SYLLABUS
ENVIRONMENTAL LAW and POLICY (LAW 7240)
Fall 2012

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Wednesday, Thursday – 10:45 – 12:10, Carlson Hall

Office Hours: M-T 10:45-12; Th 1:30-3:00

Course description: An introduction to legal and policy issues of environmental protection and decision-making, including study of both common law and statutory approaches to pollution control, and the theories and approach to federal laws governing environmental regulation.


Other Available Materials: A number of hornbooks and other materials are also available in this field. These are not required for the exam, but will expand your knowledge and understanding of the required readings if you are interested. The most frequently-used general loose leaf services in the field are BNA Environment Reporter and Environment Reporter Cases; and the Environmental Law Institute's Environmental Law Reporter. There are also a huge number of more specialized loose leaf services. (Some of my exam questions are inspired by (but of course, not identical to) recent environmental law cases that are included in these loose leaf services.) Both Westlaw and Lexis have a number of special environmental law databases, and a tremendous amount of environmental data and other information is available on-line. We cite to some of these in the book.

Objectives and Methodology: As stated in the Preface and Introduction to the text, the objective of this course is to teach all of the major concepts that guide modern environmental law, and the policies that drive them, without becoming immersed in the tremendous level of detail inherent in the actual practice of environmental law, which is impossible to cover in a survey course. We will explore the ways in which environmental law plays out in the real world, i.e., how real practitioners address and apply environmental law and policy, through a series of examples as well as standard teaching materials. Practitioners of environmental law invariably specialize in particular statutes or aspects of the field, and learn the necessary level of detail as they proceed. For an introductory survey course, it is far more important to understand all of the major principles that characterize the field. Through that approach, those of you who do not intend to specialize will know enough to help clients in a general business or other practice, and to seek appropriate help from specialists when needed. Those of you who do intend to practice will have the background necessary to take more advanced courses, and the conceptual understanding necessary to understand any statute or set of regulations you encounter in practice. However, you will also get a basic understanding of the structure and functioning of the most frequently-encountered federal environmental statutes.

Students should read all relevant statutory provisions along with assigned readings. Much of the material is difficult or impossible to understand unless the applicable statutory and regulatory
language is read along with the cases and materials. Note that some reading assignments are longer or shorter than others. On days in which we will be pursuing cases and issues of statutory interpretation in more depth, you should spend more time evaluating statutory and regulatory language in greater detail. More pages are assigned on days involving background, descriptive, or otherwise easier materials. Because environmental statutes and rules change so frequently, the most important things to learn in this course are the underlying concepts; how to read, interpret and apply statutes and regulations in this field; and how to understand the evolving interplay between law and public policy. Accordingly, it is possible that an exam question will be based on a completely hypothetical statute or regulation.

**Class attendance and participation** is important to this course and the 20% attendance rule in the College of Law Handbook and in ABA regulations will be enforced if necessary. The material is challenging, and is best understood through a combination of reading, explanatory discussion, and application during class. *All students should be prepared to answer the questions posed in the book, including in the sets of exercises that run through the book, because they are specifically designed to help you to understand how the concepts apply in practice.* The course covers a range of policy issues that are open to many legitimate views and interpretations, and therefore is much more interesting if explored through class discussion than through lecture alone.

**Computer use in class and material available on TWEN.** You may use computers in class to take notes, and to look for relevant material on the internet if you think it will help your understanding, or if it may help you add to class discussion. Using computers or other electronic devices for purposes not related to class (e-mail, texting, surfing the internet, computer games, etc.) is not allowed. It is both unprofessional and distracting to other students. All PowerPoint slides will be posted on the TWEN site. Therefore, you should not distract yourself by typing them into your notes during class rather than focusing on class lectures and discussion.

**Class recording policy.** Classes may not be recorded, using any audio or video methods (including your laptops or smart phones), without instructor permission. Permission will be granted liberally unless other class members object, but it is courteous to let others know when you are recording them, and I will announce to the class when someone is recording the session. Furthermore, class recordings may not be used for any purpose other than studying and reviewing by participants in this class. They may not be posted or reproduced in any form and on any medium without further instructor permission.

**Grading.** The course will be graded primarily based on an 8-hour, take-home open book examination. Exam grades may be raised by one half grade based on the quality of your class participation, including your responses to exercises and other questions in the book.

**ADA Disclosure:** The University of Utah seeks to provide equal access to its programs, services and activities for people with disabilities. If you will need accommodations in this class, reasonable prior notice needs to be given to Barbara Dickey, Associate Dean of Student Affairs, and to the Center for Disability Services (CDS) to make arrangements for accommodations. CDS is located at 200 S. Central Campus Drive, (Union Building), Rm 162 or you can call 801-581-5020. All written
information in this course can be made available in alternative format with prior notification.

TENTATIVE SCHEDULE and GUIDANCE

1. I hope to be able to follow this schedule closely. It is possible that we will vary the schedule somewhat based on the pace of class discussion or recent developments.

2. By focusing you on specific notes and questions from the text, I am not suggesting that you ignore other notes and questions which may help you to understand the material, and which we may discuss in class as well. (You are responsible for all of the assigned reading.) However, the issues highlighted below will be addressed in most detail in class discussion.

3. Each chapter in the book is designed to teach a particular set of concepts. Although I want you to learn the rest of the material as well, I will identify in this syllabus and in class the most important aspects you should derive from each chapter.

Chapter 1 – The Nature of Environmental Problems

8/22 Read Syllabus, Preface, Introduction and Chapter 1 (xxiii, 1-29)

The beginning of the chapter provides a background on the nature of problems addressed by the body of law known as “environmental law.” What are the worst environmental problems that we should address through legal means, and why? What problems should not be addressed by law, and why?

In the second part of the chapter, Professor Lazarus suggests that factors that pose particular challenges for environmental law relative to other areas of law. Be prepared to respond to those factors as suggested in Note 2 following the article excerpt.

The end of the chapter introduces you to the problem of climate disruption (often referred to as climate change or global warming), which we will use to explore the concepts you will learn throughout the book. In class, you should be prepared to discuss the questions following the problem statement.

Chapter 2 – Common Law Solutions

This chapter serves two main purposes. First, because common law claims continue to be brought to redress environmental injuries (including climate disruption), you should understand the standards for how they are applied to environmental disputes. Second, because many of the environmental statutes are based conceptually on common law principles, you should understand how those principles might be used in a statutory and regulatory context as well.
The chapter begins by reviewing some basic common law doctrines you learned in your first year, but places them in the context of environmental law. It then presents two of the classic early American cases interpreting and applying those doctrines to problems of pollution, followed by more recent cases addressing modern pollution issues.

8/23  Read Parts A and B.1-2 (31-49)
8/29  Read Parts B.3-4 (49-67)

In evaluating the Coase article, focus on Note 2. Be prepared to discuss the common law review problem. Also focus on the difference between the approaches articulated by Coase and Hardin, and how that might change the approach and potentially the results in the cases in the chapter, as well as the problem of climate disruption.

Chapter 3 – From Common Law to Administrative Law

This chapter provides a sufficient summary or review of the principles of administrative law needed to understand the rest of the course, but is not a sufficient substitute for a full course in Administrative Law, which everyone who plans to practice in this area should take. Much of this material will be presented in lecture format, but be prepared to discuss the holdings of the cases, because they are important to understand many of the other cases in the book, as well as specific questions and exercises. If necessary, discussion of this chapter may extend into the next session.

8/30  Read the full chapter (69-105)

In reading Part C, make sure you think about and understand the ongoing interactions between common law and statutory law approaches to environmental issues. It is not a simple “either/or” picture, and this dynamic is currently highly relevant to legal claims that have been brought recently in the context of climate disruption.

Chapter 4 – The Goals and Objectives of Environmental Statutes

9/5  Read full chapter (107-124)

This chapter is short and largely conceptual, but important. Use the climate disruption scenario to test your understanding of the ideas in Part A. For the statutory examples, focus on how Congress articulated different goals in different statutes, and why that might be.

Chapter 5 – Effects-Based Standards

Use the cases to understand how this kind of standard is set, and what factors the agency may and may not legally consider in adopting them. Think about the implications for agency lawyers counseling their clients in how to adopt this kind of regulation, and what information the agency must include in the rulemaking record. Similarly, think about what information
outside lawyers will want to include in comments on the proposed rule, and what issues will be allowed or precluded in a judicial challenge to the final rule. Also, what are the benefits and drawbacks of this kind of standard in achieving the goals of environmental statutes? What are the implications for regulated parties in terms of compliance and enforcement?

9/6 Read Parts A and B.1-2 (125-144)
9/12 Read Parts B.3 and C (144-168)

Use the atrazine problem to test your understanding of the issues inherent in risk assessment as a tool for setting environmental standards.

9/13 Read Chapter 5, Part D and Chapter 6, Part A (168-189)

Yes, there is a logic to this sequence. Comparing the Benzene case at the end of Chapter 6 with the Cotton Dust case at the beginning of Chapter 6 serves as a bridge to help you to understand the difference between effects-based and technology-based standards.

Chapter 6 – Technology-Based Standard Setting

In this chapter we will compare standards established based on effects to those based on available and feasible control technology. You should think about the same issues as you did in Chapter 5: How do agencies set this kind of standard, and what factors may and may not be considered in adopting them? What information must the agency include in the rulemaking record; what information will outside parties want to include in comments; and what issues are open to judicial review? What are the benefits and drawbacks of this kind of standard? What are the compliance and enforcement implications for regulated parties? The coal-fired power plant/mercury problem will help you to understand how much difference these factors can make in the stringency of the final rules (and therefore how clean the air will be and how much industry will have to pay to comply with the rules).

9/19 Read Part A.1 (190-206)
9/20 Read part A.2, B and C (206-224)

Chapter 7 – Cost-Benefit Approaches

This chapter evaluates cost-benefit analysis as an alternative to effects-based and technology-based standard setting. Note that, under applicable Executive Orders, cost-benefit analysis can play an important extra-statutory role in setting environmental standards even where the underlying statutes dictate different approaches.

9/26 Read Part A (225-244) Discussion will focus on the asbestos case.
9/27 No Class or Guest Lecture

10/3 Read Parts B and C (224-263)
We will use the problem at the end of the chapter to explore cost-benefit analysis in practice, and to evaluate and compare the different applications of effects-based, technology-based, and cost-benefit standards (in other words, to review Part II of the book).

Chapter 8 – Traditional Regulation

This part of the book moves from the various ways in which environmental regulations are issued to the ways in which they are implemented. For example, an effects-based standard might be implemented via prescriptive emission limits (traditional regulation) or through emissions taxes (economic incentives). Chapter 8 begins that inquiry by describing traditional regulatory approaches to implementing environmental standards.

10/4   Read Parts A and B (265-278)

Fall Break

10/17 Read Part C   (278-295)

This section will also give you a good understanding of how the Endangered Species Act (ESA) operates.

Chapter 9 – Economic Incentives

10/18   Read full chapter (297-322)

This chapter explains the use of economic incentives as an alternative to traditional regulation as a means of inducing compliance with environmental standards. Make sure you work out the numeric examples in the text as well as the offset problem to illustrate the concepts. (The math is very easy!) Focus on the distinction between economic efficiency and economic equity, i.e., maximization of total welfare versus distribution of welfare.

Chapter 10 – Information-Based Approaches

In addition to discussing the concepts of using information as an environmental protection strategy, this chapter in particular will give you a good understanding of how the National Environmental Policy Act (NEPA) operates, as well as the key role of information in regulating toxic substances. These are prime examples of how better information can be used to encourage better governmental decisions.

10/24   Read through Part A.1.a (323-350)
10/25   No Class or Guest Lecture

10/31   Read the rest of the chapter   (350-374)
Use the problems to better understand how information affects private and public environmental decisions.

Chapter 11 – Pollution Prevention and Recycling

11/1 Read full chapter (375-401)

In addition to introducing concepts of pollution prevention and recycling, this chapter will give you an introduction to the Resource Conservation and Recovery Act (RCRA), the federal law governing regulation of solid and hazardous wastes. Although this is one of the most perplexing issues of interpreting statutory and regulatory definitions in environmental law, and although it generated a very confusing (and arguably inconsistent) line of cases, the main purpose is to explore the tension between efforts to encourage recycling (pollution prevention) and to prevent environmental harm in the reuse and recycling of materials. The chapter also includes a brief introduction to the use of liability as a means of inducing pollution prevention, with an introduction to the Superfund statute (CERCLA) as the main example. This also provides an introduction to the discussion of liability allocation in CERCLA in Chapter 13.

Chapter 12 – Environmental Restoration

This chapter explores the use of environmental restoration as a means of achieving environmental goals in places that have already been damaged, or that will be damaged in order to allow economic activities. In that context, it addresses both restoration of past harm and the key role of compensatory mitigation as a *quid pro quo* to obtain a permit to conduct an activity that causes new environmental harm, under statutes such as the Surface Mining Control and Reclamation Act and section 404 of the Clean Water Act. The compensatory mitigation problem illustrates the difficulty of implementing this strategy in practice.

11/7 Read Parts A-C (403-426)

Thanksgiving Break 11/21-22

Chapter 13 – Private Cleanup Responsibility

In addition to addressing concepts of private liability and responsibility in environmental law, this chapter will complete your basic understanding of CERCLA. The atrazine problem will test your understanding of the concepts of statutory liability presented in this chapter.

11/8 Read Parts A.1-2 (443-465)
11/14 Read Part A.3 (465-488)

Thanksgiving Break
Chapter 14 – Allocation of Government Responsibility

This chapter focuses on the legal and political issues involved in deciding which levels and branches of government have authority and responsibility over environmental issues. The examples used will give you a more comprehensive understanding of how the various building blocks of the major environmental regulatory statutes fit together (especially the Clean Air Act and the Clean Water Act), which also serves as a review of virtually all of the major concepts in the course.

11/15 Read Parts A, B, and C.1, C.2.a and C.2.b (489-514)
11/28 Read Parts C.2.c and C.3 (515-540)
11/29 Read Part D (540-552) plus conceptual review and questions