Environmental Law:
UEP/CE-207 [autumn, 2007]

SYLLABUS

Department of Urban and Environmental Policy and Planning (UEP)
Wednesdays, 6:30 – 9 p.m. (starts September 5)
Class meets in Anderson Hall, room 208

The current – and official – version of this syllabus is posted here on the class website. It may be periodically updated. Latest update: September 4, 2007

NOTES:

- Please read selections in the order in which they are listed.
- Unless specified, readings in the NLS3 text begin with the first full section or note on the first page of the selection listed, and end with the last note or section on the last page listed.
- The NLS3 text contains several useful appendices, including a table of cases (with page numbers) and a list of acronyms.
- Many readings are posted on the Tufts Blackboard site. To find it, Google “Tufts” and “Blackboard,” select “course catalog,” then search the entire catalog for a course containing the words “Environmental Law.” (After the course is underway, you will be required to log in to the site.)

CLASS #1: WED., SEPT. 5  INTRODUCTION

Introduction to the Course

Please try to read the following (about 7 pages total) for our first meeting:

📖 Four Hypotheticals (see below) [Blackboard]
📖 Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) [Blackboard]

The following are background readings. If you don’t have time to read them in advance, please try to do so within three weeks (the second and third items can be perused quickly):
Four short hypotheticals will be available on Blackboard and handed out in class. Some questions to consider: What are the issues? The policy issues? The potential legal issues? What might the legal process bring to bear? What is law and what purposes does it serve? In what ways do private markets, wealth, politics and voting power interface with a legal issue? What particular problems – for policy and for law – do environmental issues pose? How can law guide (or thwart) policymaking? What is the difference between policy and law (or is there one)? And how are the interests of the various levels of government (municipal, state, federal), and branches of government (legislatures, courts, agencies, etc.) expressed in the context of an environmental policy challenge?

- Introduction to the course
- Brief hypothetical(s)
- Expectations/goals for the semester
- Environmental law: Why it matters in crafting environmental policy
- The legal process: An overview and some basic structural concepts
- Sources of law and their interaction
- Lexis/Nexis
- A brief history of environmental regulation in the U.S.
- Climate change: a focusing issue
- A look at an early common law case: Georgia v. Tennessee Copper
CLASS #2: WED., SEPT. 12   COMMON LAW & STATUTORY LAW

2-1:  “Judge-Made” (Common) Law and Environmental Protection

- NLS3: pp. 103-115 (the famous Boomer case and notes); 137-145, 148-150 (Notes 2, 5, 6), 163-165 (Plater excerpt), 171-172 (paragraph 2(a)), 174-175 (paragraph 2(c)) (negligence, strict liability, the Branch case, defenses, remedies)

- What is common law?
- Common law tort – the original remedies
- How do we know it’s a nuisance?
- Private nuisance and the classic Boomer case
- Negligence and the environment
- Branch and strict liability
- Key defenses: valid permits, pre-emption, statutes of limitation
- Remedies

2-2: Common Law in the Regulatory State: An Introduction

- The state and federal court systems: a chart [Blackboard]
- The federal judicial districts and circuits: a map [Blackboard]
- Open Space Institute v. American Electric Power, Brief of Plaintiffs-Appellants (Dec. 15, 2005), pp. 1-2, 22-26, 65 and the following page (page numbers are those marked on the document itself) [Blackboard]
- Remarks of Thomas Merrill, Global Warming Panel, Part II, from Symposium: The Role of State Attorneys General in National Environmental Policy,” 30 Columbia Journal of Environmental Law 351 (2005) [excerpts] [Blackboard]
What is “public law”?
Federalism – circles of authority
Federalism – key vertical tensions
Constraints and limits: Constitutional, statutory and regulatory (an introduction)
ORI v. AEP/Connecticut v. AEP: the common law collides with climate change

CLASS #3: WED., SEPT. 19  COMPLEX ENVIRONMENTAL CASES

Complex Litigation: In Literature and in Law

NLS3: pp. 200-207; 211-215 (Notes 2-8); 219-226 (Notes 5, 6, 8-9, 12); 227-228; 154 (section 2 introduction), 158 (Note 2); 244-248 (risk communication)
Harr, Jonathan, A Civil Action [all]
Map of the Ashland, Mass., toxics site [Blackboard]
The Blue Bus: A Hypothetical [Blackboard]
Levels of Proof/Causation/(Un-)Certainty – and Contexts [Blackboard]

Complex litigation: The challenges
Basic structure of the trial
The interplay between process and substance (of the Federal Rules of Civil Procedure ...)
The interplay between abstract reasoning and the lives of real people
Causation and the common law
Standards of certainty in law: criminal trials, civil lawsuits, government regulation, legislation
CLASS #4: WED., SEPT. 26       PUBLIC LAW -- INTRODUCTION

4-1:  The Administrative Response: CERCLA (Superfund) and Brownfields

- NLS3: pp. 265-271, 886-894 (through Note 4); 910-916 (through note 7); 931-934 (end before Starfield excerpt); 940-945 (Notes 8-10, 12-14); 1017-1021 (through Note 3); 1023 (Note 3)

- Environmental remediation by private (civil) vs. public (administrative) actions
- Woburn and CERCLA
- Scope of the federal Superfund program; legal issues
- CERCLA today
- Has CERCLA been a success?
- Brownfields reform – has this been a success?
- What’s next?

4-2:  Administrative Law: How Agencies Work

- NLS3: pp. 376-384; 428-434

- The rise of administrative law
- Why administrative agencies matter
- Agency roles: executive, legislative and judicial
- *Chevron* deference – greasing the machine

CLASS #5:  WED., OCT. 3       REGULATORY STRATEGIES I

- NLS3: pp. 469-470 (environmental statutory design – a “taxonomy”)

5-1:  Harm-Based Standards: The Clean Air Act

- NLS3: pp. 551-561; 562-564; 568-571 (Scalia opinion); 572-577 (Notes 2, 4, 5-10); 577-578 (introduction only); 583, 585 (top), 616-619; 593-596
Chart: Clean Air Act Title I: Required Measures for Ground-Level Ozone Control [Blackboard]


- Harm-based standards: The bottom line up top
- Clean Air Act: Background and structure (briefly)
- Clean Air Act Title I: NAAQS
- State Implementation Plans
- Trans-boundary pollution
- Harm-based regulation within a federal system
- Control of climate change emissions

5-2: **Technology-Based Standards: The Clean Water Act**

NLS3: pp. 620-635; 641-650, 655 (Note 6 and Section D. (intro.))


- Clean Water Act: Background and structure
- Technology-based standards
- Technology vs. design standards
- Command-and-control as a model
- Comparing the CWA and the CAA

**CLASS #6: WED., OCT. 10  REGULATORY STRATEGIES II**

6-1: **Technology-Forcing Regulation**

NLS3: pp. 743-744; 749-754; 770-771 (Note 21)


- Technology-forcing regulation – how forceful is it?
- California’s GHG standards for cars and trucks
- *Boomer* revisited – 18 months … or what?

### 6-2: NEPA and the Environmental Impact Statement: Federal Disclosure

- NLS3: pp. 471-478; 490-494 (Notes 7-9); 495-498 (Notes 13-14); 503-506 (Notes 3-6); 507-513; 515-517 (Notes 1-4); 519-522 (Notes 6, 9, 11-12)

- NEPA: The mechanics
- NEPA: Key issues
- Has NEPA succeeded?

### 6-3: Requirements for Private (Corporate) Disclosure

- NLS3: pp. 528-535
- Toxic Release Inventory – please explore your neighborhood, via: [www.scorecard.org](http://www.scorecard.org)

- EPCRA – The “right to know” law
- Corporate disclosure: The record so far
- The TRI and citizen action

→ **Mid-Term Take-Home Exam ↔**

*To be distributed by email today; Due Wed., Oct. 17 by 5 p.m. – please email to instructor*
CLASS #7: WED., OCT. 17   DEVOLUTION

7-1: Federalism in Environmental Policy

- NLS3: pp. 324-328; 331 (Note 4); 340-341; 351-352; 356-357 (Note 6); 357-358 (Sec. 2 introduction); 368-369 (Note 8); 375 (Note 9)

- Realignments in federal and state authority
- Pre-emption and federal supremacy
- Federal commerce power and its limits
- States, actors and the federal government – pressing for primacy

7-2: The Public Trust

- NLS3: pp. 1065-1074; 1080-1091 (Mono Lake decision); 1099-1104 (Notes 3-5; 7-10); 1104-1105 (Introduction)

- Public trust: An ancient doctrine applied to a new world
- Limits of the doctrine
- How well can environmental law adapt to new challenges?

Mid-Term Take-Home Exam due by 5 p.m. on Wednesday, October 17, by email

CLASS #8: WED., OCT. 24   REGULATORY STRATEGIES III

8-1: Cost-Benefit Analysis

- NLS3: pp. 676-678; 684-700; 700-706 (SDWA and C/B)

- Cost-benefit analysis: pros and cons
- When is C/B useful? When is it not? Is the problem C/B itself or how it is used (and of who uses it)?
- C/B approaches in major environmental statutes – a look at the Safe Drinking Water Act
- Pricing natural resources
- Distinguishing cost-benefit analysis from cost-effectiveness analysis

8-2: Market-Enlisting Mechanisms and their Critics

- Bolling, Reuben, “Tom the Dancing Bug” [cartoon] (1992) [Blackboard]
- SO2 Allowance Trading Prices, Air Daily (Aug. 31, 2007) [Blackboard]

- Market-enlisting mechanisms: Rules vs. standards
- Clean Air Act Title IV: Allowance trading
- Other contexts: water, fisheries, greenhouse gases
- Has allowance trading been a success?
- Emissions markets and equity
- Emission markets and ethics

Class #9: Wed., Oct. 31 Regulatory Strategies IV

“Roadblock” Statutes: The Endangered Species Act

- NLS3: pp. 772-815
- Keystone Center, The Keystone Working Group on Endangered Species Act Habitat Issues, Executive Summary (April, 2006), pp. 5-8, at:


- The ESA: Statutes that “just say No” (or is it “Maybe”?)
- ESA: What does it protect?
- ESA: Major provisions
- The listing process: The key to the Act
- Federal consultation and jeopardy
- Babbitt v. Sweet Home and the cutting edge: The ESA on private land
- Loose planks in the roadblock – or safety valves on the statutory vessel?
- Promise and practice

**CLASS #10: WED., NOV. 7 REGULATORY STRATEGIES V**

**Product Regulation and Market-Access Controls (FIFRA and ToSCA)**

- NLS3: pp. 816-844

- FIFRA: Of burdens of proof and benefit/cost analyses
- FIFRA: The alternatives to product registration/review
- ToSCA: What risks are unreasonable?
- ToSCA: The incentives not to know
Chemical regulation and the food we grow and eat

**CLASS #11: WED., NOV. 28  EQUITY**

**Environmental Justice: The Equity Dimension**

- An Issue about Equity: chart [Blackboard]
- NLS3 (September, 2002) [draft section of Plater text on environmental justice] [Blackboard]
- NLS3: pp. 63-64
- NLS3: pp. 604-611

- Horizontal equity
- Distributive justice and economic efficiency
- Types of equity and environmental justice issues
- The legal analysis and results
- Discriminatory “animus” (intent) and “impact”
- A regulatory “solution”
- Policy by Executive Order
- Does the legal system effectively promote environmental justice?
CLASS #12: WED., NOV. 28   PROPERTY AND POLITY

12-1:  Takings

NLS3: pp. 1127-1128; 1135-1153 (Pennsylvania Coal, Penn. Central, Lucas); 1157-1165 (Tahoe-Sierra and Notes 1-9, 11); 1165-1167 (takings and the public trust)

Lingle [excerpts] [Blackboard]

NLS3: pp. 1169-1172 (Nollan and Dolan)

- Private property and public (e.g., environmental) protection
- The 5th and 14th Amendments
- Physical takings
- Regulatory takings
- Penn. Central: The standard modern doctrine
- Lucas and the categorical rule
- Tahoe-Sierra and Lingle: Return to a middle ground
- Exactions: Nollan and Dolan

12-2:  Eminent Domain

NLS3: pp. 1116-1122

Kelo [excerpts] [Blackboard]

Eminent domain charts, New York Times [Blackboard]


- Eminent domain: How far is too far?
- Kelo – Precedent and the rule of the Supreme Court
- What impacts are likely? What political fallout? What environmental impacts?

No class on Wed., Nov. 21; Have a Happy Thanksgiving!
CLASS #13: WED., DEC. 5  ENFORCEMENT

13-1  Government Enforcement

- NLS3: pp. 957-958, 962-964, 968 (Note 3 and C. (Introduction)), 972-977 (Notes 2-8), 985-987 (Notes 2-5), 999-1009

- Criminal and civil enforcement: How do they differ?
- What’s the record of success?

13-2:  Citizen Suits and “Standing to Sue”

- NLS3: pp. 402-403 (Section 2, Introduction); 1027-1029; 1033-1037 (Notes 2-7); 411-413 (Laidlaw); 414-416 (Notes 1, 2, 6).
- Citizen Suit Provisions of the Clean Water Act [Blackboard]
- Massachusetts v. EPA, 549 U.S. __, 127 S. Ct. 1438 (2007), Part IV of the opinion of the Court, and Justice Roberts’s dissent [Lexis or U.S. Supreme Court web site, at: www.supremecourtus.gov/opinions/06pdf/05-1120.pdf ]

- Elements of the citizen suit
- Statutory vs. constitutional limitations
- The line between public and private law
- Standing and climate change
- Continuing viability of the citizen suit
13-3 Alternative Dispute Resolution (ADR)

NLS3: pp. 1042-1049

➢ Rejecting the “binary” adversarial model
➢ Necessary preconditions
➢ ADR: How does it work? How well does it work? A new legal universe?

→ End-of-Term Take-Home Exam ←
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