ADMINISTRATIVE LAW FINAL EXAM

Identify yourself only by your Student ID Number. Your responses should be typed, double spaced in at least 11 point type with 1" margins. You should be able to respond adequately in 10 pages, but do not write more than 15. You have eight hours to complete the exam. Answers should directly and succinctly identify the issues involved, briefly discuss the principles of Administrative Law in each, and then develop an outcome or answer to the question; the reasoning process is far more important than the conclusion. Wandering, unfocused responses **clearly** (!) indicate you are lost and grasping, so avoid the temptation. You certainly do not need to cite cases, although they can help identify a principle — for example, Chevron deference carries a lot of meaning that would otherwise have to be explained.

THE CHEMICAL PLANT SECURITY ACT

The Washington Post recently carried a story (page A10, April 8, 2003) that said in part: "The Bush Administration is proposing new legislation to improve security standards at chemical plants that will emphasize voluntary compliance by an industry that some experts say is one of the nation's most vulnerable to catastrophic terrorist attack. . . . Senator Inhofe is working with the White House and the Department of Homeland Security to craft a bill that would require chemical companies to abide by standards drawn up by their industry association, rather than be subject to mandatory government measures advocated by environmental activists and many Democrats, officials say." Although no bill has been introduced to implement this idea, we can make a couple of assumptions based on the story.

Assume for these purposes that the Chemical Plant Security Act has become law and provides that whenever the American Chemical Council, the trade association of chemical producers, submits a standard to the Secretary of Homeland Security, the "Secretary shall, by appropriate regulation, implement the recommendations of the Council without change unless the Secretary determines that implementing the recommendation would adversely affect chemical plant security."* The statute also has a "General Duty Clause" that requires "All chemicals plants shall be operated in a safe, secure manner." The Department of Homeland Security may then bring an enforcement action against any firm that violates either a standard which has been issued in this manner or the General Duty Clause.

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* If this provision seems a bit peculiar, it is based on the Grand Canyon Overflights Act, Pub. L. No. 100-91, 101 Stat. 6766 (1987) which provides that the Secretary of the Interior is to develop a plan for restoring "natural quiet" to the Grand Canyon with respect to sightseeing overflights. The recommendation is then submitted to the Administrator of the Federal Aviation Administration who is to develop "a final plan for the management of air traffic in the air space above the Grand Canyon. The plan shall, by appropriate regulation, implement the recommendations of the Secretary without change unless the [FAA] determines that implementing the recommendations would adversely affect aviation safety." §3(b)(2).

Today's exercise is to look at some of the Administrative Law issues that might be raised by this scheme — and note, this is real and something like it is about to happen.

For the first part of the exam, assume that you are a senior attorney with the large, well-respected, national environmental advocacy organization QED (which stands for "Quality Environmental Defense"); it has nearly 200,000 members. As the story in the Post indicates, you and your colleagues are outraged at the prospect of the chemical industry regulating itself. Indeed, later in the story one environmentalist is quoted as saying this "is simply creating a smoke-and-mirrors exercise to make it appear that it is issuing bona fide standards. . . . It is not." QED would like to stop the legislation dead in its tracks so it can then advocate for "real" enforcement, and hence it wants to challenge the legislation immediately upon a number of grounds.

1. Write one paragraph that describes the basis for QED's standing to bring the suit.

2. The President of QED is going to a big meeting of enviros next week and wants to get a feeling as to whether or not QED will be granted standing. He therefore asked you for a brief description of the arguments the government will likely raise in opposition and whether or not you will be successful.

3. You want to challenge the constitutionality of the arrangement by which the Department of Homeland Security converts recommendations by the Chemistry Council into binding regulations. What arguments can you make, and briefly explain whether they are likely to be successful.

4. You also want to allege that the entire decision making process of the Chemistry Council is biased against environmental concerns and that alone should invalidate this scheme. Briefly discuss the pros and cons of this allegation.

5. Now assume that the program is up and running — perhaps during the pendency of your lawsuit on behalf of QED. Assume further that the chair of the Chemistry Council Committee on Standards visited a plant that makes a particular rocket propellant. He was concerned that the two main ingredients of the fuel were stored in tanks that were not sufficiently separated physically. He returned to Washington, promptly empanelled his committee, and they wrote a standard that would require manufacturers of this particular propellant to separate the tanks either by 100 yards or by an impermeable barrier 8' high. The Council submitted the recommendation to the Secretary who issued it as a regulation. Interestingly, that plant is the only one in the country than manufactures the rocket propellant. The President of the company is outraged at this turn of events, both because he believes his plant is perfectly safe and because he believes the rulemaking was a sham. He has asked his General Counsel for a memo as to whether they can challenge the rule on the basis that it really was adjudication and they were denied a hearing. What result?