

**Environmental Law:
UEP/CE-207 [autumn, 2010]**

ABOUT THE COURSE

**Department of Urban and Environmental Policy and Planning (UEP)
Tuesdays, 6:30 – 9 p.m. (starts September 7)
Class meets in Anderson Hall, Room 112**

A. Summary of the Course

This one-semester course will introduce you to environmental law and the regulatory process.

The reach of environmental law and policy is extraordinarily broad. This class focuses on representative issues that will introduce students to legal reasoning, policymaking and politics – and their interactions. In doing so, we will explore two fundamental dichotomies, the former procedural, and the latter substantive. The first offers contrasting approaches to environmental protection: that of the traditional common (judge-made) law, and that of the massive yet still growing field of government regulation. The second examines the manner in which the legal system addresses the two major (and highly interconnected) categories of environmental threats we face – to public health, and to ecosystems and natural resources.

Environmental law also will be considered in its role as a legal and policy instrument – that is, as a technical body of rules and standards that animate private and public efforts to address the significant environmental and public health challenges we face right now. Students will be introduced to the legal process, and to its particular (and sometimes peculiar) institutions and specialized analytic approaches. These include the structure of the court system; the function of administrative agencies; the powers of state and local governments; the scope of common law, legislation and regulation; and the role of constitutional adjudication.

Central to the course will be an examination of the key policy instruments that promote environmental protection. These include the use and abuse of market-based mechanisms, cost-benefit analysis, technology-based performance standards and other “command-and-control” strategies, harm-based thresholds, and the structure of enforcement regimes – traditional and alternative.

Substantively, the class will look at contaminated waste sites and brownfields, toxics and pesticides, air and water pollution, endangered species, environmental justice, environmental impact statements, property rights, and enforcement by agencies and citizens.

Although an interest in the environment and environmental policy will help you get the most out of the course, the presumption is that you have not previously studied law or regulation.

B. Course Work

Each student will participate in one student panel during class, and complete one short exercise, two take-home exams and a longer paper. Each of the exams will cover roughly one half of the course. Details about assignments will be posted on the class Blackboard web site.

C. The Reading

Assigned weekly reading averages about 60 pages (about twice that if you factor in *A Civil Action*, although it is a very quick read). But the reading varies considerably from week to week, both in length and complexity. Some selections will be as accessible as today's newspaper; others will demand your full, focused attention, yet remain challenging. News of environmental issues that relate to the course will be emailed as it happens, and worked into our discussions.

Generally, course readings will be in one of three formats:

1. By purchase. You should buy the Plater text and *A Civil Action*.
2. Posted on the class website on Blackboard. See below for information on how to gain access to the site.
3. On line via Lexis/Nexis or another electronic service. If the latter, I generally will provide the name of the service or a more precise URL. Initially, note three general resources that may be helpful:
 - A compendium of on-line legal dictionaries: www.online-dictionary.net/law/
 - U.S. Supreme Court cases on line: <http://supct.law.cornell.edu/supct/>
 - The most recent U.S. Supreme Court cases: www.supremecourtus.gov/opinions/opinions.html

Two books are assigned. Both are available at the Tufts bookstore, and elsewhere. Please note that you will need the *fourth edition* of the Plater text, which is listed at the bookstore for \$160.00. Used editions are not yet available.

- Plater, Zygmunt J.B., Robert H. Abrams, Robert L. Graham, Lisa Heinzerling, David A. Wirth and Noah D. Hall, *Environmental Law and Policy: Nature, Law and Society, 4th ed.* (New York: Aspen Publishers, 2010).
- Harr, Jonathan, *A Civil Action* (New York: Random House, 1995) [paperback edition], 512 pp. [used copies may be available at the bookstore].

Tisch Library has been asked to order a copy of the fourth edition of the Plater text and put it on reserve for this course, although that may not happen right away. In addition, the following books have been placed on three-hour reserve at the library:

- Grossman, Lewis A. and Robert G. Vaughn, *A Documentary Companion to A Civil Action: With Notes, Comments and Questions* (New York: Foundation Press, 1999).
- Lazarus, Richard J. and Oliver A. Houck, editors, *Environmental Law Stories* (New York: Foundation Press, 2005).

D. What You Will Need

I expect you to have the following capabilities:

- Ready access to the Internet, and a functioning email address that you check at least daily.
- A basic knowledge of Lexis/Nexis, the database for law and news. All Tufts students not auditing should have access to this service, both in the library and remotely. The Tufts libraries host Lexis/Nexis tutorials, and offer other, more informal training – both on site and on line. In addition, I will provide basic information about the use of this database, and will conduct a simple demonstration in class. I am confident that you'll have no difficulty using this important resource.
- Familiarity with the Tufts Blackboard site, at <http://blackboard.tufts.edu>. The up-to-date versions of the syllabus and other key materials are found *only* on this site. You should register for the site as soon as possible (you'll need a Tufts ID), although for the first week or so of the course it will remain open to all. To get there: Google "Tufts" and "Blackboard," click on the top link, pick Course Catalogue, enter "207" and choose this course.

E. Classes

Classes will be conducted in both lecture and guided discussion formats, with emphasis on discussion. You are expected to prepare for, attend and actively participate in class. Unexcused absences will negatively affect your final evaluation.

Class meets once a week for two and a half hours. There will be at least one brief break, usually in the middle third. An effort will be made to provide several different learning situations each week.

F. Auditing

Auditing is permitted, consistent with university policy. Auditors may, if they wish, complete assignments and receive comments on them. They may not, however, participate in graded group activities (i.e., the panels).

G. Research Assistance

As noted, you'll need a very basic understanding of Lexis/Nexis. Tisch Library provides formal tutorials as well as informal help. It also offers much else in the way of research assistance. You can tap into the expertise that resides there by contacting the library's liaison to UEP:

Regina Raboin, Reference & Instruction Librarian for UEP
Reference & Collections
Tisch Library

Tel.: 617/627-4221
email: Regina.Raboin@tufts.edu

H. Evaluation and Expectations

As noted, to get the most out of UEP-207, you will need to complete the assigned reading in advance, attend class and participate actively in the discussion.

In addition to two written assignments, there will be two take-home exams. Each will cover about half of the course (that is, the latter is not cumulative).

More detailed information about grading will be provided on request.

<u>Activity</u>	<u>Due</u>	<u>% of Evaluation</u>
Class participation:	--	12.5% [see note (3) below]
Common Law Analysis:	Sept. 21	7.5%
Student panels:	various	12.5%
Mid-term take-home exam:	Oct. 12	20.0%
Law In Action paper:	Nov. 30	25.0%
End-of-term take-home exam:	Dec. 20	22.5%
		<hr/>
TOTAL:		100%

Notes:

- (1) Policy on late work: Without a valid and verifiable excuse, provided in advance, 20% credit will be deducted for each day an assignment is late; no credit on or after the fifth late day. If you are not certain whether this policy applies to you, please discuss the situation with me in advance.
- (2) Exercises/papers: These will be evaluated based on insightful analysis, creative thinking, knowledge of the relevant subject areas, effective use of sources (particularly assigned reading), and clear writing.
- (3) Class participation: The emphasis is on thoughtfulness, originality, preparation, consideration for others, and staying on point. In general, quality is more important than quantity. In addition to in-class discussion, which is strongly encouraged, the class participation component of the course encompasses substantive email exchanges and meetings with the instructor.
- (4) Exams: No exams or other assignments will be rescheduled to accommodate routine (e.g., Thanksgiving or end-of-semester break) travel plans.
- (5) Email: Unless otherwise specified, please email assignments to the instructor at either rustynet@comcast.net or Rusty.Russell@tufts.edu. Your files should include your name, and your name should also be on the document itself. Please make sure all documents are in a format readable by Windows 7 and Word 2003, 2007 or 2010 for PC, and include page numbers.

I. What You Will Learn

Here are the key knowledge centers, skills and competencies that this course will address:

1. The basic structure of the American legal process.
2. Details about the key substantive areas of environmental law and policy.
3. How the regulatory system works.

4. The major regulatory mechanisms and strategies used to advance environmental policymaking.
5. The role of the judiciary in the legal process.
6. The strengths and limitations of law in crafting environmental policy.
7. The role of law in shaping and mediating environmental controversies - and alternatives thereto.
8. How law and policy shape and resolve local environmental conflicts.
9. How to read and understand the decisions of courts and agencies.
10. The interrelated functions of constitutions, statutes, regulations and the common law.
11. How to perform basic law- and policy-related research.
12. How the legal system relates to other institutional power centers (the legislature, the executive and civil society) in creating environmental policy.
13. The different approaches and powers of the common law and of regulation.
14. The role that an individual can play in fashioning environmental policy through the use of law and regulation.
15. The legal system's overt - and hidden - ideologies.
16. An introduction to the language of the law.
17. The importance of tradition, hierarchy and precedent - and, conversely, how law can spark social change.

NOTE: This is last year's syllabus. The 2010 syllabus will be available before classes begin. However, the 2009 version of Environmental Law closely tracks the 2010 version. Please review the About the Course memo, which accompanies this syllabus, for updated information about the 2010 course. --Rusty Russell

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SYLLABUS

**Department of Urban and Environmental Policy and Planning (UEP)
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*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):

- 📖 Plater, Zygmunt J.B., Robert H. Abrams, William Goldfarb, Robert L. Graham, Lisa Heinzerling and David A. Wirth, *Environmental Law and Policy: Nature, Law and Society*, 3rd ed. and 4th ed. (Aspen Publishers: New York, 2004) [hereinafter "NLS3" or "NLS4," as applicable (these will be emailed to you)]: Introduction, NLS3: pp. xxix-xxxii; Chapter 1, NLS3: pp. 3-35; Chapter 2, NLS3: pp. 42-48; 77-102
- 📖 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)
-  Selected Nuisances, from Rodgers, William H., Environmental Law, 2d ed. (1994), pp. 114-116 [Blackboard]
-  Benjamin, Daniel K., “Common Law and Environmental Protection,” PERC Reports, Sept. 2001, pp. 12-13, at: www.perc.org/perc.php?id=410
-  Liptak, Adam, “From One Footnote, a Debate Over the Tangles of Law, Science and Money,” *New York Times*, Tues., Nov. 25, 2008, p. A16 [Blackboard]

- 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]
-  Open Space Institute v. American Electric Power, Brief of Defendants-Appellees AEP, et al. (Feb. 20, 2006), pp. 1-4, 19-23, 26-32 (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]
-  Engel, Kirsten H., "Harmonizing Regulatory and Litigation Approaches To Climate Change Mitigation: Incorporating Tradable Emissions Offsets Into Common Law Remedies," from *Symposium: Responses To Global Warming: The Law, Economics, and Science of Climate Change*, 155 *University of Pennsylvania Law Review* 1563 (June 2007) [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]
-  Anderson v. W.R. Grace & Co., Memorandum and Order on Motions for Directed Verdicts, June 9, 1986 (Skinner, J.) [Blackboard]
-  Anderson v. W.R. Grace & Co., Supplementary Memorandum on Plaintiffs' Motion for Reconsideration of Rulings on Motions for Directed Verdicts, June 27, 1986 (Skinner, J.) [Blackboard]
-  Saltzman, Jonathan, "Some Accuse Plucky Beverly Lawyer of Uncivil Actions," *Boston Globe*, Mon., July 6, 2009, p. B1 [Blackboard]
-  Daley, Beth, "State Releases Ashland [Mass.] Cancer Estimates," *Boston Globe*, Thurs., April 27, 2006, p. A8; Mishra, Raja, "Those Seeking Compensation Face Hurdles," *Boston Globe*, Thurs., April 27, 2006, p. A9; Map of the Ashland, Mass., toxics site [Blackboard]
-  Dean, Cornelia, "When Questions of Science Come to a Courtroom, Truth Has Many Faces," *New York Times*, Tues., Dec. 5, 2006, p. D3 [Blackboard]

- 📖 Liptak, Adam, "Experts Hired to Shed Light Can Leave U.S. Courts in Dark," *New York Times*, Tues., Aug. 12, 2008, p. A1 [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: 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)
 - 📖 Nakamura, Robert T. and Thomas W. Church, *Taming Regulation: Superfund and the Challenge of Regulatory Reform* (Wash., D.C.: Brookings, 2003), pp. 60-61, 70-77, 86-90, 102-07 [Blackboard]
 - 📖 Navarro, Mireya, "A Problem Rises to the Surface in Greenpoint," *New York Times*, Mon., Dec. 8, 2008, p. A23 [Blackboard]
 - 📖 Janofsky, Michael, "Changes May Be Needed in Superfund, Chief Says," *New York Times*, Sun., Dec. 5, 2004, Sec. 1, p. 36 [Blackboard]
 - 📖 Tarquinio, J. Alex, "New Law Turns Brown into Green for New York State," *New York Times*, Wed., July 23, 2008, p. C8 [Blackboard]
- 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]



Daley, Beth, “N.E. Faces Increase in Smog Warnings; New Rules Spotlight Harmful Exposure,” *Boston Globe*, Sat., July 12, 2008, p. A1 [Blackboard]



Venkataraman, Bina, “Road Hazard? Tufts Researchers Study Health Risks Highways May Pose in Neighborhoods,” *Boston Globe*, Sun., Apr. 12, 2009, p. B1 [Blackboard]



Tanner, Lindsey, “Study Links Exposure to Smog, IQ Scores,” *Boston Globe*, Mon., July 20, 2009, p. A5 [Blackboard]



Dean, Cornelia, “E.P.A. Is Told To Reconsider Its Standards on Pollutants,” *New York Times*, Wed., Feb. 25, 2009, p. A14 [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.))



Command and Control: Technology-Based Standards – The Clean Water Act [Blackboard]



Daley, Beth, “Clean Water Activists Take Aim at Androscoggin,” *Boston Globe*, Tues., Feb. 21, 2006, p. A1 [Blackboard]

- 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)



Committee on State Practices in Setting Mobile Source Emissions Standards, National Research Council, *State and Federal Standards for Mobile Source Emissions* (2006), pp. 115-17 [Blackboard]




Broder, John M., “Obama to Toughen Rules on Emissions and Mileage,” *New York Times*, Tues., May 19, 2009, p. A1 [Blackboard]



Barringer, Felicity, “E.P.A. Grants California the Right to Enforce Emissions,” *New York Times on the Web*, Wed., July 1, 2009 [Blackboard]

- 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


 Chapter 9, 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)

 DePalma, Anthony, "In Stadium Fight, Both Sides Wield the Environmental Statement," *New York Times* (Apr. 16, 2005), p. A12 [Nexis]

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

6-3: Requirements for Private (Corporate) Disclosure

 Chapter 10, NLS3: pp. 528-535


 Toxic Release Inventory – please explore your neighborhood, via: www.scorecard.org


 Deutsch, Claudia, "Climate-Change Scorecard Aims to Influence Consumers," *New York Times*, Tues., June 19, 2007, p. C3 [Blackboard]

- 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

 Chapter 13, NLS3: pp. 676-678; 684-700; 700-706 (SDWA and C/B)

 Sunstein, Cass R., *Risk and Reason – Safety, Law and the Environment* (New York: Cambridge Univ. Press, 2002), pp. 29-33, 120-128 [Blackboard]

 Rosen, Gary, "More Heat Than Light," *New York Times*, Sun., July 8, 2007, p. 20 (Magazine) [Blackboard]






 Belluck, Pam, "From Beaches to Pine Barrens, a Study Puts Values on New Jersey's Natural Assets," *New York Times*, Mon., May 21, 2007, p. B1 [Blackboard]

 Randall, David K., "Maybe Only God Can Make a Tree, but Only People Can Put a Price on It," *New York Times*, Wed., Apr. 18, 2007, p. B3 [Blackboard]

- 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]
-  Chapter 14, NLS3: pp. 712-727; 729-732 (“The Harsh Reality”); 732-736; 741-742 (Notes 10 and 11)
-  SO₂ Allowance Trading Prices, *Air Daily* (Aug. 31, 2007) [Blackboard]
-  Hilsenrath, Jon, “Currents – Environment: Cap-and-Trade’s Unlikely Critics: Its Creators – Economists Behind Original Concept Question the System’s Large-Scale Usefulness, and Recommend Emissions Taxes Instead,” *Wall Street Journal*, Thurs., Aug. 13, 2009, p. A7 [Blackboard]
-  Sandel, Michael, “It’s Immoral To Buy the Right to Pollute” (op-ed), *New York Times*, Dec. 15, 1997, p. A29 [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
-  Keystone Center, *The Keystone Working Group on Endangered Species Act Habitat Issues*, Executive Summary (April, 2006), pp. 5-8, at: <http://keystone.org/files/file/about/publications/ESA-Report-FINAL-4-25-06.pdf>
-  Nickerson, Colin, “What on Earth? Database to List All Named Species,” *Boston Globe*, Wed., May 9, 2007, p. A1 [Blackboard]

-  Barringer, Felicity, "Meadow Birds in Precipitous Decline, Audubon Says," *New York Times*, Fri., June 15, 2007, p. A19 [Blackboard]
-  Gold, Scott, "Tiny Insects Stave Off Texas Development," *Boston Globe*, Apr. 10, 2005 [Blackboard]
-  Yardley, William, "Wolves Are Set to Become Fair Game in the West," *New York Times*, Mon., Aug. 31, 2009, p. A11 [Blackboard]
-  Barringer, Felicity, "Bald Eagles, Thriving, Settle into Suburban Life," *New York Times*, Fri., June 29, 2007, p. A18 [Blackboard]
-  Easterbrook, Gregg, "Greener Pastures," *The New Republic*, Mar. 2, 1998, reprinted as "Getting Around the Takings Problem," in PERC Reports (June, 1998), pp. 3-5, at: www.perc.org/pdf/june98.pdf
 - 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
-  Goodman, Sara, "Experts Debate Ways to Reform 1976 Toxics Law," *New York Times Online*, Fri., Oct. 9, 2009 [Blackboard]
-  Roberts, Donald, "A New Home for DDT" [Op-Ed], *New York Times*, Mon., Aug. 20, 2007, p. A19 [Blackboard]
 - 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

9-2: Planning



Toles, Tom, editorial cartoon (Compromise Position on Habitat)



Chapter 25, NLS3: pp. 1245-1254

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



Kelo [excerpts] [Blackboard]














Yardley, William, "Anger Drives Property Rights Measures," *New York Times*, Sun., Oct. 8, 2006, sec. 1, p. 34 [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?

CLASS #11: TUES., NOV. 24 EQUITY


Environmental Justice: The Equity Dimension


-  An Issue about Equity: chart [Blackboard]
 -  Little, Amanda Griscom, "Not in Whose Backyard?" *New York Times*, Sun., Sept. 2, 2007, p. 17 (Magazine) [Blackboard]
 -  Draft section of Plater text on environmental justice (September 2002) [Blackboard]
 -  Chapter 2, NLS3: pp. 63-64
 -  Faber, Daniel R. and Eric J. Kreig, "Unequal Exposure to Ecological Hazards 2005: Environmental Injustices in the Commonwealth of Massachusetts," pp. 1-11, 38-59, at: www.socant.neu.edu/download/final_unequal_exposure_report_2005.pdf
 -  Pérez-Peña, Richard, "State Admits Plants Headed to Poor Areas," *New York Times*, Thurs., Mar. 15, 2001, p. B1 [Blackboard]
 -  Gerrard, Michael B., "Environmental Law; EPA Dismissal of Civil Rights Complaints," *New York Law Journal*, Nov. 28, 2003, p. 3 [Blackboard]
 -  Chapter 11, NLS3: pp. 604-611
 -  Featherstone, Liza, "E-Raced," *Grist Magazine*, Aug. 1, 2005, at: www.grist.org/news/maindish/2005/08/01/featherstone-ej/
 -  Dewan, Shaila, "Clash in Alabama Over Landfill's Plans to Take Tennessee Coal Ash," *New York Times*, Sun., Aug. 30, 2009, p. A12 [Blackboard]
 -  Arnold, David, "Pollution Checking Said To Lag in Mass.; EPA: Minority Areas Have Lower Rate," *Boston Globe*, Jan. 21, 2003, p. B1 [Blackboard]
- 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


 Duhigg, Charles, "Toxic Waters," *New York Times Online*, September 2009, at: www.nytimes.com/2009/09/13/us/13water.html (please review)


 Wirzbicki, Alan, "EPA Seen Lax on Pollution Enforcement; GAO Says Agency Dragging its Feet on Clean Air Act," *Boston Globe*, July 28, 2006, p. A2 [Blackboard]

- 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.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

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?

CLASS #13: TUES., DEC. 8 INTERNATIONAL ENVIRONMENTAL LAW



Chapter 26, NLS3: pp. 1257-1305



Wong, Edward and Keith Bradsher, "China Joins U.S. in Pledge of Hard Targets on Emissions," *New York Times*, November 27, 2009, p. A1
[Blackboard]

- 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*