

ENVIRONMENTAL LAW SYLLABUS  
FOUR CREDIT HOURS  
FALL 2004  
PROFESSOR BUZBEE  
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The textbook for this course is Percival, Miller et al, Environmental Regulation: Law Science and Policy (4th ed. 2003). You will also need the 2002 or newer edition of the West statutory compilation, Selected Environmental Law Statutes. A photocopied set of supplemental materials ("the supplement") is in the photocopy center on the first floor of the Law School. I also anticipate tailoring class coverage to accommodate particular subjects of student interest and breaking legal developments.

I will generally specify what materials I expect to cover in the next class. When in doubt, or if you wish to do a week's reading in advance, I recommend that you try to read 15-20 pages ahead for each class hour. When we start on statutory materials, you are expected to read statutory sections that are mentioned in the casebook or other assigned materials, plus other sections (such as indices, definition sections, and general enforcement and judicial review sections) that are necessary for you to make sense of the statute. Remember that when you are working with a statute, the statute, not cases or text explanations, is the most important text. In class, we will devote substantial time to enhancing your skills in interpreting statutory and regulatory texts.

I expect students to attend class and do the reading. You are each entitled to hand to me before a particular class a pass note. You are entitled to two such notes a semester without any penalty. If I receive a pass note, I will try not to call on you. If I inadvertently call on you despite your giving me a pass note, simply remind me that you gave me a note and I will move on to another student. While most of your grade will be based on your performance on an examination, I reserve the right to make minor adjustments based on extraordinarily good or bad classroom performance, participation, or preparation. Quality, not quantity, of comments or participation matter. For most students, my reserved right to raise or drop grades will have no impact. Computer games, web or email use during class are not permitted. If a student is chronically unprepared or absent without excuse, or violates the computer use limitation, I reserve the right to remove the student from the class rolls. The examination will be limited open-book.

We also will work through photocopied hypothetical problems for your preparation and discussion in class. (Likely problems for coverage are in the front of the supplemental readings package.) The problems are critical to your learning these materials and developing your environmental law skills. Year after year, students point to these problems as central to their developing environmental law facility.

Environmental law is a challenging area of law. You are likely to have many questions. I welcome and prefer questions in class so all students will benefit from your inquiry, but I will also be available to answer questions after class and in my office. I may respond to emailed

questions, but most often I'll use them to start the next class.

## ASSIGNMENTS

### I. Introduction to Environmental Law Issues and Concepts

#### a. common concepts and problems

1st class assignment: poultry waste article, second page of supplemental readings package, skim lightly CB 1-8 and read section (b) below.

#### b. Economics and collective action issues

24-28, 47-51 top

#### c. ecological roots

skim 9-14, read 35-47, 51-7 (for possible discussion of ANWR development)

### II. Common Law Remedies for Environmental Harms

59-85

Western Petroleum and Paepke excerpts, supplement

95-99

COMMON LAW PROBLEM HANDOUT

### III. Introduction to Public Environmental Law

#### a. phases of environmental statutes

85-95

#### b. Federalism issues

33 U.S.C. 1251(b) and (g), 1342(b) and (c), 1365(e), 1370; 42 U.S.C. 6926  
101-11

possible excerpts of 1999 state sovereign immunity decisions, law review articles  
Federal-state enforcement tensions—948-57, 33 USC 1319(a)(1) and (2)

#### c. the administrative law wrinkle

141-54

Executive Order 12,866 and nearly enacted S. 343 key provisions,  
supplement

Consider how would dovetail with, for ex., 42 USC 7409(b)(1) and 7411(a)(1)  
154-61

photocopied Overton Park excerpts, supplement

photocopied State Farm excerpts, supplement

#### d. citizens as enforcers

1. standing—skim 973-80 (to be covered by lecture), but focus on 980-96 and  
1007-18 (*Lujan* and *Laidlaw* will be main discussion cases)

2. agency action-forcing—996-997

3. citizen suit provisions—997-1007, 1018-25 top, *en banc* 6<sup>th</sup> Circuit opinion in  
*Jones v. City of Lakeland*, supplement  
1027-28

### IV. Environmental Statutory Schemes—Interpretation and Strategy Issues

- a. statutory strategy choices-an overview  
121-33
- b. reading statutes and poetry  
handout (on day of class)

V. The Federal Environmental Law Framework

- a.. CERCLA--liability imposition as a strategy
  - 1. liability provisions
    - A. CERCLA/RCRA distinctions  
163-74, and read and compare RCRA 42 USC 6973 and CERCLA, 42 USC 9604(a)(1)
    - B. Retroactivity issues-skim 228-31, be covered by lecture re *Olin*
    - C. PRP categories-231-48, photocopy/WL printout of *Commander Oil Corp. v. Barlo Equipment*, 215 F.3d 321 (2000)(to be inserted following *Shore Realty*, at 235)  
Amendments by definition: 42 U.S.C. 101(20)(E) and (F)  
(read with text at 245-46)  
Generator liability-248-57  
CERCLA PROBLEM HANDOUT ONE
    - D. Strict, joint and several liability-257-67
  - 2. settlements and allocation issues  
271-83, possible supplement re settlement strategies
  - 3. the cleanup process and a critique of CERCLA's achievements  
267-71, 284-88
- b. NEPA and EPCRA- information-based regulatory strategies
  - 1. NEPA
    - A. overview--783-92
    - B. when is an EIS required, what must it analyze-792-832
    - C. is the EIS adequate-832-51 top  
NEPA PROBLEM HANDOUT
  - 2. EPCRA-- 483-90
- c. The Endangered Species Act ("ESA") and Wetlands--prohibitions and area-based strategies
  - 1. The ESA
    - A. the ESA's reach and power-853-66
    - B. federal power and biodiversity goals-866-87
    - C. prohibited conduct and interpretive questions: Sections 4, 7 and 9  
887-919
  - 2. Wetlands Protection
    - A. introduction-573-75
    - B. SWANCC and federal power limitations-587-604
    - C. 404's limits-675-89
    - D. the 404 process-689-94
- d. The Clean Air Act ("CAA")--categorical regulation under diverse rationales and

state planning primacy

1. Historical Background and basic structures  
491-501
2. NAAQS- health and risk-based regulations  
CAA Sections 107-09, w/focus on 109  
Skim 501-12, for historical background and setup for  
Whitman v. American Trucking- 512-21
3. State Implementation Plans (SIPs)  
Section 110  
521-26
4. Nonattainment and plan inadequacy  
Sections 171-79 (general nonattainment provisions)  
Sections 181-185B (review for structure, increased stringency and detail  
of mandates)  
526-32
5. Stationary Sources and the new permit program-categorical regulation by  
technological capacity  
Section 111  
532-39  
Possible handout on New Source Review litigation and regulatory  
proposals
6. Hazardous Air Pollutants—from risk-based to technology-based  
strategies  
Section 112  
455-64, with focus on current form of 112
7. Mobile Source Regulation--technology-forcing strategies  
552-67  
CLEAN AIR ACT PROBLEM

e. Clean Water Act ("CWA")--

1. technology-based standards
  - A. history and statute roadmap-skim 570-85
  - B. point source regulation (NPDES)-604-19
  - C. setting of industry-wide technology-based standards-  
Sections 301, 304 and 402 -619-24, 630-31
2. Water Quality Schemes and nonpoint sources  
637-42, 662-72

CLEAN WATER ACT PROBLEM (based on this section and section (IV)  
above)(likely to be omitted)

f. RCRA and working with incinerator ash provisions

1. history and overview  
Skim 174-85
2. the "waste" question  
Skim 185-97 (material to be covered by lecture)
3. hazardous waste regulation  
197-203—read as background for ash case argument

4. Putting statutory skills, administrative law and RCRA substance together  
Read photocopied ash case briefs for class role playing debate and critique  
of opinion  
203-05 background  
205-12–skim S. Ct. opinion resolution

#### VI. Breaking Trends and Issues

- a. Criminalization of environmental laws  
957-73–skim for brief lecture
- b. Environmental justice and hazardous waste site and noxious facility policy  
16-22, 316-26 top and handout materials
- c. The ethical minefield of environmental law  
handout