Environmental Practice
Law 7260-1 – Fall 2012 through Spring 2013 – 2 Credits
Mondays 8:00 to 8:55
Room 108

Professor Jamie Pleune
Jamie.pleune@law.utah.edu

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.

Course Description. This syllabus describes the classroom portion of the year-long environmental practice course. Readings and discussions will address procedural and practical aspects of environmental law not covered in the substantive Environmental Law or Natural Resources courses, including client interviews and counseling, administrative practice and decision making, case development, jurisdiction, citizen suits, pleadings, discovery, liability analysis, remedies and relief (including preliminary relief and civil penalties), negotiations, selected aspects of trial practice, and ethical issues that commonly arise in environmental practice. This course is not a substitute for either Lawyering Skills or Pre-Trial or Trial Practice. Rather, it will address aspects of environmental practice not covered in basic skills courses, or that are covered more generally in those courses. However, this course does meet the College of Law skills course requirement.

Course Materials. All readings and exercises are from Anderson and Hirsch, ENVIRONMENTAL LAW PRACTICE, PROBLEMS AND EXERCISES FOR SKILLS DEVELOPMENT (Carolina Academic Press, 3d ed. 2010). Some of the exercises in the book may be modified for classroom simulations. The book also requires you to do original legal research, and refers to some other books and materials. Please be considerate of your classmates and use any hard copies of library materials (including case reporters, legislative history, etc.) for the minimum amount of time necessary. (Accessing materials online obviously will minimize conflicts.)

---

1 This is a year-long course that requires the successful completion of both fall and spring semester in order to receive credit. Partial credit is not an option, and enrolling for only one semester of this course is not an option. Students participating in the in-house environmental law clinic will be required to meet from 9:10 to 10:35.
**Other Available Materials.** A number of hornbooks and other materials are also available in this field, some of which are cited in the text. The most frequently-used general loose leaf services in the field are BNA Environment Reporter and Environment Reporter Cases; and the Environmental Law Reporter published by the Environmental Law Institute (ELI). There are also a number of more specialized loose leaf services. ELI, Westlaw and Lexis have special environmental law databases, and a tremendous amount of environmental documents, data and other information is available online, including in EPA and other government agency websites. We will discuss how to access some of these online resources during the course of the semester.

**Objectives and Methodology.** The objective of the course is to provide an introduction to many of the skills most commonly used in environmental practice. (Most of those skills can only be mastered after years of actual practice in the field.) The class will alternate between substantive readings and discussion of the problems and exercises in the book, lectures, and simulated class exercises. Students will participate in skills exercises in writing and in class to synthesize the substantive and strategic skills learned in the course. In reading and preparing for class, you are required to write down the answers to all assigned questions in the book designated as “Problems”. These answers will not be turned in to the instructor, but you will be expected to use them to discuss the problems in class. Therefore, this “writing” need only be sufficient for you to be able to participate in class. Some of the “problems” are quite simple. Others require more thought and analysis. You are also required to prepare all assigned questions in the book designated as “Exercises” for submission to the instructor and formal grading, as explained further below. Those assignments must be prepared as you would in real practice, with the obvious time constraints we have in this compressed format.

**Requirements and Expectations:**

**Full Class Attendance.** Because of the focus on in-class exercises and discussion, full class attendance, timely arrival, and participation are essential to this class. Although the 20% attendance rule in the College of Law Handbook and in the ABA regulations will be enforced if necessary, due to the experiential nature of this course, 100% attendance will be presumed. Because many of the exercises require partner work, please inform me of any scheduled absences as soon as possible. Even where individual students are assigned roles in specific class exercises, other students are expected to read and work through each exercise as well, and to comment on the issues raised. Students are encouraged to participate critically, that is, to express opinions and insights from personal experience rather than simply to recite from the materials. The course covers a range of ethical and other subjective issues that are open to multiple legitimate positions.
Computer Use In Class. You may use computers in class to take notes, and to look for relevant materials on the internet if you think it will be helpful to your understanding. Computer use for purposes not related to class (e-mail, surfing the internet for other purposes, computer games, etc.) is unprofessional, distracting to other students, obvious to the instructor, and not allowed. I reserve the right to lower your grade if you inappropriately use your computer in class.

Written and In-Class Exercises. All assignments must be submitted on time because you cannot participate adequately without having done the assignments. Late assignments will be penalized with reduced grades. Be as creative as you’d like to with class exercises—this should be fun as well as educational!

Grading. There will be no final exam or paper. Your final grade will be based on your performance in all of the written and oral exercises, as well as class participation. This is because I believe that you will learn more from this course by devoting your available time to the actual problems and exercises (including such things as developing real pleadings and motions), and will require more work before and during the class than you may be accustomed to. The payback, however, is that you will be finished with this course completely on the last day of class.

Grading will be based on:
- Written exercises 40% (5 assignments, worth 10% each, drop the lowest grade);
- In-class exercises 40% (5 exercises, worth 10 % each, drop the lowest grade);
- General class participation 20%.

Grading for class participation will consider attendance, timely arrival, and quality and quantity of participation. Grading for class exercises will be based on clarity, precision, judgment, depth and originality of written and oral presentations, and not on “winning or losing” an exercise. I understand that most of us get nervous about presentations. I will not grade based on “polish”. That will come over time. I will grade based on your level of preparation for and engagement in the exercises. (Which means that if everyone takes the class seriously and engages fully in the process, everyone should get a good grade.)

Schedule and Assignments.

This is the first time that I am teaching the course in this year-long format. Therefore, the exact schedule may be the subject of some trial and modification. However, the general plan is to spend approximately four class sessions on each of the five chapters in the book. Some classes will consist of lecture, discussions of readings, and discussions of questions in the book labeled “Problems.” Other classes will be devoted to the “Exercises” in the book—often with some role-playing practice.
The tentative schedule for the fall semester follows. It will be modified as needed through the semester. I will provide an updated assignment schedule for the Spring semester.

Some of the Exercises require individualized assignments. I will make those assignments when the class roster becomes more certain.

**Monday, August 27: Introduction**

Assignment: Bill McKibben, Global Warming’s Terrifying New Math, Rolling Stone (August 2, 2012)


American Board of Trial Advocates, Principles of Civility and Code of Professionalism

Class Theme: Introductions, discussion of course objectives and logistics

Class Exercise: Lecture and discussion: What does it mean to practice environmental law? Seeing the law as a set of tools, and seeing the law as an amalgamation of people.

**Tuesday, September 4: No Class.**

**Monday, September 10: Compliance Counseling (Chapter 1, cont.)**

Assignment: Read 1-55, do problems 1-1.11 (or 1.6)

Class Theme: Finding, Interpreting, and Applying the Law

Class Exercise: Review problems 1-1.6

Briefly review standards, formatting, and conventions for opinion letters.

**Monday, September 17: Compliance Counseling (Chapter 1, cont.)**

Assignment: For this assignment, we will combine the readings on pp. 52-63 and Problems 1.7-1.11 with Exercises 1.1 (pp. 58-60). The same facts and law apply to both exercises. You will do Exercise 1.1 in preparation for class.
Exercise 1.1: Write and submit an opinion letter addressing questions raised in Exercise 1.1. Remember that this is an in-house counseling memorandum and not an “advocacy” document. Think about how that should affect the content and tone of the memorandum. Legal opinion letters should contain the components of a memo, but be presented as a letter educating the client. Don’t forget to include a caption (To, From, Date, Subject), introduction, facts, discussion, and conclusion. Bring two printed versions of your letter to class.

Class Theme: Client counseling-effective written and oral communication

Class Exercise: The in-class exercise will be a role-playing exercise that will be conducted in twos. Half of you will play the role of co-counsel (“co-counsel”) and half of you will play the role of the client, Limeco’s CEO, Charlie Cashconscious (“CEO”), who is also an attorney. In anticipation of the meeting, assume that the co-counsels drafted (and the CEOs read) the opinion letter that you turned in this morning (addressing the four questions posed in Exercise 1.1). Co-counsels should be prepared to run the meeting by presenting their opinion (justified by the results of their research), suggesting an approach for moving forward, and responding to CEOs questions, just as corporate general counsel would do. CEOs should be prepared to ask informed, legally-focused, and relevant questions based on the priorities of the company. Assume that the CEO is an attorney and, as a practical matter, acts as the company’s corporate inhouse counsel.

Monday, September 24: Compliance Counseling (Chapter 1, cont.)

Assignment: Problems 1.12-1.19 and prepare answers to Exercise 1.2, which we will do as a role-play during class.

Class Exercise: Review problems 1.12-1.19; Role play Exercise 1.2 in pairs. One half of you will be assigned to the role of Carl Counsel, general counsel for Limeco. The other half will be assigned to the role of the law firm partner. You will not know what role you are assigned to play until class begins, so you should prepare the exercise with both perspectives in mind.
You will have twenty minutes to discuss: (1) whether you that the pre-heater is exempt from NSPS (if you are the law firm partner, assume that you do not agree); and (2) to close the meeting with both parties clearly understanding what steps the law partner intends to take if Carl decides to move forward with the installation of the pre-heater without complying with NSPS requirements.

We will close class with a round table discussion of the exercise, alternatives selected by the law firm partners, and effective (or ineffective) communication strategies used to close the meeting.

**Monday, October 1: Environmental Enforcement (Chapter 2)**

**Assignment:** Read pp. 75-110; Problems 2.1-2.4  
**Class Theme:** Environmental Reporting; Types of Environmental Enforcement  
**Class Exercise:** Discuss problems 2.1 to 2.4 and tension between self-reporting obligations and self-incrimination  
Receive handout containing Utah Division of Water Quality Penalty Justification Worksheets and fact scenario

**Monday, October 8: Fall Break!**

**Assignment:** Do something that you love outside.

**Monday, October 15: Environmental Enforcement (Chapter 2 cont.)**

**Assignment:** Read pp. 110-131; Handout containing UDWQ Penalty Justification Worksheets and NOV. Do Problems 2.5 and 2.6.  
**Class Theme:** Negotiating Penalties  
**Class Exercise:** Break into groups of two. One of you represents UDWQ. The other represents recipient of NOV. You have thirty minutes to negotiate penalty amount based on Penalty Justification worksheet. Report back and compare penalty settlements reached.

**Monday, October 22: Environmental Enforcement (Chapter 2 cont.)**

**Assignment:** Read 131-138 and handout—witness interviewing; Model Rule 4.2 (prohibition against about contacting individual that you know to be represented).
Class Theme: Fact Investigation: effective witness interviewing

Class Exercise: Interview of Plant Manager. This exercise is based on Exercise 2.1.

Each of you will be assigned one of three roles: plant manager; EPA attorney; or Agra attorney. In addition to playing your role during the interview, listen carefully in order to critically discuss how the interview was handled from a substantive, tactical, and ethical perspective.

Debrief experience.

Monday, October 29: Environmental Enforcement (Chapter 2 cont.)

Assignment: Exercise 2.2. Each of you will be assigned to be either an EPA attorney or an Agra attorney. The EPA attorney will draft an administrative complaint (Exercise 2.2) and “serve” it on the Agra attorney no later than the start of class on Monday, October 22, 2012. EPA attorneys may work in teams to work through the EPCRA Penalty Policy and draft your complaints. Note that a model administrative penalty complaint appears in Appendix A of the text.

The Agra attorney will draft an answer and “serve” it on the EPA attorney no later than Friday, October 26, 2012. The answer should contain any defenses (factual or legal) to the complaint. It should also provide a defense or justification for altering the penalty. The Agra attorneys may also work in teams.

Class Theme: Settlement and Negotiation Strategies

Class Exercise: Brief lecture

Monday, November 5: Environmental Enforcement (Chapter 2, cont.)

Assignment: Review the complaint and answer. Prepare for settlement negotiation that will take place during class.

Class Theme: Settlement Negotiation.

Class Exercise: Exercise 2.3. We will meet in class, but break into pairs immediately to conduct settlement negotiations. You have the entire class period to attempt to reach a settlement.
Monday, November 12: Environmental Enforcement (Chapter 2, cont.)

Assignment: Memorialize settlement agreement or explain why a settlement could not be reached. If you reached a settlement last Monday, the Agra attorney will draft up the terms of your settlement agreement in either a letter or a consent decree. The Agra attorney will submit the memorialized agreement to the EPA attorney no later than 1:00 p.m. Wednesday, October 31, 2012. The EPA attorney has until Friday, November 2, 2012 to respond to the memorialized settlement agreement with specific objections to the wording, or to approve the settlement agreement. (You can continue to negotiate beyond these two dates, but this is the minimum that must be completed). The final, memorialized settlement agreement should be signed by both attorneys and submitted by the start of class on Monday.

If you cannot reach agreement on the memorialized terms of the settlement, please submit the latest version and a brief summary of your client’s position on the points of disagreement.

If you did not reach a settlement on Monday, please submit a memo briefly summarizing the course of the negotiation. Be sure to describe the points on which you agreed. For the points on which you could not agree, summarize each party’s position. Provide at least one or two paragraphs reflecting on why you think that you could not reach an agreement, whether the failure to settle benefitted or harmed your client (consider the cost of litigation, the risks of enforcement, compared to the settlement options presented), and whether you would have done anything differently in hindsight.

Class Theme: Settlement Negotiations Debrief

Class Exercise: Debrief settlement negotiation and process of memorializing agreement. Compare results of settlement discussions. Reflect on patterns, observations, lessons learned.

Monday, November 19: Citizen Suit Enforcement (Chapter 3)
Assignment: Read 139-177; Do problems 3.1 to 3.6; read handout.

Class Theme: Public interest representation

Class Exercise: Assume that MEC does not have its own attorney. They have hired you to represent them in their efforts to clean up the North Fork and address the environmental degradation that they attribute to Pork Unlimited. Come to class prepared to discuss strategies that MEC could consider utilizing in their efforts.

- Can they obtain deliberative documents on why EPA has not enforced against Pork Unlimited (problem 3.1)
- Should they attempt to get publicity (how? Who will be the spokesperson?) (consider problem 3.2)
- Is MEC precluded from filing a citizen suit? (problem 3.3)
- Is there a violation and does MEC have standing? (problem 3.4)
- Should you reach an agreement regarding any settlement terms? Does this scenario create a conflict of interest between you and your clients? (problem 3.5)
- Are you likely to be awarded attorney fees (problem 3.6)

Monday, November 26: Citizen Suit Enforcement (Chapter 3, cont.)

Assignment: Handout; Exercise 3.1 (draft FOIA request)

Class Theme: FOIA: What role does it play? How can it be used effectively? Effective strategies for obtaining requested documents

Class Exercise: Potential guest speaker

LAST CLASS

******* Winter Break ******
Monday, January 7, 2013: Citizen Suit Enforcement (Chapter 3, cont.)

Assignment: Draft a 60 day notice letter on behalf of MEC (Exercise 3.2).

Class Theme: What is the purpose of the 60 day notice letter? When should it be used? Should you send one if you do not intend to sue? Does that hurt your credibility? How should you follow up?

Citizen Suits: Why do we have them? Do they serve their intended role?

Class Exercise: Discussion

Monday, January 14: Environmental Litigation (Chapter 4)

Assignment: Read 179-190; Problems 4.1-4.4

Class Exercise: Discussion

Monday, January 21: Environmental Litigation (Chapter 4, cont.)

Assignments: Read 190-253; problems 4.5, 4.7 to 4.12 (read but do not do 4.6)

Class Exercise: Discussion.

Review basics of drafting internal memos.

Monday, January 28: Environmental Litigation (Chapter 4, cont.)

Assignments: Re-read problem 4.6. Assume that you are an attorney for the Department of Justice. Draft a memo to your supervisor setting out your litigation strategy. Discuss each of the PRPs and explain whether or not DOJ should pursue litigation against each PRP.

Class Theme: Fact analysis based on the elements of a cause of action

Class Exercise: Discuss litigation strategy memos.

Monday, February 4, 2013: Environmental Litigation (Chapter 4, cont.)
Assignments: Draft a complaint against the PRPs that you decided to sue.

Class Theme: Complaint drafting.

Class Exercise: Receive MSJ assignments.

Monday, February 11: Environmental Litigation (Chapter 4, cont.)

Assignments: Work on motion for summary judgment and memorandum in support of motion for summary judgment (Exercise 4.2)

Class Exercise: No class. Serve MSJ on opposing counsel no later than the start of class. Opposition MSJ due no later than start of class February 11, 2013

Monday, February 18: Environmental Litigation (Chapter 4, cont.)

Assignment: Receive summary judgment brief from opposing counsel. Review brief and prepare for oral argument, which will take place during next class.

Class Theme: Effective oral argument strategies

Class Exercise: Lecture

Monday, February 25: Environmental Litigation (Chapter 4, cont.)

Assignment: Prepare for oral argument (each side has 7 minutes)

Class Exercise: Oral arguments

Monday, March 4: Environmental Policy (Chapter 5)

Assignment: Read 255-302; problems 5.1 to 5.13.

Monday, March 11: Spring Break

Assignment: Do something outside that you love!

Monday, March 18: Environmental Policy (Chapter 5, cont.)

Assignment: Read 302-323; problems 5.13-5.19

Class Exercise: Receive assignments for Public Hearing. Draft and prepare written comments.
Monday, March 25, 2012: Environmental Policy (Chapter 5, cont.)

Assignment: Exercise 5.1-5.2 (Environmental Justice and Administrative Practice). Read 302-323 as background. Each of you will be assigned to one of five different roles: (1) The New Jersey Department of Environmental Protection; (2) The Environmental Justice Legal Defense Fund; (3) The Chemical Manufacturers Association; (4) The Flint Area Economic Development Authority; and (5) the presiding EPA representative.

Instead of preparing written comments, the EPA representative will prepare an outline with the agency’s preferred outcome. During class, the EPA representative will listen to the oral comments, and may adjust the agency’s rule based on the comments, or may choose to disregard comments for justifiable reasons. At the end of the hearing, the EPA representative will have 20 minutes to deliberate and will announce the final rule, including the EPA’s justification for accepting or ignoring points made in the oral comments received during the hearing.

Class Exercise:

Monday, April 1: Environmental Policy (Chapter 5, cont.)

Assignment: Prepare for public hearing in class exercise (4.2)

Class Exercise: Keep your respective roles. Everyone will have 5 minutes to articulate his/her client’s views to the agency. At the end of the hearing, the EPA representative will have 20 minutes to deliberate and will announce the final rule, including any justification for alterations made on the basis of the oral testimony received.

EPA deliberation and announcement of decision

Debrief

Monday, April 8: TBD

Monday, April 15: TBD