

Political Science 246
Fall 2014

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 some short assignments and papers, a midterm, a group project focused on a specific case study, a project focused on addressing an emerging environmental issue and the challenge of climate change, and a final exam. Class attendance is expected; grades will reflect attendance and participation.

OFFICE HOURS:

I will have office hours before class from 2:00-3:15 Tuesdays and Thursdays in Harkness Room 308 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:

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

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 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: Should be typed, double-spaced (1 inch margins and 12 pt font). Page lengths will be noted in this syllabus for each written assignment. *Pay careful attention to the directions for each written assignment in the handout for that assignment. Written assignments should be printed out and handed to me in class the day they are due.* 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 10%; Short papers 25%; Midterm 25%; Final 35%

SCHEDULE OF CLASSES:

I. Introduction and historical context (Sept. 2-4)

Sept. 2 Introduction and discussion – We will review the syllabus, expectations for this class, and class structure. We will discuss: What is environmental law and policy? Why study it? We will share our interests in studying environmental law and policy and my experience as a practitioner of environmental law. *Students will sign up for group case discussion leader assignments.*

Reading: Salzman, ch. 1 (pp 1-13); 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: Passage of the major federal environmental laws, the birth of U.S. Environmental Protection Agency, the environmental movement and seeds of backlash. How do the challenges of the 1970s compare to today's environmental challenges? How does this compare with today's political climate and citizens' expectations?

Reading: Salzman, ch.3 (pp 58-70)

I will distribute the handout in class for the Short Paper #1 due Sept. 9th.

II. Endangered Species Act (ESA) (Sept. 9-23)

Sept. 9 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 U.S. Fish & Wildlife Service and National Marine Fisheries Service; statutory structure of the ESA: definitions of threatened and endangered species (T&E species), listing process, critical habitat designations, and take prohibitions.

Reading: Salzman, ch. 10 (pp 281-287); ESA statute sections 3-4, 9

Short Paper #1: Write a 1½ -2 page reaction to the reasons Congress had for passing the ESA in 1973. **Due in class Sept. 9th**

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

Group case discussion #1: 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. 16 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", lack of funding or provisions mandating habitat maintenance/management, and balancing T&E species and private property needs/interests through such instruments as: incidental take permits, habitat conservation plans, safe harbor agreements, candidate conservation agreements, candidate conservation agreements with assurances, and voluntary conservation programs.

Reading: Salzman, ch. 10 (pp 287-301); ESA statute sections 4(d), 9, 10

I will distribute instructions and reading materials for Sept. 18th group project and assign groups in class.

Sept. 18 Group project/T&E species case study: This is your opportunity to grapple with the challenges of T&E species protection and recovery as applied to a particular species. Each student will have a role to play representing a stakeholder group (e.g., private landowner, conservation organization, state wildlife agency, U.S. Fish & Wildlife Service). Students will break out into their groups to discuss the assigned issue and try to come to consensus on how to resolve the issue. Each group will report on the results of their negotiations at the end of class.

Reading: Endangered species case study reading materials.

ESA group project: Come to class prepared to participate in negotiation process.

Sept. 23 T&E species protection at home and abroad ~ the ESA's track record and relationship to T&E species international protection efforts: The ESA's track record at home (How do we measure success (is it fair to measure by extinctions averted, species recovering, species delisted?))? What are the implications of de-listing a species, both for the species and cooperative federalism impacts?). Protection of T&E species abroad: ESA listings & USFWS/NMFS role, Convention on International Trade in Endangered Species (CITES), the Convention on Biological Diversity, the IUCN Red List, and Australia's Environment Protection & Biodiversity Conservation Act 1999.

Reading: 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) – *only pp. 227-246, 274-311*

III. National Environmental Policy Act (Sept. 25-Oct 2)

Sept. 25 Historical 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 321-336; NEPA statute

Sept. 30 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

Group case discussion #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.

I will provide handout in class for Short Paper #2 due Oct 2nd.

Oct. 2 NEPA implementation, challenges, and legacy: is NEPA a success story? Assessing the complicated legacy of this simplest of environmental statutes.

Reading: "How Did We Get Divorced?: The Curious Case of NEPA and Planning" by Oliver Houck (ELI 2009); "Supreme Court Lifts Ban on Planting GM Alfalfa" (NY Times, June 21, 2010); J. Stevens' dissent in *Monsanto, et al. v. Geerston Seed Farms, et al.*, U.S. Supreme Court, June 21, 2010.

Short Paper #2: Write a 1½ -2 page memo from the USDA Office of General Counsel to APHIS providing your recommendation re whether an EA or an EIS is required by NEPA before APHIS can lift ban on planting GM Alfalfa. **Due in class Oct. 2nd**

IV. The Clean Water Act – Jurisdictional waters & Protection of Wetlands and Small Streams in 404 Permit Program (Oct. 7-16)

Oct. 7 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 269-281; Gardner, ch. 1, pp 5-14; ch. 2, pp 15-34; CWA Section 404

Oct. 9 CWA jurisdiction, SWANCC and Rapanos Supreme Court decisions, and proposed waters of the U.S. rule (WOTUS): CWA jurisdiction over “waters of the U.S.,” uncertainty caused by Supreme Court’s decisions in *SWANCC* and *Rapanos*, and the ongoing rulemaking.

Reading: Gardner, ch. 3, pp 35-56; SWANCC majority opinion by J. Rehnquist & dissenting opinion by J. Stevens; proposed “waters of the U.S. rule” (draft rule language only).

Group case discussion #3: A small group of students will come to class prepared to lead class discussion of *SWANCC*. All other students should come to class prepared to discuss the case.

Extra credit: Draft and submit your own comments on draft WOTUS rule on or before October 20th. Provide me with a hardcopy of your comment letter in class on **October 21st**.

Oct. 16 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. 21 Review for Midterm Exam

Oct. 23 MIDTERM EXAM

IV. Clean Water Act – Water Pollution Control (Oct. 28-Nov. 6)

Oct. 28 Historical underpinnings, purpose and regulatory strategy of the Clean Water Act ~ command & control regulation of discharges from point sources: Events triggering passage of a tough federal law, the ambitious goals of the Clean Water Act, the broad prohibition on discharges to waters of the U.S., NPDES permits & “point sources,” Publicly Owned Sewage Treatment Works (POTWs) & indirect dischargers.

Reading: Salzman, ch. 6, pp. 146-152; CWA Sections 101, 301, and 402.

Oct. 30 Clean Water Act – Today’s biggest challenge to water quality ~ failure to address polluted runoff from nonpoint sources, like farm fields: Statutory exemptions for agriculture, water quality standards (narrative v. numeric), 303(d) list waters, Total

Maximum Daily Loads (TMDLs), load allocations and waste load allocations, state and federal agency roles & strategies, dead zones & algal blooms.

Reading: Salzman, ch. 6, pp. 152-174; Oliver Houck, “Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited” (ELI 2014).

Nov. 4 Clean Water Act – Urban stormwater, MS4s, combined sewer overflows (CSOs), ageing infrastructure and overlap with Safe Drinking Water Act: Understanding how stormwater from municipalities and construction sites is regulated. How will municipalities meet the challenges of complying with CWA requirements, funding necessary infrastructure investments to provide safe drinking water and sanitary sewage disposal, and address flows from upstream in the watershed (including unregulated agricultural stormwater discharges)? Role of EPA enforcement and consent decrees, public financing, grants, revolving funds, and the potential for green infrastructure, private-public partnerships and possibly trading.

Reading: “Toxic Waters: Clean Waters Are Neglected, at a Cost in Suffering” (New York Times, September 12, 2009); “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)

Nov. 6 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.

Group case discussion #4: A small group of students will come to class prepared to lead class discussion of *Laidlaw*. All other students should come to class prepared to discuss the case.

Short Paper #3: Write a 2 page letter to your Congressional Representative asking him or her to address a key Clean Water Act issue adversely impacting your district. Explain the issue and provide your recommendation to solve the problem. **Due in class Nov. 11th.**

V. Clean Air Act – (Nov. 11-Nov. 21)

Nov. 11 Historical underpinnings, 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. 4, pp. 87-98; *Lead Industries Association, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) (read only parts I, II, V and IX).

Short Paper #3: due in class.

Nov. 13 *Whitman v. American Trucking Associations* – 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; CAA Sec. 109(b)(1),

Group case #4: 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. 18 CAA & 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. 4, pp. 98-120.

VI. CERCLA, RCRA and the 1980s

Nov. 20 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: Salzman, ch. 8, pp. 198-238

I will distribute reading materials for *Dec. 2nd* class discussion.

Nov. 25 NO CLASS.

Dec. 2 CERCLA case study: Guest speaker TBA. We will also discuss instructions for the last short paper – Short Paper #4 – due Dec. 11th.

Reading: CERCLA reading materials.

I will distribute list of topics and instructions for Short Paper #4 **due Dec. 11th**.

VII. Emerging challenges & climate change (Dec. 4-10)

Dec. 4 Emerging issues & climate change – Are traditional approaches to environmental law and policy sufficient to address emerging environmental challenges and climate change? Students will pick a topic from the handout (or a topic of your choice *with instructor permission*) for Short Paper #4.

Short Paper #4: Write a 3-5 page paper on an emerging environmental challenge, the impacts of climate change, and your policy recommendations to address, including any revisions to an existing environmental statute we studied.

Dec. 9 Class cancelled to provide more time to work on Short Paper #4. I will be available in my office during office hours and during class to answer any questions. I am also happy to meet with you by appointment as well.

Dec. 11 Review for Final Exam

Short Paper #4: Due in class.

Dec. 19 Final Exam at 8:30 a.m.