Environmental Law
UEP/CE-207 [autumn, 2008]

SYLLABUS

Department of Urban and Environmental Policy and Planning (UEP)
Wednesdays, 6:30 – 9 p.m. (starts September 3)
Class meets in Anderson Hall, room 112

NOTE: This Syllabus is a work in progress. Assignments for Classes #1 and #2 (and related Blackboard postings) are accurate and complete, but the remainder of the Syllabus is not – although it’s now (Sept. 1) pretty close. It will be generally updated in the coming week, and then tweaked throughout the semester. Please review the About the Course and About the Instructor memos for more details about our class. – Rusty Russell

The current – and official – version of this syllabus is posted here on the class website. It may be periodically updated. Latest update: September 1, 2008

NOTES:

- Please read selections in the order in which they are listed.
- Unless specified, readings in the ELE&E 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 ELE&E text contains several useful appendices – specifically, a glossary, list of acronyms and table of cases (with page references to the text).
- Note that many readings are posted on the Tufts Blackboard site.

CLASS #1: WED., SEPT. 3 INTRODUCTION

Introduction to the Course

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

- Four Hypotheticals (see below) [Blackboard and Handout].
- Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) [Blackboard and Handout].
- Transcript of Oral Argument of Petitioners in Massachusetts v. U.S. Environmental Protection Agency, November 29, 2006 (case decided on
April 2, 2007, at 549 U.S. 497, 127 S. Ct. 1438), pp. 12 (line 23) to 17 (line 13) [Blackboard and Handout].

📖 The state and federal court systems: a chart [Blackboard].
📖 The federal judicial districts and circuits: a map [Blackboard].

Please read the following for background as soon as you can:

📖 A Chronology of Federal Environmental Statutes, 1871-2003 [please skim] [Blackboard].

❖ 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 does 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
➢ Basics of the court system
➢ 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, and its much later application in Massachusetts v. EPA

➔ Please begin reading Jonathan Harr’s A Civil Action; we will discuss it in Class #3 on Sept. 17 ☝
CLASS #2: WED., SEPT. 10  COMMON LAW & STATUTORY LAW

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


- 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
- Key defenses: valid permits, pre-emption, statutes of limitation
- Remedies

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

- *Open Space Institute v. American Electric Power*, Brief of Plaintiffs-Appellants (Dec. 15, 2005), pp. 1-2, 22-26, 65 and the unnumbered page following page 65 (page numbers are those marked on the document itself) [Blackboard].

- What is “public law”?
- Federalism – circles of authority

→ The Casebrief assignment will be emailed to you by midnight on Mon., Sept. 8, along with instructions. It is due by 11 p.m. on Wed., Sept. 17 – emailed to Rusty.Russell@tufts.edu.
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. 17  COMPLEX ENVIRONMENTAL CASES

Complex Litigation: In Literature and in Law

- Harr, Jonathan, *A Civil Action* [all].
- 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. 24  PUBLIC LAW – INTRODUCTION

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

Acushnet Co. v. Mohasco Corp., 191 F.3d 69 (1st Cir. 1999) [excerpts] [Blackboard].


- 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: **The Administrative Response: RCRA**


- How does RCRA work?
- Interface with CERCLA
- Is it truly “cradle to grave”?
- The definition game: hazardous or Hazardous?
- Has RCRA been a success?

**CLASS #5: WED., OCT. 1 ** **ADMINISTRATIVE LAW AND AGENCIES**


- The rise of administrative law
- Why administrative agencies matter
- Agency roles: executive, legislative and judicial
- *Chevron* deference – greasing the machine
Chevron: The “bubble policy” and the Clean Air Act

CLASS #6: WED., OCT. 8  HARM-BASED STANDARDS, MARKETS AND THE CLEAN AIR ACT

6-1: Harm-Based Standards: The Bottom Line Up Top

- Massachusetts v. EPA, 467 U.S 837 (1984) [excerpts] [Blackboard].
- Chart: Clean Air Act Title I: Required Measures for Ground-Level Ozone Control [Blackboard].

6-2: Market-Enlisting Mechanisms and their Critics

- SO2 Allowance Trading Prices, Air Daily (Fri., Aug. 31, 2007) [Blackboard].

- Clean Air Act: Background and structure
- Clean Air Act Title I: NAAQS
- State Implementation Plans (SIPs)
- Trans-boundary pollution
- Harm-based regulation within a federal system
- Control of climate change emissions
- 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

Mid-Term Take-Home Exam

To be distributed by email today;
Due Wed., Oct. 15 by 5 p.m. – please email to instructor
**CLASS #7: WED., OCT. 15   WATER POLLUTION AND WATER RIGHTS**

**7-1: Technology-Based Standards: The Clean Water Act**

- *Law Stories*, pp. 43-76 (EPA v. Reserve Mining Co.).

- Clean Water Act: Background and structure
- Technology-based standards
- Performance vs. design standards
- Command-and-control as a model
- Water quality standards, TMDLs and the bottom line
- An initial comparison: CWA vs. CAA

**7-2: Water Rights: A Brief Overview**


**7-3: Wetlands**


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**CLASS #8: WED., OCT. 22   CONSTITUTIONAL AND STRUCTURAL ISSUES**

**8-1: Federalism in Environmental Policy**

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* [SWANCC], 531 U.S. 159 (2001) [excerpts] [Blackboard].
Federal commerce power and its limits
- **SWANCC:** The Commerce Clause, the CWA and wetlands
- Realignments in federal and state authority
- Pre-emption and federal supremacy
- States, actors and the federal government – who takes the lead?

8-2: **The Public Trust**

- *Environmental Law,* pp. 31-32.

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

**CLASS #9: WED., OCT. 29 NEPA AND DISCLOSURE**

9-1: **Legisitating an Open Governmental Process**

- NEPA, §§101 and 102 [Blackboard].

9-2: **Requirements for Private (Corporate) Disclosure**


  - NEPA: The mechanics
  - NEPA: Key issues
  - Has NEPA succeeded?
“Little NEPAs”
EPCRA – The “right to know” law
Corporate disclosure: The record so far
The TRI and citizen action

CLASS #10: WED., NOV. 5  PROTECTING SPECIES AND ECOSYSTEMS

Toles, Tom, editorial cartoon (1997) [Blackboard].


The ESA: Statutes that “just say No” (or is it “Maybe”?)
ESA: What does it protect?
*TVA v. Hill*: Tiny fish stops a big dam (for a while)
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
Is there another way?

CLASS #11: WED., NOV. 12  PROPERTY AND LOCAL GOVERNMENT LAW

11-1:  Takings


*Law Stories*, pp. 237-281 (*Lucas*).


Municipal powers
- Local government law: Regulatory strategies
- Planning and law
- Takings: Physical and regulatory
- Loretto, Penn Central and Lucas
- Tahoe-Sierra: Return to a middle ground
- Exactions: Nollan and Dolan

11-2: **Eminent Domain**


- Eminent domain: How far is too far?
- *Kelo* – Precedent and the rule of the Supreme Court

**CLASS #12: WED., NOV. 19  EQUITY AND ENFORCEMENT**

12-1: **Environmental Justice**


- Horizontal equity
- Distributive justice and economic efficiency
- Types of equity and environmental justice issues
- The legal analysis and results
- Does the legal system effectively promote environmental justice?

12-2: **Government Enforcement**


- Enforcement: The basics
- What’s the record of success?

12-3: **Citizen Suits and “Standing to Sue”**

- *Environmental Law*, p. 50-56, 228.
- Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) [excerpts] [Blackboard].

- 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

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**Written Assignment – Law In Action – due by noon on Mon., Nov. 24, by email**

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**No class on Wed., Nov. 26; Have a Happy Thanksgiving!**

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**CLASS #13: WED., DEC. 3  INTERNATIONAL ENVIRONMENTAL LAW**


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End-of-Term Take-Home Exam
To be distributed by email today;
Due Mon., Dec. 15 by 10 p.m. – emailed to instructor