

Political Science 246
Fall 2017

Terry Schley Noto
tnoto@rochester.rr.com

ENVIRONMENTAL LAW AND POLICY

COURSE OUTLINE AND READINGS: The class will include considerable class discussion as well as lectures. There will be two papers, student led discussion groups of specific cases, a midterm, a group project, and a final exam. Class attendance is expected; grades will reflect attendance and participation.

OFFICE HOURS: I will have office hours before class from 2:00-3:00 Tuesdays and Thursdays in Harkness Room 316 or by appointment. The best way to contact me is by e-mail (tnoto@rochester.rr.com), but also please feel free to call me at 383-0358.

TEXTS:

Royal C. Gardner, *Lawyers, Swamps and Money*, Island Press, 2011.

James Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy*, 4th ed. Concepts & Insights Series, Foundation Press, 2013.

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

Additional readings will be 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: Handouts will be provided (and/or posted on Blackboard) for each assignment. Papers should be typed, double-spaced (1 inch margins and 12 pt font). Be sure to comply with minimum page limits. *Do not forget to include citations, quotations, and works cited. Points will be deducted for late work **unless** prior permission is given.*

Group case discussion leader assignments: The class will break into small groups to discuss cases. Each student will have an opportunity a group case discussion.

GRADING: Attendance, participation, group work and case discussion 15%; Short Paper 10%; Final Paper 15%; Midterm 25%; Final 35%.

SCHEDULE OF CLASSES:

Introduction/1970s Environmental Decade

Aug. 31 Introduction and discussion – We will review the syllabus, expectations for this class, and class structure. Discussion: What is environmental law and policy?

Why study it? Begin discussion of the Environmental Decade. *Students will sign up for group case discussion leader assignments.*

Reading: Salzman, ch. 1 (pp 1-15); Richard J. Lazarus, *The Making of Environmental Law* (The University of Chicago Press, 2004), pp. 47-66.

Sept. 5 The dawn of the modern environmental era – the 1970s/The Environmental Decade: Why the Environmental Decade? (passage of comprehensive suite of federal environmental laws, birth of EPA, the environmental movement, CEQ). Why?

Reading: Salzman, ch.2 (pp 17-47)

II. Endangered Species Act (ESA)

Sept. 7 Historical underpinnings, purpose, and scope of ESA – listing process for threatened & endangered species & prohibitions on “takes”: Shift in societal attitudes towards wildlife, passage and purpose of ESA, the role of USFWS and NMFS. How does ESA work? T&E species, listing process, critical habitat designations, and take prohibition. Role of science.

Reading: Salzman, ch. 10 (pp 287-294); ESA statute *sections 3-4, 9 only*; “Listing a Species as Threatened or Endangered” (USFWS Jan. 2015)

Sept. 12 ESA, Federal Agencies & *TVA v. Hill*: Section 7 consultation requirement, biological opinions and jeopardy opinions by the Services, impact on federal agency actions (is this a veto power?), *TVA v. Hill* and the “God Squad” exemption.

Reading: *Environmental Law Stories: The Story of TVA v. Hill*, pp 108-140; ESA statute *Sec. 7 only*

In class: Group discussion of *TVA v. Hill* case study

Sept. 14 The ESA and private lands: The challenge of balancing T&E species needs for protection and habitat management with landowner’s private property uses. The ESA prohibition on “takes” and creative mechanisms to balance T&E species and private property/development interests (ITPs, habitat conservation plans, safe harbor agreements, CCAAs). Lack of funding or requirements for habitat maintenance/management, species reintroductions, and invasive species.

Reading: Salzman, ch. 10 (pp 295-310); ESA statute sections 4(d), 9, 10; “Our Endangered Species Program and How It Works With Landowners” (USFWS July 2009)

Short paper assignment discussed

Sept. 19 ESA & Climate Change: Is the ESA a good tool to address climate change mitigation or adaptation? Population loss v. species extinction; 6th Wave of Extinction, Bush Administration polar bear listing. How does/should climate models impact listings? How should ESA recovery plans, habitat range, tools evolve?

In class group discussion: “Saving Species as the Climate Changes” debate

Reading: Read comments from all six debaters in “Saving Species as the Climate Changes” (New York Times, April 22, 2011); Olivia Bensinger, “The Endangered Species Act to the Rescue? Climate Change Mitigation and Adaptation under the ESA” (Vermont Journal of Environmental Law)

Sept. 21 “Modernizing” the ESA, “Repeal and Replace” the ESA, or ??? – What’s Happening in Congress? The ESA’s track record. Analyzing ESA bills in Congress – what would they do? Role of States? Attorneys general letter; California Environmental Defense Act (SB 49).

Reading: Darryl Fears, “The Endangered Species Act may be headed for the threatened list. This hearing confirmed it.” (The Washington Post, Feb. 15, 2017); Christopher Ketcham, “Inside the Effort to Kill Protections for Endangered Animals” (National Geographic, May 19, 2017); “ESA Is Under Attack. But How Much Trouble Is It In?” (Audubon, Feb. 8, 2017)

III. National Environmental Policy Act

Sept. 26 Context, purpose and structure of NEPA: The need for comprehensive consideration of environmental impacts in *all* aspects of federal agency action, the role of CEQ, and the importance of the action forcing provisions of NEPA and the terms: EA, EIS, FONSI and categorical exclusion.

Reading: Salzman, pp 333-349; NEPA statute

Short paper due: hand in printed copies of your papers in class

Sept. 28 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

In class: Group discussion of Calvert Cliffs case study.

Oct. 3 NEPA implementation, challenges, track record and climate change: Is NEPA a success story? How is NEPA responding to climate change considerations? Assessing the complicated legacy of this simplest of environmental statutes.

Reading: CEQ August 1, 2016 Guidance on consideration of GHGs and effects of climate change in NEPA reviews; March 28, 2017 Trump Executive Order: “Promoting Energy Independence and Economic Growth;” “How Did We Get Divorced?: The Curious Case of NEPA and Planning” by Oliver Houck (ELI 2009).

IV. The Clean Water Act – Protection of Wetlands and Small Streams

Oct. 5 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 (404(b)(1) Guidelines steps of avoidance, minimization and mitigation); roles of Army Corps of Engineers, US EPA, and states; general permits.

Reading: Salzman, ch. 10, pp 275-287; Gardner, ch. 1, pp 5-14; ch. 2, pp 15-34; CWA Sections 101, 404, 502 (Gardner, Appendix pp. 209-211)

Oct. 10 NO CLASS – Fall Break

Oct. 12 What are Waters of the U.S.?: CWA jurisdiction over “waters of the U.S.” (“WOTUS”), uncertainty caused by Supreme Court’s decisions in *SWANCC* and *Rapanos & Carabell*, the 2015 WOTUS rulemaking, subsequent actions by the courts and the Trump Administration.

Reading: Gardner, ch. 3, pp 35-56; WOTUS handout

In class: Group discussion of WOTUS case study.

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: Gardner, ch. 4, pp. 57-71, ch. 5, pp. 73-86.

Oct. 19 Review for Midterm Exam

Oct. 24 MIDTERM EXAM

IV. Clean Water Act – Water Pollution Control

Oct. 26 NPDES – the primary regulatory strategy of the Clean Water Act: Events triggering passage of CWA, ambitious CWA goals, the broad prohibition on discharges to WOTUS without NPDES permits, “point sources,” Publicly Owned Sewage Treatment Works (POTWs) & indirect dischargers.

Reading: Salzman, ch. 7, pp. 173-188; CWA Sections 101, 301, and 402.

Oct. 31 Clean Water Act – Enforcement: CWA as a strict liability statute with criminal and civil penalties. Enforcement role of EPA, states and citizens. Discharge Monitoring Reports (DMRs), citizen suits, and constraints.

Reading: *Environmental Law Stories: The Story of Laidlaw: Standing and Citizen Enforcement*, pp 200-236; CWA Sections 309, 505.

In class: Group discussion of *Laidlaw* case study

Nov. 2 Clean Water Act, Waterbody Health, Stormwater & Climate Change: How are the water quality standards and TMDL process supposed to work to protect the health of waterbodies? Loopholes and failure to address polluted runoff from nonpoint sources, like farm fields. Agricultural exemptions. Aging sewage treatment and drinking water infrastructure. CSOs and green infrastructure. Dead zones, algae blooms, ocean acidification. Who suffers? Who pays? How about climate change considerations?

Reading: Salzman, ch. 7, pp. 189-202; “Aging Pipes Are Poisoning America’s Tap Water” (The Atlantic Monthly, July 29, 2015); “What’s in Your Water? Flint and Beyond” (NRDC Report, June 2016); “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); Robin Craig, “Climate Change Comes to the Clean Water Act: Now What?,” 1 Wash. & Lee J. Energy, Climate & Env’t 9 (2010).

V. Clean Air Act

Nov. 7 Context, purpose and regulatory strategy of the Clean Air Act: Historical air quality and public health concerns, the ambitious goals and regulatory strategy of the CAA, Uniform National Ambient Air Quality Standards (NAAQs), state implementation plans (SIPs) & balancing state/federal roles, nonattainment zones, new source performance standards (NSPSs) for stationary sources.

Reading: Salzman, ch. 5, pp. 111-123; *Lead Industries Association, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) (handout).

Nov. 9 *Whitman v. American Trucking* – industry challenge over EPA’s NAAQs for ozone & particulate matter: Consider the economic, policy and legal arguments,

including the regulatory compliance & human health costs, the CAA statutory language, and environmental policy goals re NAAQs for ozone & particulate matter.

Reading: *Environmental Law Stories: The Story of American Trucking: The Blockbuster Case that Misfired*, pp. 320-348.

In class: Group discussion of *American Trucking* case study

Nov. 14 CAA and Climate Change: *Massachusetts v. EPA*, Obama Administration's Clean Power Plan, Trump's March 28, 2017 Executive Order. "The Stopping EPA Overreach Act of 2017" H.R. 637.

Reading: Salzman, Ch. 6, pp. 149-157 and pp. 163-171; Abby Rabinowitz, "Undoing the Clean Power Plan Will Be a Legal Nightmare" (The New Republic, Mar. 29, 2017).

Nov. 16 CAA and Regulatory Innovation: Regulation of mobile sources and toxic air pollutants (shift from NESHAPs to industry by industry MACTs), trading & acid rain, ozone depletion & Montreal Protocol. CAA wrap up.

Reading: Salzman, ch. 5, pp. 123-138, ch. 6, pp. 141-149. Nadra Rahman and Jessica Wentz, "The Price of Climate Deregulation: Adding Up the Costs and Benefits of Federal Greenhouse Gas Emission Standards" (Columbia Law School Sabin Center, August, 2017); Fred Krupp, "President Trump's Clean Power Plan Executive Order Is Worse Than You Know: It Will Broadly Endanger Americans' Health and Welfare" (New York Daily News, Mar. 29, 2017)

Nov. 21 NO CLASS

VI. CERCLA, RCRA and the 1980s

Nov. 28 Historical underpinnings, purpose and statutory overview of CERCLA ("Superfund"), track record and climate change: 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; climate change considerations and CERCLA's legacy.

Reading: Salzman, ch. 9, pp. 247-267; William Yardley, "Trump's EPA wants to focus on Superfund clean ups. Will its plans take climate change into account?" (LA Times, June 14, 2017)

Nov. 30 Resource Conservation Recovery Act (RCRA): Why RCRA? Preventing future Superfunds. RCRA: recordkeeping and waste disposal; the exemption for recycling. How does RCRA's track record and legacy compare with CERCLA? RCRA and climate change: how should RCRA relate to carbon capture and storage?

Reading: Salzman, ch. 9, pp. 231-247.

VII. Climate change

Dec. 5 U.S. and climate change – The 2015 UN Paris Climate Change Agreement, 2018 National Climate Assessment report & the Intergovernmental Panel on Climate Change scientific assessments, continued discussion of Trump executive order. What is the current status?

Reading: “No, The Paris Agreement Isn’t Binding. Here’s Why That Doesn’t Matter” (ThinkProgress, Dec. 14, 2015); Robinson Meyer, “A Reader’s Guide to the Paris Agreement” (The Atlantic, Dec. 16, 2015); Camila Domonoshe, “So What Exactly is in the Paris Climate Accord?” (NPR, June 1, 2017); Jon Greenberg, “Fact-checking Donald Trump’s statement withdrawing from the Paris climate agreement” (Politifact, June 1, 2017)

In class: Group discussion – what is the significance?

Dec. 7 U.S. and climate change – What’s happening at the city, state and regional level? Climate action plans, renewable portfolio standards, etc.

Reading: Robinson Meyer, “ ‘America’s Pledge’: Can States and Cities Really Address Climate Change?” (The Atlantic, June 2, 2017); Rebecca Bromley-Trujillo, “Despite Trump, many cities and states are fighting climate change. Including Pittsburg.” (The Washington Post, June 6, 2017); Oliver Milman, et al, “The Fight Against Climate Change: four cities leading the way in the Trump era” (The Guardian, June 12, 2017); Ari Natter, “As Trump Bows Out, States Set to Fill Void on Climate Change (Bloomberg, March 28, 2017)

In class: Group discussion – how does this relate to you?

Dec. 12 Review for Final Exam

Final Paper: Due in class.

Dec. 20 Final Exam at 8:30 a.m.