

EXAM # _____

FINAL EXAM
ENVIRONMENTAL LAW, FALL 2001
CAPITAL UNIVERSITY LAW SCHOOL
Professor Hirsch

Professor's Instructions: Read Carefully

1. At the beginning of this exam you should have the following: (a) this ten-page exam packet; (b) a scantron form sheet for the multiple choice questions; (c) a scantron instruction sheet; (d) a #2 pencil to mark the scantron sheet and a pen (or computer) for writing the narrative portions of the exam; (e) answer books (unless you are taking the exam on a computer).
2. ***Please write your exam number on the front of your envelope, the upper right hand corner of your exam packet and on each of your answer books.***
3. ***Please fill in the identifying information on your scantron sheet, as indicated in the instructions.***
4. This is a two hour and forty-five minute (2:45) examination. It consists of a multiple choice section and two essays. I recommend that you spend 60 minutes on the multiple choice section, 60 minutes on Essay I, and 45 minutes on Essay II. Points will be allocated roughly in proportion to these recommended time allocations. Manage your time wisely. Make sure you reserve sufficient time to answer all parts of the exam fully.
5. Read each multiple choice question carefully, as each may ask you to perform a different task (e.g. one may ask you to choose the “most helpful” argument; the next, the “least helpful.”) The multiple choice questions are to be answered only on the multiple choice scantron answer sheet (this goes even for those taking the exam on computer). Mark your answers on the scantron form by filling in the space for the letter that corresponds to the best answer for each question. If you erase, do so thoroughly. Otherwise the computer may grade your response incorrectly. Answers written on the exam packet itself will not be considered.
6. Write all your narrative answers on the colored answer books (unless you are taking the exam on computer). Begin each essay with a new answer book. If you write more than one answer book for a given essay, number the books sequentially (e.g. Essay I, book 2). Answers written on the exam packet itself will not be considered.
7. ***At the conclusion of the exam, please insert your exam packet, answer books, and scantron sheet into the envelope. Then place the envelope in the box at the front of the examination room. You may not make a copy of or otherwise reproduce the exam packet***

MULTIPLE CHOICE QUESTIONS

(60 minutes)

1. Childco is a wholly-owned subsidiary of Parentco. Childco sent hazardous substances to Smelly Landfill, a Superfund site, and is liable as a responsible party under CERCLA. The other PRP's have brought suit against Parentco, alleging that it is liable as a parent corporation. In prosecuting their lawsuit against Parentco, it would be **least helpful to the PRP's** to be able to prove that:
 - A. Parentco's employees were physically involved in Childco's waste disposal practices.
 - B. Parentco went beyond the corporate norms of parent behavior in supervising and monitoring the activities of its subsidiary, Childco.
 - C. In establishing Childco as a wholly-owned subsidiary, Parentco used the corporate form for wrongful or fraudulent purposes.
 - D. Half of the members of Parentco's board of directors also sit on Childco's board of directors.

2. Under Article XX(b) of the General Agreement on Tariffs and Trade, a trade restrictive environmental measure can be acceptable where it is "necessary to protect human, animal or plant life or health." Under the Tuna/Dolphin I panel decision that we read, the United States failed to show that the Marine Mammal Protection Act ban on importation of tuna was "necessary" to protect dolphins because:
 - A. The dolphin was not an endangered or threatened species and the MMPA was not needed to ensure its survival.
 - B. The United States did not try hard enough to protect dolphins through cooperative agreements with other nations.
 - C. The United States failed to show how many dolphins would be saved through the MMPA ban.
 - D. The United States does not have the right to tell other countries how to conduct commercial fishing in international waters.
 - E. Upholding the MMPA and environmental provisions like it would create significant obstacles to multilateral free trade.

3. Where a state adopts, as part of its SIP, regulations that are neither economically nor technically feasible for facilities within that state to comply with, the U.S. EPA is authorized to:
 - A. Disapprove the SIP on these grounds.
 - B. Require the state to revise the SIP to the point that its requirements are economically feasible to comply with.
 - C. Require the state to revise the SIP to the point that its requirements are economically and technically feasible to comply with.
 - D. Require the state to include in its SIP those specific pollution control measures that U.S. EPA believes will most effectively bring the state into compliance with the NAAQS.
 - E. None of the above accurately describes EPA's authority in this situation.

4. For many years, the owners of Lazyco ran an inefficient business. They did not work hard enough at improving or marketing their products. They also took the path of least resistance when it came to disposing of their hazardous waste, choosing to dispose of the drummed waste in a pit on their own property rather than to pay for proper disposal. The drums eventually rusted and hazardous waste started to leak out onto the property. Some time later, business became so bad that the owners simply abandoned the property and took off for Mexico. Townsville, the locality within which Lazyco was located, became the owner of the Lazyco property through a foreclosure sale for nonpayment of taxes. It has not yet used the property for any purpose. Recently, the former Lazyco property was deemed a Superfund site. **Based only on the facts above, Townsville's strongest argument for avoiding CERCLA liability is:**
 - A. Townsville is not and has never been an "owner or operator" of the site.
 - B. Townsville may be an owner of the site, but it has never been an operator of the site.
 - C. Townsville has merely been a passive owner of the site and has never actively contributed to the waste disposal.
 - D. At the time that it purchased the property, Townsville did not know that Lazyco had disposed of hazardous substances on the property.
 - E. None of the above are strong arguments for Townsville.

5. Which of the following would not constitute a "discharge of a pollutant" under section 301 of the Clean Water Act:
- A. Using a pipe to carry water pollutants from a factory to a riverbed, where the riverbed is dry except for a one-month rainy season.
 - B. Employing a lab technician to carry individual buckets of liquid toxic chemicals out of a facility and dump them into a stream.
 - C. Using a conveyor belt to carry pollutants in the form of solid waste from a facility and deposit it into a river.
 - D. All of the above would constitute the "discharge of a pollutant" under section 301 of the Clean Water Act.
6. Hazco discards Waste A and Waste B, both of which are solid wastes. Waste A is listed as a RCRA hazardous waste. Waste B exhibits the toxicity characteristic as defined under RCRA. Before discarding Waste A, Hazco mixes it with another solid waste, Waste C, and before discarding Waste B Hazco separately mixes it with Waste C. Based only on the above facts, which of the following is **not** positively identifiable as a RCRA "hazardous waste"?
- A. Waste B.
 - B. The mixture of Waste A and Waste C.
 - C. The mixture of Waste B and Waste C.
 - D. All of the above can positively be identified as RCRA hazardous wastes.

7. Jones owned an abandoned mine in the hills near the Raging River. He decided make some extra cash by allowing companies to dump liquid industrial waste into the mine. Company A's production process generated in a liquid waste that contained mercury, a highly toxic CERCLA hazardous substance. Company A paid Jones a fee and poured a million gallons of its liquid waste into the old mine. Company B's process generated in a liquid waste that was largely water although it contained trace amounts of cadmium, a CERCLA hazardous substance, but no mercury. It, too, paid Jones a fee and poured 1000 gallons of its liquid waste into the mine. EPA has become concerned about the liquid waste stored in Jones's old mine. Acting on a tip from some locals, it has discovered a very thin crack that is allowing small amounts of the liquid waste to leak from the mine into the Raging River. It has identified small amounts of mercury in the river. Assuming that the mine is listed as a Superfund site, which of the following is the truest statement of **Company B's** position under CERCLA:
- A. Company B is probably liable under CERCLA.
 - B. Company B is probably not liable under CERCLA because EPA has identified only mercury in the Raging River and Company B's waste contained no mercury.
 - C. If it could be shown that cadmium occurs naturally in the Raging River in greater concentrations than it does in Company B's liquid waste, then Company B would probably not be liable under CERCLA.
 - D. Company B is probably not liable under CERCLA because only small amounts of liquid waste are being released into the river and the great majority of that waste likely belongs to Company A.
8. Under NEPA, which of the following would *not* have to be considered in determining whether a major federal action will "significantly affect" the quality of the human environment.
- A. The degree to which the action may adversely affect a threatened species.
 - B. The degree to which the project may increase noise, crime or traffic problems in a neighborhood.
 - C. The fact that the action will take place near a civil war battlefield.
 - D. All of the above must be considered.

9. The Clean Water Act requires the EPA to establish effluent limitations for categories of point sources and to issue NPDES permits to each such source. There are millions of point sources and EPA has found it difficult to carry out these tasks. In response to this problem, EPA is **not authorized to**:
- A. Issue general permits to all sources in a given category.
 - B. Issue area permits to all sources in a given category.
 - C. Exempt from the NPDES permitting requirement all sources in a given category.
 - D. Issue hollow permits to all sources in a given category.
 - E. EPA is authorized to take any of the above actions.
10. In establishing primary National Ambient Air Quality Standards for criteria pollutants, the EPA is ***not authorized*** to do which of the following:
- A. Consider the adverse health effects on particularly sensitive populations such as the elderly, where the majority of citizens would experience no health effects at all.
 - B. Consider the economic cost to regulated entities of achieving the standard that EPA sets.
 - C. Consider debatable health effects that have not yet been scientifically proven to be harmful.
 - D. Set a standard that goes beyond the minimum necessary to protect the public health.

11. Trashco has four different waste streams that it discards from its facility. The first of these is a gas that Trashco seals in air-tight containers before discarding. The second is a liquid waste that Trashco hauls off to a landfill in sealed barrels. The third is a toxic gas that Trashco emits through its smokestack. The fourth is a liquid waste that an individual worker occasionally carries out of the facility in buckets and pours onto the ground behind the facility. Which of these waste streams would not qualify as a RCRA "solid waste"? (For the purposes of this question, assume that none of these waste streams are regulated under a Clean Water Act NPDES permit.)
- A. The gas in the air-tight containers.
 - B. The liquid waste discarded in sealed barrels.
 - C. The toxic gas emitted through the smokestack.
 - D. The liquid waste carried out in buckets and poured onto the ground behind the facility.
 - E. None of the above would qualify as a "solid waste" under RCRA.
12. Which of the following constitutes **the most significant difference** between the Endangered Species Act (ESA) requirements for determining whether a federal action will "jeopardize" an endangered species, and the NEPA requirements for determining whether a federal action will "significantly affect" the quality of the human environment:
- A. Under NEPA the federal agency taking the action makes the determination itself, whereas under the ESA it must consult with another federal agency.
 - B. Under NEPA, the agency need not consider how the action may impact on endangered species since it need only concern itself with impacts on the "human environment."
 - C. The environmental impact statement (EIS) for the ESA "jeopardy" determination does not have to be as lengthy or detailed as the EIS for the NEPA "significantly affect" determination.
 - D. None of the above constitute a significant difference between the ESA "jeopardy" and the NEPA "significantly affect" determinations.

13. Common law tort suits are an inadequate solution to the problem of environmental harms because of:
- A. The free-rider problem.
 - B. The collective action problem.
 - C. Difficulties in proving the causal link between specific pollutants in the environment and discrete individual injuries.
 - D. All of the above.
14. From 1960-1985, dozens of companies sent thousands of barrels of waste to the Yucky Landfill Superfund Site. In 1985, there was a fire at the site and many of the labels on the drums were burned off. Several PRP's at the Yucky Landfill Superfund site have sued Chemco, a chemical manufacturer, for contribution. At trial, they have proven that Chemco sent hazardous substances to the site in drums, and have identified 57 drums as positively belonging to Chemco although they believe that it sent more than this. Based only on these facts, Chemco has asked the court to assign it liability only for the cost of cleaning up the 57 drums, and to divide its liability off from that of the other PRPs. Which of the following is the most likely outcome of Chemco's motion:
- A. Chemco will win because the PRPs have only shown that Chemco sent 57 drums to the site and should not be able to hold it liable for anything more than this.
 - B. Chemco will win because it is not jointly and severally liable for the cost of the cleaning up the site.
 - C. Chemco will lose because the amount to be divided is the cost of the harm to the environment, not the clean-up cost.
 - D. Chemco will lose because it may have sent more than 57 drums to the site, and Chemco has not proven otherwise.

ESSAY I
(60 minutes)

American Copper Pipe Co. (ACP) is a manufacturer of copper pipe in the State of Grace (a fictitious state). Its facility is located next to the Old-and-tangy River. ACP's manufacturing process regularly generates scrap copper. As is typical in the copper pipe manufacturing industry, it stores the scrap for later re-use. ACP keeps its scrap copper in an outdoor pile that is within the plant's fence-line but is only 200 yards from the Old-and-tangy River. Every two weeks, ACP gathers the scrap from the pile, melts it down, and feeds it back into the production process as raw material. Periodically throughout the year, rain falls on the pile of scrap copper. Surface run-off from the pile contains high levels of copper, a harmful substance that can be toxic if ingested in significant enough levels by humans, animals or fish.

Recently, a group of local citizens noticed that run-off from the pile was flowing into a natural gully that led to the Old-and-tangy. They tested the Old-and-tangy and found higher levels of copper downstream of the facility than upstream of it. Concerned that the pile of scrap copper was releasing copper into the river, they called the Grace EPA to report the possible environmental violation.

You are a junior attorney at the Grace EPA. Your supervisor has assigned this matter to you and asked you to assess whether ACP is violating the Resource Conservation Recovery Act (RCRA) or the Clean Water Act (CWA). ACP has never obtained a RCRA Treatment Storage or Disposal (TSD) permit or a Clean Water Act National Pollutant Discharge Emission System (NPDES) permit.

Write an objective memo to your supervisor in which you evaluate the potential RCRA and CWA violations. Be sure to discuss these issues fully, providing both the arguments for and against a possible violation before reaching an eventual conclusion. If you need more facts to inform your discussion, identify the facts that you need. For the purposes of this memo, assume that all the cases we read this semester are binding law in the State of Grace.

ESSAY II
(45 minutes)

Christie Whitman, Administrator of the U.S. EPA, is considering a substantial change in the way that the Clean Air Act regulates the nitrogen oxides (NO_x) and mercury emissions from coal-fired electrical utilities. Traditionally, the CAA's New Source Review program has required such power plants to install best available technology (BAT) pollution controls when they are newly built or when existing plants are re-built or modified in a way that significantly increases emissions. Recently, some of Whitman's advisors have recommended that EPA employ instead a market-based emissions trading scheme for NO_x and mercury emissions from power plants. Title IV of the Clean Air Act has already established such a program for sulfur dioxide (SO₂) emissions (we read about and discussed this during the course). The new scheme would be set up along much the same lines as the Title IV program (although it would involve different pollutants) and would operate alongside of it. Members of Congress have expressed support for the idea and the advisors are confident that new legislation would be forthcoming if it is needed. NO_x contributes to the ozone (smog) problem but it is not classified as a hazardous air pollutant. Mercury is a toxic substance and is classified as a hazardous air pollutant.

You are a member of Whitman's staff. Write her a memo in which you: (1) explain, in general terms, what an emissions trading scheme for NO_x and mercury emissions from power plants would look like and how it would function; and (2) explain, as a matter of policy, the advantages and disadvantages of her proposed shift from a command-and-control, technology-based BAT approach to a market-based emissions trading approach for NO_x and mercury emissions from power plants. You do not need to address issues concerning the legislation that might be necessary for implementing such a shift. Your focus should be on the policy issues.