

Exam No. \_\_\_\_\_

## NATURAL RESOURCES EXAM

May 1, 2018

Professor Houck

### INSTRUCTIONS

1. This is a three-hour examination. The questions sum to one hundred (100) points, although I may add a limited number of points for an exceptional answer. Allocate your time accordingly.
2. This is a closed book exam. You may use no outside materials of any type. Portions of course-related statutes and regulations are provided in the Appendix attached.
3. In your answers please:
  - Please treat all pertinent issues, including opposing arguments where anticipated; relevant cases and analogies are persuasive as well.
  - Accept the facts as given, but if you feel an additional fact is necessary please state your assumption and how it affects the analysis (i.e., if A, then X; if B, then Y).
  - If writing by hand, on one side of page only ... and legibility matters.

Thank you, and good luck.

APPENDIX: Statutory Supplement

## EXAM

### I ENERGY DOMINANCE (30 point total)

In Fall 2017 President Trump issued Executive Order 13783, declaring “energy dominance” to be a priority consideration for all federal programs and directing agencies to “promote” and “reduce the regulatory burden” on the production of energy resources.

One month later Secretary of Interior Zinke issued an “Administrative Executive Order”, instructing all agencies within the Department to make energy production a “primary consideration” in their decision-making to the fullest extent possible. Each agency will, further, identify “Strategic Energy Zones” (SEZs) within its jurisdiction for accelerated energy development, prepare plans with industry, states, and local communities for this development, postpone environmental reviews to the specific project level, target existing Monuments for reductions or repeal where “significant energy potential exists”, and remove other environmental restraints unless approved at the Secretarial level and “clearly-required by existing law.” Until these plans are completed, the Order enjoins the proposal or implementation of new actions or environmental restraints with the potential to adversely affect energy development in the Strategic Energy Zones.

Question 1: (30 points) Several environmental organizations with members in areas affected by the Zinke Order retain you to advise them on a lawsuit opposing it. Please identify and evaluate potential claims, citing relevant authority and recognizing opposing arguments that may arise.

### II TRUMP GRAND (25 point total)

A “blind trust” managing the President’s assets is proposing to construct a “four-season” seaside resort, “Trump Grand”, on Grand Isle, Louisiana. The prospectus for Phase One, termed a “reconnaissance”, features a dock and (upgraded, existing) marina facility, and “Gulf View”, a four-star restaurant overlooking the water. Per the brochure, Phase Two, for which significant funding is described as “pending” (i.e. not on hand), will proceed at an undefined later time following the success of the restaurant, and feature a “five-star” hotel, heliport, 9-hole golf course, swimming pool, tennis courts, and associated facilities. The Corps of Engineers has issued a permit and Environmental Assessment for the dock and marina upgrade, the only part of the resort that will require federal approval (all of the other described features are on privately-owned, dry land), concluding (convincingly) that their aquatic impact will be minimal.

Question 2: (10 pts) Local residents worried about losing “the character” of Grand Isle seek your advice on a NEPA claim. Your evaluation? (pro and con).

\* \* \*

Assume now that the oak groves on Grand Isle are disappearing, as they are all along the coast, due largely to real estate development. These oaks provide resting areas for large numbers of songbirds in migration, which are in turn preyed on, in flight, by several species of hawk including the endangered Peregrine Falcon. The Trump resort facilities and associated infrastructure, when completed, will eliminate one-third of the remaining coastal oak inventory of the island, but less than one-twentieth of all in Louisiana.

Question 3: (10 pts) The Louisiana Audubon Society approaches you for advice on an Endangered Species Act lawsuit. Please evaluate relevant issues and outcomes. (Do not consider NEPA in this question, nor statutes not studied in this class.)

\* \* \*

Assume now that the Trump Administration “persuades” the Army Corps of Engineers to propose a (quite costly) hurricane barrier project along Grand Isle, protecting the Trump resort. The project EIS overlooks significant impacts on wildlife

and omits consideration of alternatives altogether. On behalf of Audubon (again) you file a NEPA suit challenging the adequacy of this EIS. Without addressing the merits of the case (nor should you address them here), the Corps moves for dismissal on the basis that the APA does not authorize the suit in the first place.

Question 4: (5 pts) What is the basis for the Corps motion? Please (a) evaluate arguments pro and con, and (b) does this issue matter to environmental law?

### III OF TREES AND GOLD (30 point total)

#### A. TIMBERRRR!! (15 pts)

In *NWF v US Forest Service*, involving watershed damage from clearcutting on the Suislaw National Forest, the District Court rejected a claimed violation of the Church guidelines, stating in relevant part:

#### *Facts*

*Erosion and landslides are natural phenomena in the Mapleton District. But road building and timber harvesting have dramatically increased the rate of landslide erosion. The present Forest Service management techniques have eliminated some, but not all, of the practices responsible for the increased landslide erosion. Unless all such practices are eliminated, the accelerated landslide erosion will cause major long-term damage to soil, water, and fishery resources.*

*Because intact vegetation reduces the potential for soil failure, the Forest Service tries to leave fragile or landslide-prone areas uncut. It is uncertain whether leave areas, as used by the Forest Service in the Mapleton District, prevent landslides. There is insufficient statistical evidence to evaluate them. Only twelve headwall leave areas have been put in place in the Mapleton District. Of these, only five were successful, five were partially successful, and two were unsuccessful. These two experienced slides.*

*The Forest Service employees who were surveyed in 1979, using a technique called the Delphi Method, predicted that 52 percent of the vegetative leave areas will survive. In 1981, they predicted a 32 percent survival rate for 5-acre leave areas and a 23 percent survival rate for 2.5-acre leave areas. Leave areas in the Mapleton District average 3 acres.*

#### *Discussion*

*Past timber harvests have inflicted serious damage on the fisheries in the Mapleton District. The Forest Service concedes this, but asserts that improved harvesting techniques and mitigation measures will prevent similar damage from the timber sales proposed in the Seven Year Action Plan. An essential part of this determination, that no serious damage will result from the timber sales, rests on the assumption that Forest Service mitigation measures are effective. There is insufficient evidence to conclude that these timber sales will or will not result in major injury to fisheries. Because of this factual uncertainty and because the Forest Service has adopted new harvesting techniques and mitigation measures, I reject plaintiffs' contention that the Church Guidelines alone are a sufficient ground on which to enjoin the Seven Year Action Plan.*

Question 5: Would the subsequently enacted provisions of NFMA have changed the outcome here? Please evaluate both sides in this answer.

#### B. EUREKA!! (15 pts)

The Canadian mining giant Barrick Gold has filed a claim in the Custer-Gallatin National Forest of Montana. The claim will be developed by the use of cyanide heap-leach mining, excavating the rock, crushing it, and running a (highly toxic) cyanide

solution through it to “bleed out” flecks of gold. The wastes are contained in leveed ponds which sometimes rupture, and at times leak through their liners and into groundwater below. It is the only cost-effective method of gold mining in this and other regions with similar characteristics. While this claim was pending before the Department of Interior (which certifies hard-rock claims), Montana enacted legislation barring the use of this mining method as “incompatible with our mining history” and a “threat to the water resources of the state.”

Question 6A: Does Barrick have a valid claim, this legislation notwithstanding?

Question 6B: If the Forest Service itself had banned this form of mining from all Forest Lands as incompatible with Forest purposes, would Barrick have a valid suit against the ban?

Question 6C: If Barrick loses this case does it have a valid “takings” claim against the federal government requiring compensation?

#### IV SHORT CUTS (15 point total)

Question 7: (5 pts) The Trump Administration, seeking funds for the badly-underfunded US Park Service, is proposing to sell corporate naming rights to the National Parks, which he characterizes as “overdue” and a “win-win” for the American people. “Some parks”, he explains, will attract “hundreds of millions of dollars ...maybe more”.

Can he do this?

Question 8: (5 pts) On April 26 the US House Committee on Natural Resources held a hearing entitled “The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare”. One of the proposals was the requirement of a \$5 million bond to be posted by environmental plaintiffs seeking TRO or injunctive relief, to be forfeited if the relief is not granted. A former EPA general counsel (under President Bush) supported the measure, stating that environmentalists “ought to consider impacts on jobs and the economy”.

What, either way, might you reply? Please consider opposing arguments in your answer.

Question 9: (5 pts) If you were to write a piece of fiction about anything in this course, what (in brief) would happen?