Department of Urban and Environmental Policy and Planning (UEP)
Tuesdays, 6:30 – 9 p.m. (starts September 8)
Class meets in Anderson Hall, room 112

The current – and official – version of this syllabus is posted here on the class website.
Latest update: December 1, 2009

NOTES:

❖ Please read selections in the order in which they are listed.
❖ Unless specified, readings in the NLS 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.
❖ 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: TUES., SEPT. 8  INTRODUCTION

Introduction to the Course

Please try to read the following (about 8 pages total) for our first meeting:

📖 Four Hypotheticals (see below) [Blackboard]
📖 (A fifth hypothetical – dueling op-eds about windpower:) Murkett, Peter,
“A Sacrifice Worth Making,” and Tillinghast, Eleanor, “Turbines Are a
Costly Blight,” Boston Globe, Mon., July 13, 2009 [Blackboard]
📖 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. __, 127 S. Ct. 1438), pp. 12 (line 23) to 17 (line 13)
[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 a week (the second and third items can be perused quickly):


- A Chronology of Federal Environmental Statutes, 1871-2003 [Blackboard]

- Chapter 2, NLS3: pp. 66-70 (“A Modern Statutory Array”)

- 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? How might the legal process affect the outcome? What is law and what purposes does it serve? In what ways do private markets, wealth, politics and voting power influence the development and resolution of 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

→ Please begin reading Jonathan Harr’s *A Civil Action*; we will discuss it in class on Sept. 22 ←
Exercise #1, Common Law Analysis, has been posted on Blackboard. It is due by 11 p.m. on Tues., Sept. 22 – emailed to Rusty.Russell@tufts.edu.

Class #2: Tues., Sept. 15  Common Law & Statutory Law

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

Chapter 3, NLS4: pp. 3-1 to 3-3 (prior to Borland); pp. 3-7 to 3-15 (the famous Boomer case and notes); p. 3-15 (Sec. A.4, Introduction); p. 3-19 to 3-23 (Notes 2-4, 9, 11-14); pp. 3-24 to 3-25 (Sec. A.5, Negligence); pp. 3-25 to 3-30 (Sec. A.6, Strict Liability, and Notes 1-5); p. 3-48 (Sec. C.2(a), Compensatory Damages); p. 3-51 (Sec. C.2(c), Punitive Damages); 3-53 (C.2(d), Limitations on Punitive Damages, paragraph 1); pp. 3-55 to 3-62 (Exxon Shipping case and Notes 1-6)


- 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 – and their limitations (the Exxon Shipping case)

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: TUES., SEPT. 22

COMPLEX ENVIRONMENTAL CASES

Complex Litigation: In Literature and in Law

Chapter 4, NLS4: pp. 4-1 to 4-6 (Sec. A.1); p. 4-17 (Sec. B, introduction); pp. 4-22 to 4-25 (Notes 1-3); pp. 4-32 to 4-35 (Notes 5-8); pp. 4-35 to 4-36 (Sec. C, introduction); pp. 4-48 to 4-52 (Sec. C.b); Chapter 3, NLS4: pp. 3-31 to 3-32 (Sec. B.1 and B.2 (introduction)); p. 3-35 (Notes 2-3)

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: TUES., SEPT. 29  PUBLIC LAW – INTRODUCTION

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

- Chapter 19, NLS3: pp. 886-894 (through Note 4); 910-916 (through note 7); 931-934 (end before Starfield excerpt); 940-945 (Notes 8-10, 12-14); Chapter 21, NLS3: pp. 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
- Burlington Northern v. United States
- Has CERCLA been a success?
- Brownfields reform – has this been a success?
- What next?
4-2:  **Administrative Law: How Agencies Work**

- Chapter 7, 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: TUES., OCT. 6  REGULATORY STRATEGIES I**

- Introduction to Part III: NLS3: pp. 1-3 (environmental statutory design – a “taxonomy”)

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

- Chapter 11, 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**

- Chapter 12, 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

→ **Mid-Term Take-Home Exam** ←

*To be distributed by email today; Due Fri., Oct. 16 by 5 p.m. - please email to instructor*

→ **NB: No Class the Week of October 12** ←

**CLASS #6: TUES., OCT. 20   REGULATORY STRATEGIES II**

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

- Chapter 15, 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**

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

6-3: Requirements for Private (Corporate) Disclosure


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

CLASS #7: TUES., OCT. 27 REGULATORY STRATEGIES III

7-1: Cost-Benefit Analysis


- 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 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

7-2: 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 #8: TUES., NOV. 3 REGULATORY STRATEGIES IV

“Roadblock” Statutes: The Endangered Species Act

Chapter 16, NLS3: pp. 772-815


➢ 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 #9: TUES., NOV. 10 REGULATORY STRATEGIES V

9-1: Product Regulation and Market-Access Controls (FIFRA and ToSCA)

➢ Chapter 17, 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
➢ ToSCA: Reform in the wind
➢ Chemical regulation and the food we grow and eat
CLASS #10: TUES., NOV. 17   PROPERTY AND POLITY

10-1: Takings

- Chapter 23, 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)
- Chapter 23, 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: Return to a middle ground
  - Exactions: Nollan and Dolan

10-2: Eminent Domain

- Chapter 23, NLS3: pp. 1116-1122
- Keloland [excerpts] [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?
Environmental Justice: The Equity Dimension

- An Issue about Equity: chart [Blackboard]
- Draft section of Plater text on environmental justice (September 2002) [Blackboard]
- Chapter 2, NLS3: pp. 63-64
- Chapter 11, 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?

Written Assignment – Law In Action – due by noon on Tuesday, December 1, by email to the instructor
CLASS #12:   TUES., DEC. 1   ENFORCEMENT

12-1:   Government Enforcement


  Chapter 20, NLS3: pp. 957-958, 962-964, 968 (Note 3 and C. (Introduction)),
         972-977 (Notes 2-8), 985-987 (Notes 2-5); Chapter 21, NLS3: pp. 999-1009


  Wirzbicki, Alan, “EPA Seen Lax on Pollution Enforcement; GAO Says

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

12-2:   Citizen Suits and “Standing to Sue”


  Chapter 7, NLS3: pp. 402-403 (Section 2, Introduction); Chapter 21, NLS3:
         pp. 1027-1029; 1033-1037 (Notes 2-7); Chapter 7, NLS3: pp. 411-413
         (Laidlaw); 414-416 (Notes 1, 2, 6)

  Citizen Suit Provisions of the Clean Air 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 [use Lexis or U.S.
  Supreme Court web site, at: www.supremecourttus.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

12-3:   Alternative Dispute Resolution (ADR)


  Chapter 21, 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?
What are the components of international law?

What is the difference between “soft” law and “hard” law in the international arena?

In what ways does international law differ from the use of law domestically (i.e., in the U.S.)?

End-of-Term Take-Home Exam

To be distributed by email today;
Due Mon., Dec. 21 by noon – email to instructor