

Political Science 246  
Fall 2020

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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 preparation to lead or participate in group case discussion, work on group case discussion questions, worksheets, and team-based group project presentation preparation and short paper. 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 (i.e., 3:25 pm to 4:40 pm). Lectures will be given by zoom. There may be some opportunity for students in the Rochester area to attend in person class in MOREY Room 525 on group case discussion days; however, this is limited to 10 students on a first come, first served signup basis.

**COURSE OUTLINE AND READINGS:** The class will include considerable class discussion as well as lectures. There will be student led discussion groups of specific cases, a group project, four tests, a paper, and possibly quizzes. Grades will reflect class attendance and participation. If you need to participate a-synchronously, contact me to let me know.

**OFFICE HOURS:** I will have office hours before class from 2:00-3:00 Thursdays by zoom and I am also happy to meet with you via zoom by appointment. The best way to contact me is by e-mail ([tnoto3@ur.rochester.edu](mailto:tnoto3@ur.rochester.edu)).

Briana Cahill is the teaching assistant for this class. She will hold office hours from 2:00-3:00 Tuesdays by zoom and can also meet with you by appointment. The best way to contact Briana is by e-mail ([bcahill2@u.rochester.edu](mailto:bcahill2@u.rochester.edu) )

#### TEXTS:

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

James Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy*, 5<sup>th</sup> ed. Concepts & Insights Series, Foundation Press, 2019

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

Additional readings will be available on the internet. 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 court case discussion leader assignments: The class will break into small groups to discuss cases. This will happen primarily through breakout groups on zoom but there will also be limited opportunity for in person participation in Morey. Discussion questions will be provided prior to class on Blackboard. Each student will have an opportunity to lead a group court case discussion over the course of the semester.

Group project: Reading and instructions for the group project will be posted on Blackboard prior to our September 17<sup>th</sup> class. Students will work together in class (via zoom and possibly limited opportunity in person in Morey) on the group project.

**GRADING:** Attendance, participation, group project, case discussion and any quizzes 15%; Paper 15%; your 3 highest test grades will count as 20% of your grade each and your lowest test score counts as 10%.

**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](mailto:http://disability@rochester.edu); (585) 276-5075; Taylor Hall. <https://www.rochester.edu/college/disability/faculty/syllabus-statements.html>

SCHEDULE OF CLASSES:

## **I. 1970s Environmental Decade**

Aug. 27 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 3-15); Lily Rothman, “Here’s why the Environmental Protection Agency was created” (Time Magazine, March 22, 2017)

Sept. 1 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); Meir Rinde, “Richard Nixon and the Rise of American Environmentalism” (Science History Institute, June 2, 2017)

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

Sept. 3 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 293-307); ESA statute *sections 3-4, 9 only*

Sept. 8 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. 10 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 307-313); ESA statute sections 4(d), 9, 10

Sept. 15 Biodiversity Crisis, Climate Change & ESA: IPBES Report and the biodiversity crisis. 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? What is meant by “modernizing” the ESA? What is the new ESA policy?

Reading: 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)

Sept. 17 “Modernizing,” strengthening or repealing the ESA – What’s Happening in Congress Group Project: Reading will be posted on Blackboard. Students are expected to have completed the reading prior to class so they can participate fully in the in-class group project. There may be some limited opportunity for in person participation in Morey but otherwise this project will be conducted via zoom.

**Sept. 22 Review for Test 1**

**Test is due by midnight, September 25<sup>th</sup>**

### **III. National Environmental Policy Act**

Sept. 24      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, Ch 12, pp 339-355; NEPA statute

Sept. 29      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. 1      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?

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"

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

Oct. 6      NEPA and Environmental Justice: NEPA is particularly important for communities that suffer disproportionately from pollution and have often been deprived of prior public notice and the opportunity to comment on impending projects that may adversely impact the community, the local environment and public health.

Reading: "Fact Sheet: Modernizing CEQ's NEPA Regulations" CEQ, July 15, 2020

"Trump sued to stop assault on bedrock environmental law" Environmental News Service, July 29, 2020

"Environmental racism in the United States," CBSN, July 17, 2020  
<https://www.cbsnews.com/video/summers-social-unrest-highlights-environmental-racism-in-the-us/#x>

Beth Gardiner, "Unequal Impact: The Deep Links Between Racism and Climate Change" Yale Environment360, June 9, 2020

Listen to NEPA webinar (May 14, 2019) on YouTube,  
<https://www.youtube.com/watch?v=LTRG9kvLKMtE>

**Oct. 8            Review for Test 2**

**Test 2 due by Midnight Oct.9<sup>th</sup>**

**IV. The Clean Water Act**

Oct. 13            Historical context, purpose and structure of the CWA: Shift in public perception and 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 275-293; Gardner, ch. 1, pp 5-14; ch. 2, pp 15-34; CWA Sections 101, 404, 502 (Gardner, Appendix pp. 209-211)

Oct. 15            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. 20            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. 22            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. 27        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**

Oct. 29        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)

Optional reading: Robin Craig, “Climate Change Comes to the Clean Water Act: Now What?,” 1 Wash. & Lee J. Energy, Climate & Env’t 9 (2010)

**Nov. 3            Review for Test 3**  
**Test 3 due by Midnight Nov. 6<sup>th</sup>**

## **V. Clean Air Act and Climate Change**

Nov. 5        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. 115-137

Nov. 10        *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. 12      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. 152-172

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)

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

Nov. 17      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. 138-142, ch. 6, pp. 143-152

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)

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

Nov. 19      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. 252-270

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. 24        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. 235-252

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

**Nov. 26        NO CLASS – HAPPY THANKSGIVING**

**Dec. 1         Test 4 Review**  
**Test 4 due by midnight Dec. 4th**

## **VII. Climate change**

Dec. 3        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. 8        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.*

**Paper is due by midnight Dec. 8<sup>th</sup>**