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***General Comments on the Final Examination for Environmental Law***

Having read all the answers to the final examination, I have written a few comments about them. The text below is not intended to serve as a “model answer.” I spent more than three hours preparing this document, and I consulted whatever sources I pleased. Accordingly, there is no way that any exam taker could have addressed all of the issues that I discuss below.<sup>1</sup> Instead, this document exists to list some of the main points that students could have raised in response to the questions calling for narrative answers, and it also identifies a few common mistakes. The purpose is to enhance the exam’s utility as a teaching tool.

**Multiple Choice:**

The number of multiple choice questions makes it impractical for me to provide commentary. Students should feel free to contact me if they have questions or comments about specific multiple choice questions.

For those who are wondering, I note that this year no students received credit for answers on the basis of comments. In other words, the scoring of a total of zero multiple choice answers was changed from “incorrect” to “correct” because of the accompanying explanations. Also, no answers were rescored from “correct” to “incorrect.”

Thirty-six students took the exam. Out of thirty multiple choice questions, the number answered correct ranged from 14 (47percent) to 27 (90 percent). The mean raw score on this section was 21.6 correct answers (72 percent), and the median was 22 correct answers (73 percent).

**Short Answers:**

*Question 1: Ninety-Nine Cent Cheeseburger*—This question invited students to explain the concept of an “externality” and its relevance to environmental law. In particular, many activities associated with the production of meat result in social costs that meat producers (and meat purchasers, *a.k.a.* meat eaters) currently do not “internalize.”<sup>2</sup> A decent answer defined “externality” and explained how those who partake in cheap cheeseburgers avoid paying what some argue is the “real” price of their food. Better answers offered some examples of externalities associated with meat, such as water pollution from animal waste, greenhouse gasses produced by beef cattle, unpriced pollution resulting from transporting meat from feedlot to table, and direct health risks such as the fomenting of antibiotic-resistant bacteria and the spread of illnesses attributable to animal waste.<sup>3</sup> Also, American

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<sup>1</sup> That said, these comments are by no means exhaustive; my failure to address an issue in this document does not necessarily mean that a student was erroneous in discussing it on the exam. These comments are too brief to acknowledge every good point I read while grading.

<sup>2</sup> Many of the arguments about meat apply also to dairy products such as cheese.

<sup>3</sup> When identifying relevant externalities, many students noted that the ability to cause harm to the environment without paying the cost can lead to a “tragedy of the commons,” the commons in such cases being a clean environment.

agricultural policy subsidizes the production of corn, which is then used as animal feed, meaning that meat prices are kept low with tax dollars not incorporated into the price of burgers.<sup>4</sup>

Students with broad interests in social welfare might have mentioned a few additional externalities not directly related to environmental law. For example, workers at slaughterhouses suffer high rates of injuries (among other problems), and related costs are almost surely not fully borne by meat sellers and purchasers.<sup>5</sup> Considerations such as these were a bit attenuated from the main focus of the question and could easily have been omitted from a good answer.

Students wishing to push back against the saying—*i.e.*, to criticize the implicit argument that externalities associated with meat production justify some sort of regulation—might have argued that raising the price of meat will hurt the poor. They might also have noted that the tension between competing desires to protect the environment and to sustain the existing American standard of living is a recurring theme in debates over environmental regulation (*e.g.*, shutting down coal mines costs jobs). One might also have questioned whether the government can accurately value the alleged externalities at issue, whether regulations could have unintended negative consequences, and whether a forthright effort to increase meat prices is politically viable.<sup>6</sup>

Good answers agreeing with the sentiment of the “saying” included some suggestions of how the relevant externalities might possibly be internalized. The simplest suggestion is a tax on meat. Other ideas might include regulation of the harm-causing activities (*e.g.*, certain feedlot practices could be banned) or the creation of a pollution-trading scheme for meat producers.<sup>7</sup>

*Question 2: Non-Point Sources of Water Pollution*—This question asked why reducing water pollution from non-point sources is so difficult. A respectable answer discussed practical concerns as well as political ones. It also explained what a “non-point source” is and identified a few of the major categories, such as agriculture, urban runoff and stormwater, mining, erosion caused by logging, and air pollution.

The practical problems are significant. First, even identifying the non-point sources polluting a specific body of water can prove impossible. Second, even if non-point sources are identified, they are difficult to address. Unlike a pipe, to which one can attach a filter, a diffuse source of pollution such as fertilizer runoff cannot be reduced with a single piece of equipment. In addition, while the filter at the end of a pipe can be inspected, many of the potential responses to non-point sources of water pollution (*e.g.*, reductions in pesticide use) are more difficult to monitor.

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<sup>4</sup> Other policy choices, such as those concerning the management of federal land, also affect the price of beef and could sensibly have been discussed by students familiar with them.

<sup>5</sup> Another “cost” rarely even calculated, much less internalized by meat producers, is harm to animals. But laws concerning the welfare of food animals do exist. *See, e.g.*, Proposition 2 (“Prevention of Farm Animal Cruelty Act”), passed by California voters in 2008.

<sup>6</sup> A more subtle critique is that Americans do not pay the “real” cost for goods generally, making the cheeseburger discussion a tad arbitrary. If consumers must pay the “real” cost of burgers, what about books? Or lettuce shipped from California to New York? Or anything else that comes by train or truck?

<sup>7</sup> A few students interpreted the saying akin to “There’s no such thing as a free lunch” and proceeded to write answers having little if anything to do with cheeseburgers. Such answers missed the intended point of the question, but to the extent they provided thoughtful comments related to environmental law (*e.g.*, the “no free lunch” idea could evoke deep ecology, or it could refer to environmental externalities generally, as opposed to specifically related to burgers), I attempted to grade the answers on their own terms and give fair credit where due. The saying did come up in class at least once in explicit reference to externalities associated with actual (as opposed to metaphorical) cheeseburgers.

Also, certain non-point sources result from local decisions (*e.g.*, zoning laws), and a comprehensive effort to change these decisions would raise concerns about federal intervention into land use and other areas normally handled by states and their political subdivisions.

Politically, regulation of non-point sources is a very tough sell. When one reviews the leading sources, one quickly realizes that agricultural and mining interests will likely oppose quite vigorously any serious effort to regulate runoff under the Clean Water Act. Farmers don't want EPA inspectors questioning their fertilizer and pesticide use,<sup>8</sup> and mine owners don't want much if any inspections at all. Major sources of air pollution already face substantial regulation under the Clean Air Act. A proposal to subject them to additional restrictions related to water quality will not be popular.

The practical and political concerns are related, and a good answer need not have addressed them in turn. For example, urban runoff (*e.g.*, oil and grease washed into waters of the United States from city streets) is difficult to reduce, and potential methods for reducing it would be unpopular. Nonetheless, a good answer needed to address both practical and political problems.

Especially strong answers devoted some attention to existing efforts at reducing non-point sources of water pollution, such as Clean Water Act § 319 and the total maximum daily load (TMDL) provision at § 303(d), and explained their shortcomings.<sup>9</sup> Also, the potential for regulation of non-point sources under CWA § 401 was worth exploring if time allowed.

*Question 3: Discounting to Present Value*—This question asked students to explain the concept of “discounting” a cost or benefit to its “present value” and to explain the importance of the process to environmental regulation.<sup>10</sup> Accordingly, responsive answers included a definition of discounting and then explained why one should care about it. Better answers provided some examples of discounting in action.

Solid answers tended to explain discounting with the simple example of money. After stating that one would prefer to receive a dollar today than to receive the same dollar in a year, students explained that the value of the dollar to be delivered in one year could be given a “present value” (that is, the value today of the right to collect the dollar in one year) and that the process of determining the lower<sup>11</sup> present value is called “discounting.”

With discounting explained, good answers then turned to cost-benefit analysis (CBA), describing how agencies conduct CBAs when considering whether to enact a regulation. Because costs and benefits weighed during this process are monetized (that is, assigned a value in dollars), and various costs and benefits are expected to arrive at different times, CBA calculations involve the discounting of future benefits and costs to their present values. For example, if a regulation would prohibit the use of a certain carcinogen in the workplace (requiring that industry instead use a safe, more expensive chemical), industry will incur the replacement cost as soon as the regulation

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<sup>8</sup> Perhaps more salient: Senators representing farm states, regardless of party, would also likely oppose robust regulation of agricultural runoff under the Clean Water Act.

<sup>9</sup> One related question is whether Section 319 is proving more effective than Section 208, whose shortcomings Section 319 was intended to remedy.

<sup>10</sup> This question was easily the least popular among exam takers, with half the class choosing to skip it.

<sup>11</sup> In theory the present value could be greater than the future value (with a negative discount rate). The remainder of this commentary will ignore that possibility and will focus on positive discount rates.

becomes effective, but the primary benefits of the regulation (a reduction in employee cancers) will arrive years or even decades into the future (when the cancers that otherwise would have stricken employees fail to do so). The benefits of the regulation, the eliminated cancers, would be assigned a value, and that future value would then be discounted to its present value. Finally, the present value could be compared to the costs of the regulation. This example illustrates a phenomenon common to proposed environmental regulations, in which the promised benefits often arrive far later than the costs.

Particularly thoughtful answers addressed some of the challenges inherent in CBAs and with discounting in particular. For example, a higher discount rate causes future benefits to be counted as less valuable than they would be under a lower discount rate. How should the discount rate be chosen? When benefits are in the form of human lives (*e.g.*, persons saved from cancer deaths), can those be discounted in the same way as more mundane benefits (such as money)? If many benefits are undervalued because they are difficult to monetize (*e.g.*, protecting species not associated with much current economic activity), does that suggest that discounting such benefits is particularly questionable, and if so, what if anything should be changed about CBAs?

*Question 4: Scope of the Clean Water Act*—This question concerned the scope of the Clean Water Act, specifically asking what “water” is subject to regulation under the CWA. Useful analysis begins with the statutory text, in particular with CWA § 301(a) (which prohibits the “discharge of any pollutant” except in compliance with other CWA provisions) and CWA § 502 (which defines “discharge of a pollutant” along with other terms such as “navigable waters”). In general, a property owner need not worry about the Clean Water Act with respect to water on her land unless she intends to “discharge a pollutant” from a “point source” into the water and the water counts as “navigable waters” (*i.e.*, as “waters of the United States”). Many answers neglected even to mention the key statutory terms, turning instead directly to cases. The cases are important, but one cannot ignore the statute.<sup>12</sup>

As we discussed in class, however, the statutory terms lack obvious meanings upon which everyone can agree. In particular, good answers reviewed decisions construing the term “waters of the United States.” Although naming the landmark cases served as a convenient way to organize a good answer, actual references to the cases was not necessary so long as an answer provided an accurate report on the current state of the law. In other words, if a student explained what facts a property owner needed to consider when evaluating whether water on her land is subject to the CWA (*e.g.*, proximity or connectedness to actual “navigable” waterways), citations were not required to obtain full credit.<sup>13</sup>

Certain bodies of water are easy to classify as either within or without the scope of the CWA. For example, a river or other traditionally “navigable” waterway (along with other “continuously present” bodies of water such as lakes and streams) almost surely qualifies as “waters

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<sup>12</sup> Recall the old saying on the three leading principles of statutory interpretation: “read the statute, read the statute, and read the statute.” If anyone knows who first coined this phrase, I would appreciate being informed.

<sup>13</sup> If a student was desperate to cite a case, the best choice was probably *Rapanos v. United States*, 547 U.S. 715 (2006), particularly if the student was prepared to discuss the distinction between the plurality opinion and that of Justice Kennedy.

of the United States.”<sup>14</sup> In addition, wetlands “adjacent to waters as more conventionally defined” are covered. *See Riverside Bayview Homes*. On the other hand, a small, isolated intrastate pond is nearly certain not to fall within the definition. *See SWANCC*.

Closer questions are presented by wetlands (or other watery places) that are neither “conventionally defined” bodies of water nor contiguous to such bodies of water (*i.e.*, with a continuous surface connection) yet nonetheless have a “significant nexus” to such a water body. *See Rapanos* (three opinions debating the issue). It appears likely that five Justices support application of the CWA to water possessing a “significant nexus” to navigable-in-fact waters even absent contiguity. The issue then becomes the definition of “significant nexus.” Answers presenting this level of detail were already quite impressive, and a very brief list of factors relevant to finding a nexus (or lack of one), such as hydrological linkage, was more than sufficient to complete an excellent response.

*Question 5: NEPA*—This question asked whether the NEPA should be repealed and, if not, whether it could be improved. Essentially, the question prompted students to evaluate the primary criticisms of the NEPA. Such evaluation was made easier by a brief discussion of how NEPA operates and what its drafters intended to accomplish.

To argue that the NEPA should be repealed, is perfect, or should be maintained but amended, one must describe the statute at issue. Fortunately, the statute is fairly short and plainly written,<sup>15</sup> and we devoted a fair amount of class time to its key provisions, as well as to regulations promulgated to implement it. Good answers explained what activity is subject to the NEPA (*i.e.*, explained § 102(2)(C) and the main terms of that section such as “major Federal actions,” “significantly affecting the quality of the human environment,” and “detailed statement”). They also briefly addressed the procedures agencies conduct to comply with the NEPA, introducing the concept of an EA, and EIS, and a FONSI.

The main critique of the statute is that it wastes time and money, causing agencies to produce lengthy reports (whose conclusions they need not follow—after all, agencies need only think about the effects of their actions on the environment, not change their behavior)<sup>16</sup> which are then the subject of pointless prolonged litigation.<sup>17</sup> In particular, the tactic of challenging an EIS as inadequate (or challenging an agency’s decision to forgo producing an EIS) for the sole (or at least the primary) purpose of delaying a project is open to all sorts of sensible complaints, and the course readings provided specific examples of projects delayed by NEPA litigation.<sup>18</sup> From the opposite side, one might criticize the statute’s lack of teeth. That is, instead of saying the NEPA should be repealed because it creates meaningless paperwork, one might propose making the paperwork

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<sup>14</sup> Additional facts that would suggest specific water qualifies as “waters of the United States” include use by interstate travelers for recreation or other purposes, use as a source of fish or shellfish sold in interstate commerce, or use for industrial purposes by industries engaged in interstate commerce.

<sup>15</sup> Compared to other environmental statutes.

<sup>16</sup> Consider, for example, that NEPA did not prevent the several federal actions leading to the ongoing oil spill in the Gulf of Mexico.

<sup>17</sup> Also noteworthy is that the paperwork burden and volume of litigation were not foreseen by those enacting the statute.

<sup>18</sup> The complaints need not question whether a lawyer should use the tactic so long as it remains available. One might argue that the tactic should be removed from a lawyer’s arsenal without suggesting that a savvy lawyer should ignore its existence today.

meaningful, by requiring that agencies adopt environmentally-friendly courses of action identified in their EISs.<sup>19</sup>

Defenders of the statute had two especially strong arguments. First, considering environmental consequences can cause agencies to make better decisions all on their own. Second, creating public records of such consideration allows greater accountability and provides an opportunity for citizens to influence policy. In addition, the delay tactics mentioned above sometimes have beneficial effects, and the use of NEPA to stall bad projects has certainly prevented some very stupid decisionmaking.<sup>20</sup> Specific examples (*e.g.*, the Westway) made arguments stronger.

Overall, this question is about as close to a pure “policy question” as one is likely to encounter on a law school exam (at least one written by me). Students should note that even open-ended policy questions cannot be answered well without real knowledge and explanation of existing law.

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<sup>19</sup> Anyone making this proposal should have addressed concerns about practicality (*e.g.*, Would some court of appeals decide whether each action was good for the environment, and if not, who would? How long would the “EIS With Teeth” process take?) and legitimacy (Who are the courts anyway to decide how executive agencies should treat the environment?).

<sup>20</sup> I have no way to evaluate whether such delays are a net benefit (that is, whether the silly delays outweigh the sound delays). Regardless, some sound delays exist, and they provide at least some justification for the NEPA.

## Issue Spotter Essay:

This question provided students with an opportunity to demonstrate their knowledge of the major provisions of the Clean Air Act. It also raised a few issues related to other statutes, including the Clean Water Act and the NEPA. Because the background “notes” provided by the question lacked essential detail, and because time during the examination was limited, students could not possibly address in depth all of the issues an attorney in the Environmental Bureau (EB) might have considered. In addition, the broad discretion granted by CAA § 110 to states in crafting their State Implementation Plans (SIPs) also gave students wide latitude in deciding how to respond to the question. That said, certain issues cried out for attention, and good answers devoted at least some discussion to them.

As the notes state, “Kent has a lot of work to do with respect to clean air.” If the state cannot produce an adequate SIP to address them, EPA could—at least in theory—impose a Federal Implementation Plan (FIP) on Kent.<sup>21</sup> I will move from east to west in my discussion, although many organizational schemes were entirely appropriate.<sup>22</sup> In the “Busy Belt,” near the state’s eastern border, manufacturing plants and power plants are creating dirty air. The fact pattern strongly suggests that the region is a nonattainment area (NA) for particulate matter (PM),<sup>23</sup> and perhaps other criteria pollutants too.<sup>24</sup> If so, all new major stationary sources of air pollution (*e.g.*, manufacturing plants and power plants) in the region must use lowest achievable emission rate (LAER) technology.

In addition, existing plants should already be using reasonably available control technology (RACT). Perhaps, however, some of the existing plants actually should be required to use LAER instead of the less strict RACT standard. This would be true if the surprising longevity of the plants is attributable to “major modifications” disguised as routine maintenance, repair, and replacement (RMRR).<sup>25</sup> If RMRR exemptions were disallowed, affected plants would be subjected to New Source Review. For any plants subject to LAER requirements, the standards would apply for all criteria pollutants for which the Busy Belt is an NA (but not for other criteria pollutants).

Because the Busy Belt is so close to the Kent-Jefferson border, the EB should investigate whether pollution from the Busy Belt is contributing to nonattainment in Jefferson. *See* CAA § 110(a)(2)(D) (requiring that SIPs contain provisions adequate to ensure that states do not “contribute significantly to nonattainment” in downwind states). It is also possible that Jefferson is

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<sup>21</sup> Imposition of a FIP would be undesirable to Kent officials for several reasons beyond the scope of this question. Fortunately for the officials, EPA generally has little desire to impose FIPs (for many of the same reasons).

<sup>22</sup> For example, one could have organized an answer by statute (*e.g.*, Clean Air Act issues first, then NEPA, etc.), perhaps with subsections for major CAA programs (*e.g.*, PSD, NA). Most students went county by county.

<sup>23</sup> The reference to “tiny particles that get deep into people’s lungs” was intended to alert students to the PM issue.

<sup>24</sup> In addition, the “bad stuff” in the air could have included toxic pollutants, in which case the Maximum Achievable Control Technology (MACT) standards applicable to Hazardous Air Pollutants (HAPs) would become important. *See* CAA § 112.

<sup>25</sup> *See Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007). Note also that new major sources (and major modifications) in a nonattainment area also trigger requirements concerning emission offsets. Another possibility is that the owners of older facilities are avoiding New Source Review by “netting out” increases in pollution.

sending pollution that exacerbates problems in the Busy Belt. Further investigation would be helpful.<sup>26</sup>

How might pollution in the Busy Belt be reduced? Beyond potential enforcement of LAER requirements on recalcitrant plant owners, the state might also consider an emissions-trading scheme. That way, plant operators along the busy belt would have incentives to adopt efficient pollution-reduction strategies. Kent could also tax emissions of PM (and any other pollutant for which the area is out of attainment). Another possibility is for Kent to subsidize the purchase of clean technology at the dirtiest plants. Finally, if Kent's coal-burning power plants use high-sulfur coal, the state might encourage (or even mandate) the use of low-sulfur coal.<sup>27</sup>

In Central County, the air in and around Chancellorsville is "smoggy," particularly during the summer, and is worse during the day than at night. This indicates problems associated with mobile sources of air pollution (*i.e.*, vehicles—the area is known for "intense use of passenger cars"), and it almost certainly signals nonattainment for ozone and nitrogen dioxide (NO<sub>2</sub>), one of a group of highly reactive gasses known as "oxides of nitrogen," or "nitrogen oxides (NOx)."<sup>28</sup> To reduce pollution from vehicles, Kent could adopt the California emission standards, if it has not done so already.<sup>29</sup> It could also opt-in to the reformulated gasoline (RFG) program authorized by CAA § 211(k).<sup>30</sup> Various schemes to get particularly dirty cars off the road (*e.g.*, robust emissions inspections) could help too. Kent might also consider various policies aimed at reducing total miles driven, such as increased availability of mass transit, a higher gas tax (or the creation of a gas tax if none exists), tolls (potentially including congestion pricing), and "high-occupancy vehicle" lanes to promote carpooling.<sup>31</sup> Although the pollution-reduction benefits from sensible land use would take years to arrive, the state might also encourage localities, particularly those near the capital, to promote development less dependent on cars. In addition, the light industry in the area, to the extent it produces pollutants for which the area is in nonattainment, would be subject to the same standards discussed above with respect to the Busy Belt (RACT for existing sources, LAER for new ones and those making major modifications).

South of the capital, in Smeltington, the state's only lead smelter somehow has avoided causing nonattainment for lead air pollution in the state, and Kent's southern neighbor, Adams, is also in attainment for lead. Because the area near Smeltington is in attainment for lead, the smelter

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<sup>26</sup> If either Kent or Jefferson is contributing to nonattainment by the other, the downwind state could petition the EPA under CAA § 126 for a finding that certain sources of pollution are in violation of § 110(a)(2)(D), with the eventual goal of having the contributing sources shut down.

<sup>27</sup> Such encouragement would be a natural result of other ideas already mentioned, such as a tax on emissions or an emission-trading plan. Also, the state might regulate mobile sources of pollution (because the Busy Belt has a busy highway) as discussed below for the state capital area.

<sup>28</sup> Recall the NOx SIP call. NOx combines with volatile organic compounds (VOCs) to form ground-level ozone. Emissions from industrial facilities and electric utilities, motor vehicle exhaust, gasoline vapors, and chemical solvents are some of the major sources of NOx and VOCs.

<sup>29</sup> See CAA § 177. Note that unlike California, Kent cannot create its own mobile source standards. See CAA § 209(b) (allowing only California to apply for waivers from the general prohibition on state regulation of vehicle emissions). The state can, however, favor low-emissions vehicles when buying government vehicles. See *Engine Mfgs. Assoc. v. SCAQMD*, 541 U.S. 246 (2004).

<sup>30</sup> Section 211(k)(6) allows states to "opt-in" to the program if they are not among the areas required to participate. The required areas are those most seriously affected by smog and ozone. Kent officials should note, however, that methyl tertiary butyl ether (MTBE)—often used as an additive in RFG—has contaminated water supplies across the country.

<sup>31</sup> A trading system involving the "light industry" in the area could work too, depending on details not presented in the notes. Kent would want to avoid the pitfalls of the SCAQMD "old-vehicle scrapping" regime.



is subject to regulation for prevention of significant deterioration (PSD). Specifically, a major modification of the facility would require implementation of best available control technology (BACT).

Although attainment in Adams of the lead NAAQS eliminates for this region of Kent concerns about significant contribution to nonattainment, the discovery of lead pollution in Lake Adams allegedly attributable to Kent's smelter raises other issues.<sup>32</sup> If the lead in the lake arrives by air, then it could be considered a non-point source of water pollution, and Adams will have the usual difficulties in preventing such pollution. If however, lead is being deposited into the water near the smelter and then somehow travels to Lake Adams, the smelter may be in violation of Clean Water Act prohibitions concerning discharges of pollution from point sources. (In other words, the smelter may need an NPDES permit, or it may be violating an existing permit. Lead is toxic, meaning that the smelter would likely be required to use best available technology (BAT) to control any discharge.) If instead the lead is being dumped on land—and then somehow getting from the dumpsite to Lake Adams—the smelter is probably violating the RCRA. Lead that enters the environment in violation of the RCRA or the CWA would quite likely expose the smelter to liability under the CERCLA, which in the case of a cleanup of Lake Adams could be quite expensive.<sup>33</sup>

As for the proposed industrial projects in Western County, chances are the industrialist has purchased land in a PSD area for all or nearly all criteria pollutants. Much of the county is devoted to national parkland and wildlife refuge, and the remainder is described as “rural and bucolic” with a primary industry of tourism.<sup>34</sup> Accordingly, the proposed new manufacturing plants would be subjected to BACT requirements, which likely would make it difficult for them to compete with existing plants in the Busy Belt.<sup>35</sup> In addition, the plan to use “immense chimneys” to send pollution away is reminiscent of “tall stacks,” a tactic states cannot use to satisfy their responsibilities under the SIP program.<sup>36</sup> With respect to the proposed power plants, a federal permit would almost surely be required.<sup>37</sup> Accordingly, an environmental study is likely required under the NEPA, and litigation concerning the quality (or absence) of a resulting EIS may delay construction.<sup>38</sup> A nuclear or hydroelectric plant might well trigger Section 401 of the Clean Water Act—assuming that the project would involve the discharge of pollutants into waters of the United States—in which case a certification from Kent would be a necessary precondition for the issuance of the federal permit.<sup>39</sup>

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<sup>32</sup> The lack of detail made it difficult for students to reach firm conclusions about Lake Adams. After all, perhaps the lead in Lake Adams does not come from Kent at all. A brief mention of the major potential issues was a sufficient response to this part of the fact pattern.

<sup>33</sup> The smelter might well be exposed to CERCLA liability even absent any violation of law, but this paragraph has already indulged fairly deeply in speculation.

<sup>34</sup> Indeed, the proposed industrial site may be in a Class I area, which is subjected to particularly strict PSD regulation. See CAA §§ 162-164.

<sup>35</sup> Unless the Busy Belt plants are found to have engaged faux RMRR efforts (as discussed above, see note 25 and accompanying text) and are themselves subjected to LAER requirements.

<sup>36</sup> See CAA § 123.

<sup>37</sup> Hydroelectric plants require permits from the Federal Energy Regulatory Commission, and nuclear plants require permits from the Nuclear Regulatory Commission.

<sup>38</sup> The publication of a high-quality EIS might cause delays too. Proposing a new heavy industrial region in the suggested location is likely to incite intense opposition. The information in the EIS would probably provide ammunition to opponents of the project.

<sup>39</sup> See *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994) (discussing relationship of Section 401 and Section 303, among other relevant provisions).

## General Comments:

Even when time is limited, students are wise to format their answers clearly. Creating nonobvious abbreviations (such as “sts” for “states,” “commerce cl” for the “Commerce Clause,” or “j/d” for “jurisdiction”) cannot possibly save enough time to justify the loss of clarity. Using “h20’s” for “waters” (as in “navigable h20’s”) is even worse. Reserve abbreviations for mouthfuls like “National Ambient Air Quality Standards (NAAQS).” This advice, while good for any law school examination, is especially sound for a subject like environmental law that already has so many abbreviated terms of art.

When a question concerns a matter of opinion (*e.g.*, whether the NEPA should be repealed or whether a certain saying is “silly”) as opposed to a more straightforward matter of fact (*e.g.*, how have courts interpreted the Clean Water Act), students miss opportunities when they neglect to consider counterarguments. Even if one believes the repeal of the NEPA would be preposterous, students should confront the best arguments likely to be made by a repeal advocate.<sup>40</sup> In addition to serving as useful practice for a career in the law, in which one may occasionally encounter silly arguments that nonetheless require a response, addressing the “other side” allows a student to demonstrate mastery of the topic and to earn more points on the exam.

Another way in which many students “left points on the table” was by rushing past the mundane details of statutes in favor of policy discussion or the pronouncements of courts. For example, in a question concerning the scope of the Clean Water Act, ignoring the text of the few statutory provisions at issue (*e.g.*, CWA §§ 301 and 502) prevented an answer from receiving full credit. In addition, the question concerning the value of NEPA could not be answered well absent at least some discussion of the statute’s provisions and the actions taken to satisfy the law.

In the advice following the examination’s instructions, I cautioned students to attend to the “call” of a question. For the issue spotter, the question requested a memo for the director of the state Environmental Bureau. In most states, the equivalent official is a political appointee responsible for many complicated programs, and the director may not have spent a career in environmental regulation. Accordingly, students did well to avoid unnecessary jargon and to explain the importance of key legal provisions. For example, it seems from the fact pattern that Jefferson might have grounds to complain about interstate air pollution contributing to nonattainment (depending on who is downwind from whom), while such a claim by Adams appears weaker because Adams is in attainment for lead. This “brass tacks” information is useful to a state official responsible to the governor. Similarly, if major industrial plants in Eastern County may be subject to LAER requirements they have heretofore evaded, the EB director might appreciate knowing that such regulation will be burdensome (*i.e.*, expensive). Students were wise to answer the “Why should I care” question implicit in nearly any request for a memorandum by busy agency head.

The overall quality of the examination answers was high, in keeping with the class discussion over the semester. I have enjoyed working with you all, and I appreciate all the effort students devoted to the class.

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<sup>40</sup> For example, the NEPA does indeed require a lot of paperwork. NEPA litigation has surely delayed at least some worthwhile projects for no good purpose.