

Political Science 246  
Fall 2018

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## ENVIRONMENTAL LAW AND POLICY

**COURSE DESCRIPTION:** An examination of federal environmental law and policy from a practical and historical perspective. This course will provide a basic foundational understanding of U.S. environmental law and help students develop the tools necessary to critique and improve environmental policy making. Topics include an overview of key federal environmental laws, some of the major loopholes, how environmental laws are shaped through agency regulation, judicial interpretation, political pressure, and their efficacy at safeguarding the environment and the public. The course will be taught through a combination of lectures, a group project focused on a specific case study, and student-led discussions about key aspects of environmental laws. Students will finish by considering emerging environmental issues and ways to address them.

**CREDIT HOURS:** 4 credit hours. This course follows the College credit hour policy for 4-credit courses. This course meets twice weekly for 150 minutes per week. The course also includes independent out of class assignments and group work for 1 hour per week, including using assigned readings and other class materials (as noted in the syllabus assignments). These activities include to preparation to lead or participate in group case discussion, work on group case discussion questions, worksheets (posted on Blackboard), reflections, and team-based group project. Students are expected to spend at least 8 hours per week on assigned reading and papers as discussed below. Length of reading assignments will vary given the complexity of the material assigned.

**CLASS DAYS/TIMES and LOCATION:** Tuesdays and Thursdays, 15:20-16:40, MOREY Room 525

**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 from 10:00-11:00 Thursdays in Harkness Room 316 or by appointment. The best way to contact me is by e-mail ([tnoto@rochester.rr.com](mailto:tnoto@rochester.rr.com)), but also please feel free to call me at 585-383-0358.

### TEXTS:

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

James Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy*, 4<sup>th</sup> 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: Directions will be provided (and posted on Blackboard) for each assignment. Be sure to comply with all instructions, including *minimum* page limits. ***Academic honesty is important; you must include citations, quotation marks, 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, worksheets, group project and case discussion 15%; Short Paper 10%; Final Paper 15%; Midterm 25%; Final 35%.

COURSE LEARNING/OUTCOMES: Students will be able to demonstrate a basic foundational understanding of the historical context, purpose, statutory and programmatic goals, and evolution of the federal environmental laws and programs studied this semester as assessed by the midterm and final exams. Per the instructions provided for the papers, students will demonstrate the ability to analyze legal issues in documents, such as proposed rules, and construct a well-reasoned and well supported argument addressing the assigned issue. Students will develop an understanding of how court decisions impact environmental law and policy and how administrative agencies and Congress can, and in some cases currently are, changing environmental law and policy. Students will develop their skills in discussing these issues via student led discussion, class discussion, and through team-based group project work inside and outside of the classroom.

ACADEMIC SUPPORT SERVICES: Students are encouraged to utilize academic support services: the Writing Speaking and Argument Program, <https://writing.rochester.edu> ; Center for Excellence in Teaching and Learning (CETL), [www.rochester.edu/college/cetl/](http://www.rochester.edu/college/cetl/)

ACADEMIC HONESTY: All assignments and activities associated with this course must be performed in accordance with the University of Rochester's Academic Honesty Policy. More information is available at: [www.rochester.edu/college/honesty](http://www.rochester.edu/college/honesty)

DISABILITY RESOURCES: The University of Rochester respects and welcomes students of all backgrounds and abilities. In the event you encounter any barrier(s) to full participation in this course due to the impact of disability, please contact the Office of

Disability Resources. The access coordinators in the Office of Disability Resources can meet with you to discuss the barriers you are experiencing and explain the eligibility process for establishing academic accommodations. You can reach the Office of Disability Resources at: <http://disability@rochester.edu>; (585) 276-5075; Taylor Hall. <https://www.rochester.edu/college/disability/faculty/syllabus-statements.html>

## SCHEDULE OF CLASSES:

### **Introduction/1970s Environmental Decade**

Aug. 30        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. *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. 4        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).

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

### **II. Endangered Species Act (ESA)**

Sept. 6        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*

Sept. 11       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. 13        The ESA and private lands: The challenge of balancing T&E species needs for protection and habitat management with landowner's private property uses. ESA prohibition on "takes" and creative ways to balance T&E species and private property/development interests (ITPs, habitat conservation plans, safe harbor agreements, CCAAs).

Reading: Salzman, ch. 10 (pp 295-310); ESA statute sections 4(d), 9, 10

Sept. 18        ESA & Climate Change: What does climate change portend for the effectiveness of the ESA? To what degree should climate change be factored into listing decisions and ESA implementation? Is the ESA a good tool to address climate change mitigation or adaptation?

**In class group discussion: "Saving Species as the Climate Changes"**

Reading: Read comments from all six debaters in "[Saving Species as the Climate Changes](#)" (New York Times, April 22, 2011)

[Michael C. Blumm and Kya B. Marienfield](#), "Endangered Species Act Listings and Climate Change: Avoiding the Elephant in the Room," 20 *Animal L.* 277 (2014)

[Olivia Bensinger](#), "The Endangered Species Act to the Rescue? Climate Change Mitigation and Adaptation under the ESA" (*Vermont Journal of Environmental Law*)

Sept. 20        "Modernizing" the ESA, "Repeal and Replace" the ESA, or ??? – What's Happening in Congress? What's Happening in the Executive Branch? Group project analyzing ESA bills in Congress and Trump Administration's proposed rule changes – what would they do?

Reading: [Coral Davenport, Friedman, Lisa](#) "Lawmakers, Lobbyists and the Administration Join Forces to Overhaul the Endangered Species Act" (New York Times, July 22, 2018)

Jim Lyons, "[Under Threat: The Endangered Species Act and the Plants and Wildlife It Protects](#)" (Center for American Progress, posted Nov. 28, 2017)

ESA bills & proposed regulatory changes Handout (to be posted on Blackboard)

**III. National Environmental Policy Act**

Sept. 25        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. 27 *Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*: What is the lasting meaning of this case? Is NEPA substantive or a procedural statute? What is the long-term meaning for NEPA's role and judicial review?

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

**In class: Group discussion of *Calvert Cliffs* case study.**

Oct. 2 NEPA implementation, challenges, track record and climate change: Is NEPA effective? How was NEPA policy changed during the Obama Administration address climate change considerations? What changes are happening under the Trump Administration? Assessing the complicated legacy of this simplest of environmental statutes.

Reading: "[NEPA: lessons learned and next steps](#)" (Statement by Prof. Robert Dreher before the Task Force on Updating NEPA of the House Committee on Natural Resources, 109<sup>th</sup> Congress, Nov. 17, 2005)

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](#)"

June 20, 2018, CEQ proposed rule: "[Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act](#)"

[Carl Segerstrom](#), "Feds eye changes to a bedrock environmental law: a clash over the National Environmental Policy Act follows familiar fault lines" (High Country News, July 6, 2018)

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

Oct. 4 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. 9            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

*Solid Waste Agency of Northern Cook County (SWANCC) v. US Army Corps of Engineers*, 531 U.S. 159 (2001) (Chief Justice Rehnquist’s majority opinion and the dissent by Justice Stevens)

**In class: Group discussion of SWANCC case**

Oct. 11            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. 16            NO CLASS – Fall Break**

**Oct. 18            Review for Midterm Exam**

**Oct. 23            MIDTERM EXAM**

**IV. Clean Water Act – Water Pollution Control**

Oct. 25            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. 30            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. 1 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? Issue of polluted runoff from nonpoint sources, dead zones, algae blooms, ocean acidification. How are/aren't climate change considerations addressed?

Reading: Salzman, ch. 7, pp. 189-202

["Toxic Waters: As Sewers Fill, Waste Poisons Waterways"](#) (New York Times, Nov. 22, 2009)

[Tom Philpott](#), "Why This Year's Gulf Dead Zone is Twice as Big as Last Year's" (Mother Jones, Aug. 14, 2013)

[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. 6 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

Nov. 8 *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. 13 CAA and Climate Change: *Massachusetts v. EPA*, Obama Administration's Clean Power Plan, Trump's March 28, 2017 Executive Order and subsequent EPA actions.

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)

[Massachusetts v. EPA](#), 549 U.S. 497 (2007)

Additional reading TBA

**In class: Group discussion of *Massachusetts v. EPA* case**

Nov. 15      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. Obama and Trump administrations and CAFE standards. CAA wrap up.

Reading: Salzman, ch. 5, pp. 123-138, ch. 6, pp. 141-149

[Robinson Meyer](#), “How the Car Makers Trumped Themselves: Automakers wanted rule changes, but not *these* rule changes” (The Atlantic, June 20, 2018)

[Justin Gerdes](#), “Cap and Trade Curbed Acid Rain: 7 Reasons Why It Can Do the Same for Climate Change” (Forbes, Feb. 13, 2012)

[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)

**Nov. 20      NO CLASS**

**VI. CERCLA, RCRA and the 1980s**

Nov. 27      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. 29        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?

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

[“RCRA as a Tool for Environmental Justice Communities and Others to Compel Climate Change Adaptation.”](#) 131 Harv. L. Review 2409 (June 8, 2018)

## **VII. Climate change**

Dec. 4        U.S. and climate change – The 2015 UN Paris Climate Change Agreement, 2018 National Climate Assessment report & the Intergovernmental Panel on Climate Change (IPCC) 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)

[Statement by President Trump on the Paris Climate Accord](#) (Whitehouse.gov, June 1, 2017)

[Jon Greenberg](#), “Fact-checking Donald Trump's statement withdrawing from the Paris climate agreement” (Politifact, June 1, 2017)

Dec. 6        U.S. and climate change – What's happening at the city, state and regional level? Climate action plans, renewable portfolio standards, etc. *Juliana v. U.S.*

Reading: TBA

**Dec. 11        Review for Final Exam**

**Final Paper: Due in class**

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

