP. However, then they were planned as small clearcuts of 25, 30 and 35 acres. Nevertheless, there was already an EA mostly completed and so Mary has been updating it to conform to the NWFP, the Aquatic Conservation Strategy in the NWFP, and other specific requirements for management of old growth reserves. Now these sales will be selection harvests aimed at removing numerous small trees, thus making room for the remaining trees to grow larger. Since these sales were located within a watershed with anadromous fisheries, Mary sent the project description and EA to the forest team of biologists for a consistency review with the ACS and NWFP. This team has forwarded its review to her with an overall positive judgment, but a few questions and reservations regarding sufficiency of buffer strips on secondary streams remain. Mary sent their report, her proposal and EA to the Level One team this morning for further analysis of compliance with agency statutes, policies, and regulations. She is preparing the materials to send to National Marine Fisheries Service (NMFS) for them to issue a biological assessment and biological opinion on these three proposed actions. Since Mary needs these projects to meet her performance targets this year, she hopes these processes will work quickly and give a favorable response for putting the sales up for public bid.

¹ The Florence Ranger District is one of the administrative units of the Siuslaw National Forest.

Lily is also anxious that all goes smoothly as she needs some income in the next months since the economic slump is slowing the purchase of her husband's paintings.

(a) You are on the staff of the Office of General Counsel for the U.S. Department of Agriculture and assigned to the Regional Office staff in Portland, Oregon. You are thrilled with this job (which your helpful law professors helped you to get!) and are taking a tour around the region to see the area and meet the Forest Service staff. While you are in Florence, you meet Mary Woods and she tells you about her timber sales under analysis. She asks you to help her anticipate any legal requirements she needs to meet in order to be sure her proposals go through smoothly. With your EL 1 experience fresh in your mind, you give her a list of the key issues she needs to address to ensure that these sale proposals satisfy legal and procedural requirements. (15 points)

(b) Just by chance, since everyone who visits Florence eats at Moe's Restaurant, you meet a classmate from EL1! As you compare notes, you learn that your classmate has just met Lily Waters as part of a pro-bono effort by a small, local law firm that represents logging companies. Your classmate has been sent out to meet with small owners like Lily Waters to provide free advice as a way of expanding their client base. What kinds of issues did your classmate identify when Lily asked for some help in preparing her bid for these timber sales? (10 points)

(c) Mary Woods just called your office in Portland. She is worried about the reply she got from the Level 1 Team and NMFS. The Level 1 team said that the sales are consistent with the standards and guides in the Aquatic Conservation Strategy (ACS) and the Northwest Forest Plan (NWFP). NMFS also said that these projects were consistent with the ACS and NFWP. Mary wants to know from you whether these decisions are sufficient for her to go ahead with putting these sales up for bid. After puzzling a minute, racking your brain for EL1 tidbits, you outline for her several possible legal problems with the decisions that could derail her sales if they are challenged. What are they? (10 points)

Question 5. Final agency decisions can be reviewed in the courts based on the Administrative Procedure Act. When a federal agency proposes an action and undertakes the development of an Environmental Impact Statement under NEPA (the National Environmental Policy Act), it can be challenged in the courts only after the issuance of the Record of Decision (5 points).

True or False?

Explain.

Question 6. (a) When the U.S. Fish and Wildlife Service or the National Marine Fisheries Service declares a species to be endangered, the agency must simultaneously designate critical habitat boundaries to protect the ecosystem on which the species depends for survival. (5 points)

True or False?

Explain.

(b) Could a citizen suit be used to require an agency to either list a species as endangered or designate critical habitat? (5 points)

Yes or No?

Explain.

Question 7. Regulating the marine fisheries is under the jurisdiction of the National Marine Fisheries Service. The Magnuson Fishery and Conservation Act gave the Secretary of Commerce the responsibility to regulate the fisheries because a “national program for the conservation and management of the fishery resources of the United State is necessary to prevent overfishing, to rebuild overfished stocks, and ensure conservation, and to realize the full potential of the Nation’s fishery resources.” To achieve these purposes the Act required the establishment of regional fisheries councils and required them to develop fisheries management plans, which will achieve and maintain the optimum yield from the fisheries. In *Alliance against IFQ vs. Ron Brown, Sec. Of Commerce*, the Pacific Fisheries Council was challenged for

having proposed an “individual fisheries quota” to be given to each boat, not to individual fishermen. Individual fishermen challenged this approach in *Alliance*, but the 9th Circuit upheld the approach saying that the Secretary’s decision was within the scope of his discretion and consistent with the law. True or False. What was the reasoning given by the court for its decision? How does economic theories of the ‘commons’ help understand this opinion? (10 points)

Question 8. Under the *Mono Lake* decision, the public trust doctrine is fairly seriously watered down. Thus, while it is true that the state must “consider” the public trust in approving a water diversion, after it grants approval the state is effectively locked in to that decision, since the water use becomes a constitutionally protected property interest. (5 points)

True or False?

Explain.

Question 9. Under the General Agreement on Tariffs and Trade as administered by the World Trade Organization individual nation states are barred from exercising their environmental regulatory powers so as to discriminate against products originating in other states based on the methods by which they were produced or processed. (5 points)

True or False?

Explain.

Question 10. The holding in *People v. Platt* that states have no power to require land owners to modify their activities so as to protect fish in non-navigable streams running across their land is still good law. (5 points)

True or False?

Explain.

Question 11. On the whole, the American system of environmental law surveyed in this course does a good job of recognizing and protecting ecosystem services. (15 points)

True or False?

Explain. (In answering this question you should define ecosystem services and give several examples. You should also refer to several areas of law discussed in the course.)

Question 12. Explain the meaning (if any) of the following sentence: "The Clean Water Act's BAT standards are intended to be categorical, but when narrative criteria are applicable, permit-writing essentially becomes dependent on the permit writer's best professional judgment." (10 points)

End of Exam

We wish you good luck with the remainder of your exams and happy holidays.