

U252 - Environmental Law

Monday and Wednesday 11:00 a.m. -12:20 p.m. in SSPA 1165

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What can and should the law and its institutions do to protect the environment? Environmental law is the immense and ever changing field of law which addresses this question with foci on pollution control, natural resource protection and use, and most generally, environmental quality. A course on environmental law encompasses many areas of legal study: international, comparative, federal, state and local statutory, administrative, common and constitutional law related to environmental quality. Its exact boundaries vary with the instructor, the book used and the geographical region of the course--especially as the distinction between other areas of law and environmental control blurs. Our coverage aims to make the field accessible to non-law graduate students. I have chosen materials that are important to environmental planners, urban planners, environmental managers, and people interested in other environmental careers. However, my focus is also on law and society issues and policy issues, so the course should be of interest to others as well.

Goals of the Course

- 1) To introduce the scope of the field;
- 2) To become familiar with modes of analysis used in the field--how to study environmental problems from a legal and policy perspective;
- 3) To identify leading issues, common themes and common problems in environmental law;
- 4) To obtain professionally useful substantive knowledge in several areas of environmental planning and protection.

Text

The texts for the course are: James Salzman and Barton H. Thompson, Jr. , Environmental Law and Policy. (Second Edition, Foundation, 2007, noted below as S&T) and Joseph F.C. DiMento, The Global Environment and International Law. (University of Texas Press, 2003), noted below

as jfcd. The bookstore also has Black's Law Dictionary; to it or to some other law dictionary you will need to refer regularly.

Approach

We will not attempt to be comprehensive in our analysis of environmental law; rather, I have selected a few areas that we will study in a standard way. That way is:

- To ascertain the perspectives on, the scientific background of, and philosophies surrounding, specified environmental problems
- To get a sense of background to an environmental controversy
- To explore how the controversy or problem arose (including by attention to the persons and groups involved and the interests they represent, and in many cases to the science and/or other evidence that is relevant)
- To learn, as relevant, some Black Letter Rules relevant to a controversy i.e. those legal principles that should generally apply
- To address a manifestation of the controversy by means of a case briefing framework
- As appropriate, to investigate steps in the resolution of the controversy
- To ask whether there are alternative means of resolving the controversy
- To go a step deeper into areas of environmental law and policy of particular interest to your careers: environmental impact analysis and air quality are two candidates; others will be determined by your interests.

Requirements

The reading for each session will be modest, averaging ~twenty five pages per class. Each student is expected to be prepared for possible recitation each day. A thorough understanding of the materials by each class hour is our aim; that is impossible without pre-class preparation. Environmental law is not a field that one can learn just before the examinations.

For each class you should be prepared to both ask and answer questions on the reading and to analyze how today's reading relates to materials covered earlier in the course.

In addition to class attendance (which I will regularly note) and participation, which can count up to 20% of the final grade, there will be these other assignments:

1. Mini midterm examination - 30 minutes, tentatively scheduled for November 7

2. Final examination

The exams are composed of both short answer and essay questions with at least some analysis of hypothetical cases using the frameworks we develop in the course. For the examinations you are responsible for all materials assigned whether we cover them explicitly in our discussion or not. One of the questions on the final examination will be:

Outline a short article on environmental law. Include in your outline reference to five law review articles on your subject. Include in the outline in traditional outline form:

- *Introduction and rationale for your article (3 to 5 sentences)*
- *Two Major Legal Issues Raised (In traditional briefing form)*
- *Bibliography [i.e., citations to the articles]*

Note: You will not write the article, only its outline. You are not outlining some other scholar's article; rather you are using the work of others to generate your own article outline. You are required to use law review articles--not magazines, newspapers or journals from another discipline. We will work on the same topics for these outlines. There are at least two options: air quality and international environmental law. We will spend part of one session early in the course discussing these candidates and others.

Copies of examinations administered in prior offerings of this course will be added to our web page.

3. Mini-assignments: Half page written comments on an assigned question from the reading.

Example and **Mini #1**

“What did the Court decide in *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir, 1965?)” [This example is chosen to get you started and help make you familiar with your new S&T book. It is more rote-oriented than future minis, which will be more thought provoking.]

Also, clip and turn in a newspaper article (or a copy of an article from a newspaper archive) about an environmental problem or controversy.

Mini #1 is due in class on October 6.

Mini #2

A second mini assignment is a web page exercise. Its purpose is to introduce you to the world of international environmental law. Please search the web to find a site on international or comparative environmental law. Then provide the following information on the site: 1) name of site; 2) web address; 3) brief description of site; 4) laws, treaties or agreements addressed; 5) your evaluation of the site [i.e. how user friendly is it for non-specialists or how could it be made more understandable to you.] Among candidates for international topics: The Montreal Protocol; Global Climate Change; the Basel Convention; The North American Commission for Environmental Cooperation; the Black Sea Environmental Programme, but please feel free to search widely and based on your individual interests in the international environment. Mini #2 is due in class on October 22.

Course Coverage

In addition to some explicit coverage in early sessions, we will review and integrate into our discussions various understandings of environmentalism as we move through the substantive legal material.

We also explicitly address fundamental perspectives on environmental law: these involve understandings of scientific uncertainty, markets, mismatched scales, cognitive biases, and sustainable development, protected interests, and important analytical frameworks brought to the field. After a very brief introduction to the common law of environmental protection and its limitations and potential, we introduce an inventory of instruments to address environmental problems.

We study a relatively new trend in environmental protection: the aggressive use of criminal law.

We ask about constitutional dimensions of environmental law: Do the constitutions provide for rights of action to stop pollution and to a clean environment? What are the important limitations on governmental regulation to achieve articulated public purposes of protecting the environment?

We quickly overview some legally technical but nonetheless important elements of environmental law: the administrative law of the environment. Here we address those procedures and doctrines that determine whether a case will ever be fully addressed in a legal forum such as a court. Can a potential plaintiff get access to judicial review?

We study a major "procedural" law, looking to the requirements of environmental impact analysis imposed by states and the federal government. I chose this topic because it is fundamental to decision making and because some of you may work with environmental impact assessments (EIRs and EISs) in one way or another.

I selected one area of now-classic substantive command-and-control environmental law. Because we all live in one of the most challenging regions in the world for protecting the air resource and because of the links among transportation, land use and air quality, I have chosen to focus on air, with a particular focus on provisions of the law of air pollution which are most significant in California. We learn here that the Clean Air Act has evolved from a substantially command-and-control orientation to a hybrid form, adopting economic incentive strategies.

In the course's second half, we specifically address the increasingly important and exciting field of global or international environmental law. [I will give international environmental law mini lectures throughout the coverage of domestic law, as appropriate, especially with a focus on Global Climate Change.] We address treaties, customary law and "soft law" and put this material in a broader context: international environmental management.

Some final points

For some students, the approach used in this course will be relatively new. Others have more experience with a law-school oriented approach to learning (case analysis, dialogue, a bit of Socratic method analysis, and application of concepts and doctrines derived from judicial opinions). For some of you this way of learning will take a little getting used to. We will move relatively slowly and I will be explicit about the approach I am using. If you take the course seriously, the analysis, reading, and method should be exciting and enjoyable.

Some last details

1. Please remember your name card/tag every session.
2. Office hours can be in small groups as appropriate.
3. For those of you interested in extra, non-required learning through the World Wide Web, I will provide addresses of some interesting sites.
4. If you are having difficulties following the material, please see me right away.
5. Keeping a glossary ["a side bar"] of new terminology may prove helpful to your learning.

SCHEDULE

Class 1, 9/29: Environmental Law via a Teaching Hypothetical; The Breadth and Scope and Perspectives on Environmental Controversies in the Second Quarter Century of Environmental Law; Studying Environmental Law

Class 2, 10/1: Continue: Perspectives on Environmental Law, and Basic Themes. S&T 1-24

Class 3, 10/6: Perspectives and Practice, Mini #1 due; Web Exercises. S&T, 25-64; Criminal law hand-out.

Class 4, 10/8: Constitutional Issues in Environmental Policy, S&T, 65-75

Class 5, 10/13: The role of citizens: lobbying, citizen suits, standing and related threshold questions, S&T, 75-85

Class 6, 10/15: Environmental Law Library Resources & Research: Ms. Gelfand

Class 7, 10/20: Air Pollution I, The Clean Air Game, S&T 87-97

Class 8, 10/22: Air Pollution II, Mini #2 due S&T, 98-120

Class 9, 10/27: The Endangered Species Act; One-sentence statements due. S&T, 277-297

Class 10, 10/29: Catch Up Session; [No new reading]

Class 11, 11/3: Procedural and Substantive Constraints on Decision-making: Environmental Policy Acts; [Possible Guest Lecturer] S&T, 309-322

Class 12, 11/5: Video. Toxic Torts, mini mid term

Class 13, 11/10: READING PERIOD AND STANFORD CASE STUDY [TBD.]

Class 14, 11/12: New Directions in Environmental Law [including in the new administration] and the Relationship between Domestic and International Environmental Law

Class 15, 11/17: Bibliography due. INTERNATIONAL ENVIRONMENTAL LAW INTRODUCTION, jfcd ix-12, Mini #3 due

Class 16, 11/19: LAW TRYING TO SAVE THE EARTH, jfcd 13-31

Class 17, 11/24: LAW TRYING...jfcd 32-56

Class 18, 11/26: International Environmental Law--Successes and Failures, jfcd, 82-102

Class19, 12/1: International Environmental Law: Additional Cases: Water and the Great Seas, Land and Hazardous Waste, jfcd,102-127

Class20, 12/3: International Environmental Law, Climate Change-Again, and Overall Lessons, jfcd, 127-140 and sections from DiMento & Doughman (eds), CLIMATE CHANGE, WHAT IT MEANS FOR US, OUR CHILDREN AND OUR GRANDCHILDREN, MIT, 2007

* The final examination will be on December 12 , from 8:00 a.m.-10:00 a.m. Requests to take the examination at another time cannot be honored.