

Environmental Law and Policy ENVS-2304/GOV-2915 (Fall 2019)

Environmental Studies Department
Mondays and Wednesdays 8:00 to 9:25 a.m. (First Class September 4)
Class meets in Adams 406

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About the Course

The course will be a shared inquiry into environmental law -- its roots, goals, successes, failures -- and will briefly explore new directions and paths to meet the significant environmental and public health challenges of the new millennium. We will explore some of the seminal writings that formed the foundation of the environmental movement and the motivation for citizens to call for government intervention to protect the environment. We will examine the foundations of American law including the common law and Constitutional principles and whether they promote or limit the prospect of sustainability. We will explore in depth a toxic tort case to examine the court process and the role of science in environmental law. We will also learn the structure of administrative law and study the range of policy designs underlying the various environmental protection statutes (e.g., Clean Air Act, Clean Water Act, Endangered Species Act, etc.) We will see how creative lawyers are employing each of these tools to combat Climate Change. Students will learn how to analyze judicial decisions, interpret statutes, apply legal principles and reasoning to a selected set of issues, develop critiques of the various theoretical approaches to environmental law, and explore new directions environmental policy might take.

In addition to learning the rudiments of the environmental law regime (the so-called "black letter" law), throughout the course we will be asking the questions: (a) does the particular legal instrument being examined serve its purpose or could another policy design better serve that end? (b) has the original vision of protecting the environment that motivated the creation of the regime of environmental law been achieved, bungled, or betrayed? (c) what might offer a superior approach?

An interest in government, law and policy is helpful, but no prior knowledge of law or environmental policy is assumed. Scientists are encouraged to take the course, especially if they contemplate involvement in the policy arena as professionals or interested, informed citizens. Coursework will include writing a case brief, an analytic memorandum, a midterm examination, a group exercise culminating in an in-class hearing in which students play the roles of proponents, opponents, and decision makers in a mock environmental proceeding, and a final examination. The reading for the class

averages about 70 pages weekly, but varies widely in length and complexity. Please plan for up to three night sessions in addition to regular class meetings to view documentary videos and for the Hearing exercise. In addition to the assigned readings and Electronic Reserves referenced in this syllabus, from time to time supplementary materials will be distributed to the class via e-mail or posted on the class Blackboard website. It is assumed that all students have functioning e-mail addresses and ready access to the worldwide web.

Classes will be conducted in both lecture and discussion format, but with a strong emphasis on discussion. Participation in class discussion is essential and will be a significant factor in the final grade. The instructor may assign three or four students per week on a rotating basis to be "on-call" i.e., have special responsibility for preparation and discussion of that week's material.

Evaluation

To get the most out of ENV5-2304, you should plan to keep up with the reading, attend class, and participate in the discussion. The midterm examination will be administered in class and will test both coverage and comprehension of the readings and the classroom lecture and discussion. The final exam is expected to be a "take home" exam. The evaluation policy is outlined below with weighting information:

<u>Activity</u>	<u>Due Date</u>	<u>Percent of Grade</u>
Class Participation	--	15%
Case brief	9/23	5%
Mid-term Exam	10/9	15%
Memorandum	10/30	20%
Hearing Day	12/10	20%
Final Exam (take home)	12/14-21	25%

The Reading:

Plater, Zygmunt J.B., Robert H. Abrams, William Goldfarb and Robert L. Graham, *Environmental Law and Policy: Nature, Law and Society*, 5th Ed. (Wolters Kluwer, New York, NY, 2016)
 Harr, Jonathan, *A Civil Action* (New York: Random House, 1995)

On Reserve:

Selected Environmental Law Statutes (St. Paul, MN: West Group 2001).

Syllabus:

I. Introduction to the Course

9/4 ELP: 1-34.

Logistics, Readings, Syllabus Review, Grading.

Review goals of the course. Pose the "big" questions of the course.

Substance: What is law?
 Why do we need environmental laws?
 What should they do?
 What is the promise of the environmental movement?
 Has it been realized by the current regime of environmental law?
 How have the major ideas of the movement been manifest in environmental law?
 What are the important critiques of environmental law?
 What alternatives might hit nearer the mark?

Process: What are the sources of environmental law? The federal, state and local systems.

II. The Lexicon: Basic Literacy in Environmental Law

9/9 A. The Environmental Movement: Ideas and Perspectives
 ELP: 35-40; 315-317 (NEPA).

9/11 ELP: 41-72
Electronic Reserves: Sunstein: *Throwing Precaution to the Wind* (Boston Globe July 13, 2008)

9/16 B. Environmental Economics and Risk Primer
 ELP: 575-581
Electronic Reserves: Plater: *Environmental Economics and Risk Primer*, 97-127; 136-156.

9/18 C. The Legal Lexicon
Electronic Reserves: Buck: *Understanding Environmental Administration and Law*: 1-15; 61-71.
 Begin reading *A Civil Action*

III. The Legal Bedrock

9/23 A. The Common Law and Environmental Protection
 ELP: 75-76; 108-116;
Electronic Reserves: Buck: *Understanding Environmental Administration and Law*:, re-read 61-85.

Assignment #1 Due: How to Read and Brief a Case: Boomer v. Atlantic Cement Co.

- 9/25 1. Torts
ELP: 76-85; 89-96.
- 9/30 ELP: 85-89; 96-107.
2. Remedies
ELP: 117-144.
- 10/2 B. The Public Trust Doctrine
ELP: 879-912.
Electronic Reserves: Selected readings: Protect Our Parks v. Chicago Parks District (Brief of Property Law Professors in Support of Defendants); Our Parks v. Chicago Parks District (Brief of Professor Epstein in Support of Plaintiffs); Our Parks v. Chicago Parks District (Order); Juliana v. U.S. (materials)
- 10/7 Who has the entitlement? Who Should?
Electronic Reserves: Calabresi and Melamed: *Property Rights, Liability Rules, and Inalienability: One View of the Cathedral* 1089-1128; Posner: *Economic Analysis of Law*, 44-55; 97.
- 10/9 **Mid-Term Examination**
- IV. *A Civil Action*: The Common Law in Action.
- 10/16 A. The Woburn Case
ELP: 145-169.
Harr, *A Civil Action*.
Electronic Reserves: ELP (4th ed.) 152-156; Grossman, *A Documentary Companion to 'A Civil Action'*, 61-101 (The Pleadings: Complaint and Answer)
- 10/17 Documentary: “The Devil We Know” (evening viewing, Beam Classroom, Kresge VAC)
- 10/21 B. Science in the Courtroom
ELP: 156-169.
Electronic Reserves: ELP (4th ed.) 143-152; 156-169.
Huber: *Galileo's Revenge* 9-23; 92-110; 198-209; Grossman, 216-231 (The Pretrial Process: Expert witness discovery motions); 558-582 (Summary judgment pleadings).

- 10/23 C. Private v. Public Law
ELP: 687-696; 731-745. (CERCLA basics);
Electronic Reserves: Plater: ELP (3rd ed.) 265-271 (comparative);
Menell: *Limitations of Legal Institutions for Addressing Environmental Risks*, 93-113.

V. Constitutional Limits on Environmental Protection: Property Rights

- 10/28 A. Basics, Eminent Domain, Regulatory Takings; Due Process.
ELP: 913-948.
Electronic Reserves: Buck: *Understanding Environmental Administration and Law*: 71-85; ELP (4th ed.) 907-911.

VI. Administrative Law and the Technocratic State

- 10/30 A. Modern Environmental Public Law: A Historical Perspective
ELP: 173-198.
- B. Administrative Law in a Nutshell
ELP: 199-212.
Electronic Reserves: Clean Air Council v. Pruitt

Assignment #2 Due: Case Memorandum analyzing Anderson v. W.R. Grace.

- 11/4 D. Overton Park: Admin. Law basics.
ELP: 212-223.
- 11/6 E. The Source of Administrative Power: Delegation
ELP: re-read 201-206.
Electronic Reserves: American Trucking v Whitman; American Trucking v. Browner.
- F. Standards of Review: "Hard Luck" instead of "Hard Look" after Chevron
ELP: 249-255.
Electronic Reserves: Chevron recent developments I and II; *The Debate, Environmental Forum*, Environmental Law Institute (Sept./Oct. 2017).
- 11/11 G. Citizen Enforcement and "Standing"
ELP: 223-240.
Electronic Reserves: Myers, Broderick, and Smyth: *Charting an Uncertain Legal Climate: Article III Standing in Lawsuits to Combat Climate Change*, 45 ELR 10509 (June 2015)

VII. Regulatory Design

- 11/13 A. Harm-Based Standards
ELP: 459-489 (Clean Air Act); 555-570 (Clean Water Act).
- 11/18 Regulating Greenhouse Gas Emissions Under the Clean Air Act
ELP: 512-518; 413-418 (Adaptive Management and Climate Change).
Electronic Reserves: Profeta, et al.: *Regulating Climate: What Role for the Clean Air Act?*, 39 ELR 10837 (2009);
Regulating Greenhouse Gas Emissions Under the Clean Air Act, Final Rule: *U.S. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases under section 202 of the Clean Air Act (December 15, 2009)*; Executive Office of the President: *Climate Action Plan* (June 25, 2014); *Connecticut v. AEP materials*;
[*Native Village of Kivalina v. Exxon-Mobil Corp.: The End of Climate Change Tort Litigation?*](#) ABA (January 2013); Obama “Clean Power Plan” (summary); [*White House Methane Strategy*](#), January 14, 2015;
[*Executive Order*](#) No. 13,783: *Promoting Energy Independence and Economic Growth* (March 28, 2017); Jody Freeman: *Implications of Trump’s Victory and the Republican Congress for Environmental, Climate and Energy Regulation: Not as Bad as it Seems?* (November 10, 2016)
- 11/20 B. Command and Control

Technology-based Standards
ELP: 489-496 (Clean Air Act); 519-555 (Clean Water Act);
Electronic Reserves: Gerard and Lave: *Implementing Technology-Forcing Policies*, 1-33; U.S. EPA Waters of the United States (WOTUS) Rulemaking: <https://www.epa.gov/wotus-rule>
- 11/25 Technology-forcing Standards
ELP: 507-512 (Clean Air Act);
- C. Market Entry Controls
ELP: 663-679 (TSCA)
Electronic Reserves: *U.S. EPA TSCA Press Release* August 7, 2017, 663-679 (TSCA); Mike Belleveau: *Drive for Safer Chemicals Policy in the U.S., New Solutions* (2011).

- D. Disclosure
- NEPA and Environmental Assessment
ELP: 313-333.
- 12/4 E. "Roadblock" Statutes: Laws that "Just Say 'No'"
- Endangered Species Act
ELP: 419-458.
Electronic Reserves: [DOI Press Release](#) – Trump Administration Improves the Implementing Regulations of the Endangered Species Act (August 12, 2019); EarthJustice Legal Defense Fund, [Notice of Violation](#) of the Endangered Species Act: 2019 Revised 2019 Revised ESA Regulations (August 20, 2019)
- F. Critique of Command and Control
- Cost-Benefit Analysis
ELP: 196-198; 571-575; 581-606.
- 12/9 G. Market Mechanisms
ELP: 607-629; 636-643.
- 12/10 Hearing Exercise (evening session)**
- VIII. New Directions?
- 12/11 **Electronic Reserves:** *The Dutch Model: Green Plans*
See: <http://www.rri.org/greenplans.php>
- Documentary: "Greenplans" (On reserve)
- Voluntary Best Practices
ELP: 643-648.
Electronic Reserves: Zoback, et al.: *Addressing the Environmental Risk from Shale Gas Development*", Worldwatch Institute (July 2010); *Center for Responsible Shale Development Performance Standards*; *Forest Stewardship Council*;
U.S. EPA GasSTAR Challenge; Energy Collective, EDF Energy Exchange: *As Trump Rolls Back Methane Rules, What Should the Oil and Gas Industry Do?* (July 20, 2017)

