

Prof. Ben Trachtenberg
Brooklyn Law School, Environmental Law, Spring 2009
Three-Hour In-Class Final Examination

RULES

Students May Consult the Following Materials During the Examination:

The Robert Percival casebook, *Environmental Regulation*, any other assigned or recommended readings from the syllabus, a statutory supplement, and an outline or notes prepared by the exam taker or by any other student (or group of students) enrolled in Ben Trachtenberg's Environmental Law class this semester at Brooklyn Law School (*i.e.*, no commercial outlines, hornbooks, or work product of students not in Trachtenberg's class are permitted).

Reminder: No electronic materials are permitted. If you want notes or other documents that exist on a computer, you must print them out and bring hard copies to the examination.

Grading:

Each of the three sections is of equal weight. You may use your time as you wish, but I suggest you spend about one hour on each section.

I will not see (and accordingly will not consider when grading) anything written on the exam questions themselves. Please put all answers into the appropriate place.

Supreme Court Decision of May 4, 2009 Concerning the CERCLA:

For purposes of this examination, students should ignore the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, No. 07-1601 (U.S. May 4, 2009).

Commentary Concerning Multiple Choice Questions:

If you believe a multiple choice question has no correct answer (or has more than one), you may explain your reasoning. You may do so for no more than two questions; if you write narratives for more than two, I will read only the first two. Note that a correct answer with no explanation gets full credit, and a correct answer with an erroneous explanation is marked wrong. Accordingly, please provide explanations for your answers only if you think such commentary is truly necessary. As noted above, any commentary must be included with your examination answers; I will not see any comments written on the examination questions.

Academic Honesty:

Please obey Brooklyn Law School's rules concerning academic honesty and ethical examination taking. It is far better to perform poorly on an examination than to violate these rules. I take these rules seriously, as does the Law School, as do admissions committees of state bar organizations.

ADVICE

Look carefully at questions before you answer them. Especially in the multiple choice section, you may see a question seeking the answer “most likely” to be true (or false) or the one that “best summarizes” a concept. Make sure you understand what the question asks before choosing an answer.

Please think about your narrative answers before you write them. A clear, brief answer is nearly always superior to a slightly longer, less clear answer.

In particular, for the short answer questions, it is more important to demonstrate familiarity and mastery of a question’s topic than to recite everything in the course materials that potentially relates to the question.

Budget your time carefully. If you spend ninety minutes on the multiple choice questions, it will be very difficult to answer the remainder of the examination questions.

Good luck. I have enjoyed working with you all this semester.

QUESTIONS

Multiple Choice Questions: 1/3 of exam grade in total

Choose one answer for each question.

1. A party is sued under the CERCLA. Which fact (assuming it is true and can be proven) is most likely to protect the defendant from liability?
 - a. All relevant damages were caused by the defendant's tenant, not the defendant or its agents
 - b. At no point was the defendant negligent in a manner relevant to the lawsuit
 - c. The costs giving rise to the suit were incurred entirely by private citizens, not the government
 - d. The damages sought are for physical injuries suffered by the plaintiffs exposed to toxic waste
 - e. The substances giving rise to the damages at issue are not "hazardous waste" as defined by the RCRA and RCRA-related regulations

2. Which of the following actions, if taken by a state, is most likely to survive a legal challenge?
 - a. Requiring all coal-burning power plants in the state to use coal mined within the state
 - b. Purchasing coal mined within the state and giving it away to operators of in-state power plants
 - c. Requiring all cars sold within the state to meet emission standards stricter than those set by California
 - d. Prohibiting all construction on parcels that a state commission determines must remain free of buildings to prevent beach erosion
 - e. Declaring that the Clean Water Act is "null and void" within the state

3. Which of the following is most likely a "hazardous waste" for purposes of the RCRA?
 - a. Toxic cleaning products, in powder form, washed down the drain at a private residence
 - b. The corrosive byproduct of a manufacturing process that the generator intends to reuse
 - c. A discarded drum of industrial cleaning solution, in liquid form, that is "reactive"
 - d. Agricultural irrigation return flows
 - e. Wastes generated by extraction and processing activities at a mine

4. Which chemicals combine to form the acid responsible for acid rain (a form of "acid deposition")?
 - a. Sulfur dioxides and Nitrogen oxides
 - b. Sulfur dioxides and CO₂
 - c. Nitrogen oxides and VOCs
 - d. Sulfur dioxides and VOCs
 - e. Greenhouse gases and Nitrogen oxides

[The remainder of the multiple choice questions asked on the examination have been redacted from this document.]

END OF MULTIPLE CHOICE QUESTIONS

Short Answer Questions: 1/3 of exam grade in total

Answer four of the five questions (if you answer all five, I will read only the first four).

1. The EPA is quite proud of its role in reducing the lead content of automotive fuel. Should it be? Why or why not?
2. Why is it significant that the EPA recently issued a proposed finding that in “both magnitude and probability, climate change is an enormous problem. The greenhouse gases that are responsible for it endanger public health and welfare”?
3. The CERCLA has been criticized on the ground that it unfairly subjects certain parties to liability far beyond what is justified by the malfeasance or negligence of those parties. What do you think about that critique?
4. Explain the concept of the “value of a statistical life,” including how a VSL is calculated and for what purpose.
5. What is the difference between health-based regulation and technology-based regulation? Why might one be better than the other? Provide an example or two of each.

END OF SHORT ANSWER QUESTIONS

Issue Spotter (traditional law school exam question): 1/3 of exam grade

You are an environmental lawyer. The CEO of Alpha Corporation visits your office and tells you the following story:

In 1990, Amos Alpha founded Alpha Corporation, which from its inception had two divisions: Westside and Eastside.

Westside Division operated a factory in Modesto, California that produced paint. At the start of each month, various ingredients would arrive at the factory, and the workers would manufacture the paint and prepare it for shipping to customers. Near the end of the month, the paint would leave the factory, and the workers would then clean the factory's machines in preparation for the next month's production.

To clean the machines especially well, Westside used a cleanser called HyperClean ("HC"). Unsure of whether HC was dangerous, Westside ensured from the outset that all employees used protective gear during the cleaning process, and no employee has been injured as a result of exposure to HC. After each cleaning, Westside had a residue composed of HC and paint. One third of the residue was stored in drums and buried behind the factory. Another third was dumped down a drain leading to a pipe that emptied in a nearby stream. The final third was used onsite as an ingredient in next month's paint.

In 1995, Westside learned that HC is carcinogenic. Remaining vigilant about ensuring that workers wore protective gear, Westside continued to use HC.

From 1996 on, Modesto school children occasionally toured the Westside factory on school trips. Westside did not inform the schools or the children about the carcinogenic properties of HC. In 2006, one former visitor was diagnosed with a rare form of cancer commonly associated with HC exposure.

In 2005, downstream landowners noticed HC on their property and contacted federal officials. Not knowing the source of the HC, federal officials began cleaning up the downstream properties. Then, in 2006, a freak tornado tore through the factory fence, unearthing the buried HC drums and depositing them on a piece of land miles upstream of the factory, where they broke open. The upstream owner contacted EPA, who then realized that Westside is the source of all nearby HC leaks. The paint factory is now closed.

Eastside Division was in the business of buying land, building shopping malls on the parcels, and selling the developed parcels to investors who would then own and operate the malls. In 1990, Eastside bought three parcels, one in Tennessee, one in Georgia, and one in Florida.

The Tennessee site was bisected by a river on which people canoe. Other than the river segment, the site consisted of swamp. With permission from Tennessee authorities but not from federal authorities, Eastside dug mud from one side of the river, allowed it to dry out, and deposited it on the other side, causing that side to become firm enough to support a parking lot and mall. It built the mall in 1999 and sold the site in 2000.

The Georgia site was smaller than Eastside's usual parcels. Although composed mostly of dry land—and located far from any rivers or lakes—the parcel contained a small pond in the middle. The location of the pond was inconvenient for Eastside because it would have decreased the potential size of any mall on the site. Accordingly, Eastside filled in the pond and built a mall in 1999, which it sold in 2000. In 2002, birdwatchers reported that certain ducks, which normally stopped at the pond while flying from New York to Florida for the winter, had changed their route to adjust to the absence of the filled pond.

The Florida site is half a mile from the Transit River, which is used for commercial shipping. A highway running along the Transit (between the river and the mall site), makes the site convenient for mall customers. In 1992, Eastside discovered a pile of MetalMelter ("MM"), a corrosive waste left over from the site's previous tenure as a mine. In addition, part of the site had ground too soft to support a building. A consultant informed Eastside that, if mixed with dirt, the mining waste would no longer be corrosive. In 1995, Eastside had dirt trucked to the site, mixed it with the waste, and used the dirt-waste combination to harden the ground. It then built a mall and sold the property in 1997. In 1998, EPA designated MM a listed waste under the RCRA. In 1999, the mall's new owner, Mall Operator Corporation ("MOC"), built additional buildings on the site, and during this construction the mall's original foundation cracked and had to be replaced. In 2000, a commercial ship captain complained that his ship's hull had degraded while travelling down the Transit River. Tests revealed that when the foundation cracked, MM somehow travelled from the mall parcel to the Transit River, which now requires expensive cleanup efforts. EPA began such efforts in 2005.

Amos Alpha sold Alpha Corporation in January 2009. In February 2009, the new board of directors hired the current CEO, who subsequently learned the facts recited above.

Alpha has received an inquiry from an investor considering buying the company, and Alpha's CEO wants to honestly report to the investor any problems that Alpha might have resulting from the facts reported above. You are asked to draft Alpha's report to the investor. The report should discuss (a) what environmental laws Alpha may have violated and (b) what financial liability Alpha might face related to environmental cleanup efforts.

Assume that none of the relevant actors here ever had a permit under any environmental law unless it is specifically mentioned. Also assume that there's no such thing as a statute of limitations.

END OF ISSUE SPOTTER QUESTION

END OF EXAMINATION QUESTIONS