

Political Science 246
Fall 2013

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ENVIRONMENTAL LAW AND POLICY

COURSE OUTLINE AND READINGS:

The class will include considerable class discussion as well as lectures. There will be frequent short assignments, a midterm, a group project focused on a specific case study, a group project focused on addressing the emerging issue of climate change through existing law, and a comprehensive final exam. Class attendance is expected; grades will reflect attendance and participation.

OFFICE HOURS:

I will have office hours before class from 2:00-3:15 Tuesdays and Thursdays in Harkness Room 335 or by appointment. The best way to contact me is by e-mail, but also please feel free to call me at 383-0358.

TEXTS:

Richard J. Lazarus, *The Making of Environmental Law*, Univ. of Chicago Press, 2004.

James Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy*, 3rd ed. Concepts & Insights Series, Foundation Press, 2007.

Richard J. Lazarus and Oliver A. Houck (eds), *Environmental Law Stories*, Foundation Press, 2005.

Additional readings are available on electronic reserve. All readings are *required* and should be read before class to enhance the value of both the lectures and the discussion.

ASSIGNMENTS:

Written assignments: Should be typed, double-spaced (1 inch margins and 12 pt font). Page lengths will be noted in this syllabus for each written assignment. Late work will only be accepted with advance permission. Note that it is possible that changes may occur in the schedule. If you miss a class, it is your responsibility to find out what the assignment is for the next class period.

Group case discussion leader assignments: Each student will have an opportunity to be part of a group that leads a class discussion of an environmental case study.

GRADING:

Class attendance & participation 5%; Group project and class discussion assignments 15%; Short papers 20%; Midterm 25%; Final 35%

SCHEDULE OF CLASSES:

I. Introduction and historical context (Sept. 3-5) – What is environmental law? Where does it come from? Why is it so complex? Why were so many federal environmental laws enacted in the 1970s? Why study environmental law and policy?

Sept. 3. Introduction and discussion – We will review the syllabus, expectations for this class, class structure and share our interests and my experience as a practitioner of environmental law. We will discuss: What is federal environmental law? Why study it? Students will sign up for group case discussion leader assignments.

Reading: Salzman, ch. 1 (pp 1-13), Lazarus, ch. 4 (pp 47-66)

Sept. 5 The dawn of the modern environmental era – the 1970s: Passage of major federal environmental laws, birth of U.S. Environmental Protection Agency, growth/launch of the environmental movement and seeds of backlash

Reading: Lazarus, ch. 5 (pp 67-97)

II. Endangered Species Act (Sept. 10-24) – Historical underpinnings, purpose, statutory structure, gaps, challenges.

Sept. 10 Historical underpinnings and purpose of ESA: Societal attitudes towards wildlife, legislative antecedents to ESA, emergence of conservation groups and wildlife groups, passage and purpose of ESA:

Reading: Salzman, ch. 10 (pp 281-285)

Assignment 1: Write a 1 page reaction to the reasons Congress had for passing the ESA in 1973 or description of the vision you would have had for the ESA if you were in Congress in 1973. Would you have been interested primarily in protecting charismatic species and megafauna? Would you have been concerned with the potential impacts to society (e.g., lost scientific discoveries, like the medicinal value of a rainforest plant, or unintended adverse impacts, like the explosion of cockle-bur after the extinction of the Carolina parakeet)? Would you view this issue as an indicator of ecosystem peril (the “canary in the coal mine”) or a moral issue? Would you define the goal of the act as preserving the current status quo or recovering the species?

Sept. 12 Statutory structure of the ESA: Listing process, prohibitions and permitting requirements for private landowners, and consultation requirements for federal agencies

Reading: Salzman, ch. 10 (pp 285-301)

Sept. 17 Tennessee Valley Authority v. Hill: What is the lasting meaning of this case? Is this a case of David v. Goliath (3 inch fish v. huge government agency) or of misuse of ESA to block an unpopular dam? Does this case represent a failure or a vindication of the ESA?

Reading: Environmental Law Stories: The Story of TVA v. Hill, pp 108-140

Assignment 2: A small group of students will come to class prepared to lead class discussion of this case. All other students should come to class prepared to discuss the case.

Sept. 19 The Upcoming Lesser Prairie Chicken Listing Decision: This is your opportunity to grapple with a major listing decision that the U.S. Fish & Wildlife Service is wrestling with right now. This football sized bird is an iconic High Plains species; a decision to list the lesser prairie chicken could have significant regional implications.

Reading: Russell Gold, "Save a Chicken, Drill a Well" (Wall Street Journal, July 19, 2013); "Energy Industry Awaits U.S. Ruling on Prairie Chicken (NY Times January 12, 2013); Ted Williams, "Free-Range Chickens" (Audubon Magazine, September 1, 2011); "Questions & Answers: Proposed Rule to List Lesser-Prairie Chicken As Threatened" (U.S. Fish & Wildlife Service, Nov. 30, 2012)

Assignment 3: Pick an effected interest (e.g., oil and gas industry, ranchers, environmental group, wind industry, state wildlife agency etc.) and, based on the readings above and any additional reading you choose, craft a 1 ½ to 2 page editorial urging the U.S. Fish & Wildlife Service to list or refrain from listing the lesser prairie chicken. Use evidence from your readings to support your argument. *During class, we will break up into small discussion groups. Be prepared to speak about the issue you focused on in your editorial.*

Sept. 24 Challenges of ESA implementation, gaps, loopholes, successes and failures

Reading (*read at least two*): Michael J. Bean, "The Endangered Species Act: Success or Failure?" (Environmental Defense Incentive Paper No.2 May 2005); Alexander F. Annett, "Reforming the Endangered Species Act to Protect Species and Property Rights" (The Heritage Foundation November 13, 1998); "Protect Endangered Species (Competitive Enterprise Institute, January 19, 2011); Center for Biological Diversity, "On Time, On Target: How the Endangered Species Act is Saving America's Wildlife (Center for Biological Diversity, May 2012); Patrick Parenteau, "Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction (William & Mary Environmental Law and Policy Review, Vol. 22, 1998)

Assignment 4: This year is the 40th anniversary of the ESA. Write a 1½ -2 page paper expressing your opinion as to whether the ESA is a success or a failure. Be sure to explain the criteria you are using to judge the track record of the Act and back up your opinion with examples from the reading.

III. National Environmental Policy Act (Sept. 26-Oct 3) – Historical underpinnings, purpose, statutory structure, gaps, challenges.

Sept. 26 Historical context; purpose and structure of NEPA

Reading: Salzman, pp 321-336; Lazarus, pp 67-68

Oct 1 Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Commission: What is the lasting meaning of this case? Is it a pyrrhic victory for the AEC and the nuclear energy industry? What is the long-term meaning for NEPA's role and judicial review? Is this a story of judicial restraint and the limits of judicial authority that, ironically, helped launch a "1,000" lawsuits?

Reading: Environmental Law Stories: The Story of Calvert Cliffs, pp 77-107

Assignment 5: A small group of students will come to class prepared to lead class discussion of this case. All other students should come to class prepared to discuss the case.

Oct. 3 NEPA implementation, challenges, and legacy (SEPA's, TEPA's, EPCRA and Executive Order 12,291): is NEPA a success story?

Reading: Lazarus, pp 85-87, 99-106, 111-113, 185-188; "How Did We Get Divorced?: The Curious Case of NEPA and Planning" by Oliver Houck (ELI 2009)

IV. Section 404 of the Clean Water Act – Wetlands and Small Streams Protection (Oct. 10-17)

Oct. 10 Historical context, purpose and structure of the 404 program: shift in public perception (from swamp to wetlands); evolving scientific understanding of wetland functions and values; Riverside Bayview Homes & the hydrologic cycle; extent of conversion of historic wetlands; activities and physical jurisdiction; core of 404 regulatory program (avoidance, minimization and mitigation); roles of Army Corps of Engineers, US EPA, and states; general permits.

Reading: Salzman, ch. 10, pp 269-281

Oct. 15 Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: This is a story of how an intensely local debate over the decision of some affluent communities to site a landfill in a poorer community triggered Constitutional arguments over the scope of the Army Corps of Engineers regulatory jurisdiction over "isolated" wetlands. We will consider the meaning of "waters of the U.S.", "navigable waters", the Migratory Bird Rule and functions and values of "isolated" wetlands.

Reading: Environmental Law Stories: The Story of SWANCC: Federalism and the Politics of Locally Unwanted Land Uses, pp. 283-319

Assignment 6: A small group of students will come to class prepared to lead class discussion of this case. All other students should come to class prepared to discuss the case.

Oct. 17 Section 404 program implementation, gaps, loopholes, challenges and successes: Some key statistics (percentage of permits granted and percentage of EPA vetos); "no net loss of wetlands" policy and wetland delineation manual debate;

exemptions for ongoing agriculture & silviculture, drainage loophole and the Tulloch rule; wetland mitigation banking; and takings challenges.

Reading: Lazarus, ch. 7, pp. 126-140; ch. 2, p. 18

Oct. 22 **Review for Midterm Exam**

Oct. 24 **MIDTERM EXAM**

IV. Clean Water Act – Water Pollution Control (Oct. 29-Nov. 7) – historical underpinnings, purpose, statutory structure, gaps, and challenges.

Oct. 29 Historical underpinnings, purpose and regulatory strategy of the Clean Water Act: state and federal legislative precursors, events triggering passage of a tough federal law, the ambitious goals of the Clean Water Act, command and control regulatory program coupled with incentives for sewage treatment infrastructure.

Reading: Salzman, ch. 6, pp. 146-152, Lazarus, ch. 5, pp. 71-72

Oct. 31 Statutory Structure of the Clean Water Act: the broad prohibition on discharges to waters of the U.S., NPDES permits and “point sources”, 303(d) list waters, numeric water quality criteria, Total Maximum Daily Loads (TMDLs), and “nonpoint sources,” and agency roles.

Reading: Salzman, ch. 6, pp. 152-174

Nov. 5 Friends of the Earth, Inc. v. Laidlaw Environmental Services: We will consider the significance of enforcement, the role of citizen suits and self-reporting in the CWA, and considerations, such as standing and mootness, that may hinder citizen enforcement.

Reading: Environmental Law Stories: The Story of Laidlaw: Standing and Citizen Enforcement, pp. 201-236; “Toxic Waters: Clean Waters Are Neglected, at a Cost in Suffering” (New York Times, September 12, 2009)

Assignment 7: A small group of students will come to class prepared to lead class discussion of this case. All other students should come to class prepared to discuss the case.

Nov. 7 CWA implementation, gaps, loopholes, challenges and successes: the exemptions for agriculture (except CAFOs) and challenges posed by nonpoint source agricultural pollution and subsurface tile drainage (e.g., hypoxia in the Gulf of Mexico and algae blooms in freshwater lakes); the rollback of jurisdiction over “isolated” waters; and the challenge of addressing impaired waters at watershed scale – the Chesapeake Bay TMDL; addressing urban stormwater, combined sewer overflows and aging sewer lines; and the much acclaimed, but little realized, potential for water quality trading.

Reading: “Toxic Waters: Health Ills Abound as Farm Runoff Fouls Wells” (New York Times, September 17, 2009); “Toxic Waters: As Sewers Fill, Waste Poisons Waterways” (New York Times, Nov. 22, 2009); “Toxic Waters: Saving

U.S. Water and Sewer Systems Would be Costly” (New York Times, March 15, 2010); Robert W. Adler, “Resilience, Restoration, and Sustainability: Revisiting the Fundamental Principles of the Clean Water Act (Washington University Journal of Law and Policy, Vol. 32 (2010)); Robert Semple, Jr., “Happy Birthday, Clean Water Act” (October 16, 2012 New York Times editorial)

Assignment 8: Pick a challenge facing the CWA and write a 1½ -2 page paper explaining the issue and providing your recommendation to solve the problem.

V. Clean Air Act – (Nov. 12-Nov. 21) – historical underpinnings, purpose, statutory structure, gaps, and challenges.

Nov. 12 Historical underpinnings, purpose and regulatory strategy of the Clean Air Act: state and federal legislative precursors, the ambitious goals and regulatory strategy of the CAA, scientific challenge (air modeling), early resistance to the CAA, enforcement and first citizen suit provision.

Reading: Salzman, ch. 4, pp. 87-91

Nov. 14 Statutory Structure of the Clean Air Act: Uniform National Ambient Air Quality Standards (NAAQs), state implementation plans (SIPs), non-attainment zones & tougher requirements; industrial sources & tougher new source performance standards (NSPS) for stationary sources; regulation of mobile sources and hazardous air pollutants (NESHAPs).

Reading: Salzman, ch. 4, pp. 91-112

Nov. 19 Chevron v. Natural Resources Defense Council: the Supreme Court defers to EPA’s “bubble” policy facilitating trading under the CAA.

Reading: Environmental Law Stories: The Story of Chevron: Environmental Law and Administrative Discretion, pp. 171-199

Assignment 9: A small group of students will come to class prepared to lead class discussion of this case. All other students should come to class prepared to discuss the case.

Nov. 21 CAA implementation, gaps, loopholes, challenges and successes: The 1990 CAA amendments, acid rain and ozone depletion; history of regulating cars (fuel efficiency, leaded gasoline, etc); tall stacks, coal fired power plants and scrubbers; the new mercury and air toxics standard and asthma; carbon and Massachusetts v. EPA.

Reading: Lazarus, ch. 8, pp. 171-178; Arnold W. Reitze, “A Century of Air Pollution Control Law: What’s Worked; What’s Failed; What Might Work (21 Environmental Law 1549 (1991))

Assignment 10: Write a 1½ -2 page paper expressing your opinion as to whether the CAA is a success or a failure based. Back up your opinion with examples from the reading and our class discussion. Students may choose to focus on a single major issue, such as addressing depletion of the ozone layer.

VI. CERCLA, RCRA and the 1980s

Nov. 26 Historical underpinnings, purpose and statutory overview of the CERCLA (the “Superfund”), RCRA and the zeitgeist of the 1980s: Love Canal, the lame duck Congress and strong public support for the Superfund; the reporting, clean up and liability provisions (joint and several, strict liability); how the legal and scientific communities ramped up to implement CERCLA; and CERCLA’s legacy. RCRA: recordkeeping and waste disposal; the exemption for recycling.

Reading: Lazarus, ch. 6, pp. 98-110, 113-124; Salzman, ch. 8, pp. 198-238

VII. Emerging challenges: climate change (Dec. 3-10)

Dec. 3 Emerging issue of climate change – Efforts to pass climate legislation (cap & trade), Obama Administration administrative agency agenda, and efforts to date to address climate change through existing environmental laws. *We will discuss instructions for group project and signup for topics (see below).*

Reading: Salzman, ch. 5, pp. 113-145; Gregg Easterbrook, “Global Warming: Who Loses – and Who Wins?” (The Atlantic Monthly, April 1, 2007); William Ruckelshaus, Lee Thomas, William Reilly, and Christine Todd Whitman, “A Republican Case for Climate Action” (New York Times Op Ed, August 1, 2013); 1992 World Scientists’ Warning to Humanity (www.ucsusa.org)

Group Project: Students will work together in small groups students to prepare and present (Dec. 5 or 10) a 15 minute power point presentation examining the emerging issue of climate change, the potential impact on an environmental law studied in this class and the resources it is intended to protect. Include your group’s recommendations to revise the environmental law you’ve chosen to better meet the challenges of climate change.

Dec. 5 Group project presentations and discussion

Dec. 10 Group project presentations and discussion

Dec. 12 Review for Final Exam