

Updated June 1, 2023 – **[Piedmont Project version]**
LAW 624X – *Environmental Law & Policy*
Emory University School of Law, Graduate Course
Professor Mark Nevitt
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Spring 2024 | Monday & Wednesday 10:30 – 12:00 | Gambrell 5F
Office Hours: Room G509 - After Wednesday Class (or by app't)

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Please sit in the first several rows of the class and bring your name card to each class.

Course Overview & Introduction: Welcome to Environmental Law & Policy!

This course is a “2.0 version” that reflects my work with Emory University’s innovative [Piedmont Project](#), a two-day immersive faculty project that is a grassroots initiative to strengthen Emory’s engagement with environmental issues and sustainability. My experience at Piedmont highlighted to me the importance of both thinking “big picture” about environmental solutions as well as operationalizing legal and policy solutions at the state and local level. There are several federal and state laws that are designed to address access to clean water, sustainable energy, and protect our coastal communities. These are among the most critical issues facing Georgia, Atlanta, and the United States. While many of the key federal and state laws address sustainability in some form or fashion, I have traditionally focused on the “black letter law” without a specific emphasis on sustainability or a particular region. The focus of my class has always been on understanding and applying the underlying environmental law. The Piedmont Project helped me to rethink that focus, and this new syllabus reflects new pedagogical tools, a renewed emphasis on the Piedmont region as a laboratory for sustainability and environmental legal issues, and a better understanding of how laws and policies help or even hinder broader sustainability goals. This includes case studies around the Atlanta Beltline, the Georgia coast, and environmental justice issues within Atlanta. At the end of the semester, you should have a better understanding of law’s role in broader sustainability goals, and what measures can be taken in Atlanta and Georgia to advance broader sustainability goals.

As you will learn, environmental law consists of a complex “hodgepodge” of international, federal, state, and local laws that cut across so many legal disciplines (tort, property, constitutional law, etc.). We are also located in Atlanta, GA where there are so many environmental justice, sustainability, and environmental challenges that are crying out for law students to assist. The Piedmont Project also highlighted to me the importance of engaging in interdisciplinary scholarship and research, which I have incorporated throughout this revised syllabus. Lawyers play a *key role* in environmental, sustainability, and climate solutions and law and regulation can serve as both an obstacle to environmental solutions. But law is just one part of the equation, and the solutions to difficult environmental and sustainability problems require a holistic approach. Throughout the course, I will ask you to consider what role federal, state, or local law is playing in addressing an environmental problem.

Toward the end of the semester, you will present a Capstone Project that is 10 minutes or less in length. This Project will address a “big picture” environmental problem that is accompanied by an actionable item that can be implemented at the local level. For example, you may want to address big picture problem of climate change, and highlight how our local, transportation infrastructure incentivizes auto emissions and driving. This presentation can be an in-person presentation, video, or other creative format. Please highlight how a law, regulation, or policy *should* be changed to address this problem.

Background:

This class is being held at a critical time for environmental law and sustainability more generally as the Biden administration seeks to employ an “all of government” approach to combating the climate crisis and pursue environmental justice. With Congress in gridlock on most environmental issues, fierce battles are being waged in the courts on how to interpret core environmental laws. The Supreme Court seems determined to roll back environmental protections even as Congress just passed historic legislation — the Inflation Reduction Act — designed to accelerate the green energy transition.

This semester, we will address environmental law head-on from a legal and policy perspective. Smart, solution-oriented Emory University School of Law graduates will play a critical role in addressing the myriad environmental problems facing the world, to include the problems associated with the climate crisis. Because this area is a fast-moving area of the law, the syllabus will be updated via an online Google Doc [here](#).

Because of the breadth and complexity of the environmental law field, much of the material we cover is challenging and you will have to do a fair amount of reading. My commitment to you is that I will do everything I can to help you understand the material and to make the material as enjoyable and accessible as possible. I’ll do my best to mix up the assignments and classes with readings, podcasts, small-group work, and a guest speaker or two. Class discussion of the material is important and students should be prepared to be called upon in class.

Emory’s Outstanding Environmental Law Program & Clinic: For more information about the *Environmental Law Program* and the Turner Environmental Law clinic, contact Mindy Goldstein Managing Director at mindy.goldstein@emory.edu

Required Course Materials: The required casebook is Percival, Schroeder, Miller & Leape, *Environmental Regulation: Law, Science & Policy* (Aspen, 9th ed. 2021). This is the most recent edition of the most widely used environmental law casebook in the country, published on July 31, 2021. For some materials, I will post the material to Canvas and/or e-mail this to you separately.

The Emory Law library has set up a helpful Course Reserve site at <https://library.law.emory.edu/index.html>

Optional Course Materials: Percival & Schroeder, *Environmental Law: Statutory and Case Supplement 2022-2023* (Aspen 2022). This statutory and case supplement contains the text of the principal federal environmental statutes, outlines of the principal provisions of the statutes, and legislative history timelines organized in the same chapter format as the casebook, as well as excerpts from

important recent court decisions. This supplement is entirely optional, but you may find it helpful. Professor Percival also maintains a casebook website at www.erlsp.com that will include updates (organized by chapter) on developments occurring after publication of the casebook and information about pending cases and photos of the sites of famous environmental cases. You can find all of the statutes on Westlaw/Lexis, but some of you may want the hard copy. FYI, I used this case supplement every day as a practicing environmental attorney.

Learning Objectives:

- Comprehend the basic structure of environmental law, which will enable them to identify, and to assist in resolving, environmental law issues that they may encounter in their subsequent professional lives.
- Develop and enhance statutory analysis and interpretation skills.
- Understand the regulatory process that is used by administrative agencies to develop and promulgate regulations.
- Develop an enhanced ability to critique regulatory policy choices.
- Demonstrate a thorough understanding of major federal environmental laws (including statutes, regulations, and executive orders) and common law schemes used to regulate and remedy environmental harms.
- Critically assess the various legal strategies employed in environmental laws.
- Describe and navigate the shared federal and state elements employed in environmental laws.
- Evaluate the uses and limitations of existing legal processes to promote environmental justice.
- Predict the outcome of environmental disputes by applying federal environmental laws to hypothetical or real fact patterns.

Grading:

- A final exam will comprise 70% of your grade.
 - **Final Exam:** A final exam will take place at the end of the course. This will be an open book/note exam that is tentatively scheduled for 3 hours. The questions will be a mixture of multiple choice, short answer, and essay. I will provide more detail on the exam's substance as the semester evolves. Please know that there will be word limits to help ensure that the quality of your answers – and not the quantity of words used – is assessed.
- For non-law school students, you have the option of writing a paper as part of the formative assessment. If you decide to elect this option, please e-mail and set up a time to speak with Professor Nevitt prior to Spring Break.

Class Participation, Small Group Work, “Flipped Classroom,” and

- Class participation as well as small-group work and presentations will comprise 20% of your remaining grade. This consists of three components.
- You are required to do all reading and be actively engaged throughout the course. For each class, beginning on class #2, I will call on students to help guide the discussion.
- Please note that you must be familiar with all required reading for the course. I will routinely ask you to refresh the class on reading from the *previous* class. Because of the dynamic nature of the course, oftentimes readings will overlap from class to class.
- **First, Attendance and Overall Class Participation:** I expect students to attend every class, complete the assigned readings, and participate in all discussions and polls.

- **Second, Small Group Breakouts.** Throughout the course, you will be assigned to small groups to explore hypothetical problems (and other course material) in more detail. With your small group, you are expected to discuss and answer the questions posed by the hypothetical problems. Some small group discussions will also have an accompanying worksheet. At the conclusion of the discussion, someone in your small group must send the completed worksheet to the professor. Be sure to have all names on the worksheet.
- **Third, the “Flipped Classroom” Experience.** Beginning on Class #4, each student will have an opportunity to present the day’s reading material at the beginning of class via a short (10-15) presentation synthesizing the material. One of the key skills I try to develop in law students is oral communication skills and the ability to synthesize complex material in a clear manner. These skills are essential in the practice of law. I will socialize a sign-up sheet early in the semester so you can present on an area of particular interest.
- **Fourth, the Capstone Project.**

Accommodations: If you have a documented disability and anticipate barriers related to the format or requirements of this course, or if you believe you have a disability (e.g. mental health, attention, learning, vision, hearing, physical, or systemic) and are in need of accommodations for this semester, you should contact the Office of Accessibility Services (OAS) to learn more about the registration process and steps for requesting accommodations. Website: www.accessibility.emory.edu; Phone: 404-727-9877; Email: accessibility@emory.edu.

- If you are a currently registered with OAS and have not received your accommodation notification letter within the first week of class, please notify OAS immediately. Students who have OAS-approved accommodations in place are encouraged to contact me during the first week of the semester to discuss your specific needs for the course as related to your approved classroom accommodations and any other accommodations that will need to be implemented during the semester.

Electronics & Absences:

- Laptops are permitted but must be used for class purposes only.
 - I feel strongly about this, and allow laptops but my views are mostly aligned with Prof. Cole’s views at Georgetown, [here](#).
- Please let me know if you’re going to miss a class. For non-emergencies, please send me an e-mail 48 hours in advance. For illness/emergencies, please give as much advance notice as feasible. Inconsistent attendance will affect your final grade.

Our Mutual Commitments

- If you have any questions about the course material I want to be as accessible to you throughout this semester as possible to ensure you are working towards the learning objectives, understand the material, and generally are enjoying the course.
- You likely selected this class because you have an interest in the topic. Environmental Law is a rapidly developing area of law and I will do everything within my power to keep you apprised of the latest developments and bring in relevant guest speakers.
- You will be prepared for class and be ready to engage in class discussion upon arrival.

Schedule of Classes and Readings

Please note that the readings are a guide and there will be significant overlap from one class to the next. In fact, each class will start with a review of last week's readings. Readings and assignments may change to accommodate recent developments and to adjust for guest lecturers' schedules. In addition to the reading, you are highly encouraged to stay up to date on the latest environmental and climate change matters that are discussed in the news. Doing so will only assist in your participation grade. We will often begin each class with an "in the news" section on changes in climate change law and policy.

For most classes, you will see either an Assignment or Discussion questions listed. For *Assignments with a Number*, I will ask people to get in teams to discuss the questions and fill out the respective worksheet. Following the conclusion of class, one member of the team should email me their answers (include everyone's names on the MS Word document). These assignments count toward your overall Participation grade.

For Discussion questions, you do not need to fill out and return a worksheet, although your participation is required.

PART I: ENVIRONMENTAL LAW OVERVIEW

1. January xx – Course Overview, Introduction [via ZOOM]

- Introduction to the Course, Environmental Problems and Values, Environmental Justice and Corporate Environmental Responsibility.
- Read (1) pp. 1-21 (Stop at "Principles of Environmental Justice")
- Read Section 101, National Environmental Policy Act (NEPA)
 1. Think of an environmental problem in your local community or hometown. How has environmental law addressed or failed to address the problem?
 2. What is the most significant environmental problem facing the United States? The world?

2. January - Environmental Justice, Economics and the Environment

- ASSIGNMENT: Read pp. 21-36 in the casebook (Stop at "Cost-Benefit Analysis and the Value of Human Life")
- Read 39-49 (Stop at ANWR, Pipeline, Fracking Exercise)
- **Assignment #1 (Beltline)**
 1. In addition: what are the environmental justice issues associated with the Beltline?

3. January– ANWR Recap; The Common Law Roots of Environmental Law: Private and Public Nuisance.

- Read pp. 50-54 (ANWR), 59-70 (Stop at Regulatory Legislation "Harmonizing Conflicting Interests")
- ANWR Question Alaska National Wildlife Refuge (ANWR) "The Refuge" podcast, *Episode 1 Sibling Rivalry*
- **Assignment #2 (Arctic) Assignment**

1. How does our constitutional system of government allocate power and authority over natural resources? Is this the right mix?
2. In Alaska, whose interests should be considered and what weight should they be given?
3. Should we open drilling in Alaska? Why or why not?

No class, Monday, January 16th (MLK Day)

4. **January The Rise of the Regulatory State, Environmental Federalism, Displacement of Federal Common Law and Preemption of State Law, and Introduction to Environmental Standing. [Flipped Classroom Starts]**
 - Review: 80-110 (Stop at *AEP v. Connecticut*)
 - Discussion Questions: What is the state of the federal common law after *AEP*? Do you agree with Justice Ginsburg's opinion? Why or why not?
5. **January– Standing, Environmental federalism, constitutional authority to protect the environment, approaches to regulation and the regulatory process.**
 - Read 110 – 130; 1026-1050 (*Lujan, Laidlaw, Juliana*)
 - Discussion Questions: Why is standing a difficult issue for environmental law cases? Should non-persons (such as trees) have standing? Why or why not?
6. **January– Standing (cont.) & Environmental Federalism [Note: There will be overlap between this class and the earlier class]**
 - Review: 1026-1050 (*Lujan, Laidlaw*)
 - Read: pp. 130-138 (Stop at “Approaches to Regulation”) Read: 165-166
 - Please *skim* 138-144 and 150-158 to help you answer Assignment #3
 - **Assignment #3 (Greenhouse Gas Control)**
7. **January Environmental Law Meets Administrative Law**
 - **Review: readings from last class**
 - Read: p. 166-184 Focus on *Chevron*.
 - Discussion Questions: *Chevron* is considered to be one of the most important administrative law cases addressing an agency's authority. Why is this? Why is *Chevron* a particularly important case for environmental law and EPA/agency authority?

PART II: LAND USE AND CLIMATE ADAPTATION

8. **February Environmental Law & Land Use I: Regulatory Takings**
 - Read pages 721-746 (Stop at “The Modern Revival of Regulatory Takings...”)
9. **February Land Use Controls and Regulator Takings**
 - Read pages 746-762 (Stop at *Palazzolo*)
 - Read pages 797-810
 - Managed Retreat readings: “How do We Manage Managed Retreat?”

- **Assignment #4 (Climate Adaptation):** Look at the key land use readings and cases in the casebook.
 1. How does the Takings doctrine affect climate adaptation efforts?
 2. In what ways does regulatory takings doctrine potentially thwart climate adaptation efforts in the coastal zone?

PART III: MAJOR FEDERAL ENVIRONMENTAL STATUTES

10. February Environmental Impact Assessment – NEPA 1

- “Major Federal Action”
- Read pages: 813-820 (*Calvert Cliffs*, Stop at *Strycker’s Bay*)
- Read: National Environmental Policy Act
- NEPA podcast/short paper/law review article - TBD
- VHCA and highway building in Virginia Highland Example - TBD

11. February NEPA 2

- “Significantly Affecting the Quality of the Human Environment”
- Read 823-836 (*Kleppe*, Stop at *Thomas v. Peterson*).
- Read 845-865 (Stop at *Sierra Club v. FERC*)
- Use the questions as 871-874 as your Discussion Questions for today.
- **Assignment #5 (GHG Emissions : Questions 1-5)**

12. February NEPA 3 - ZOOM

- **Review 845-847**
- Read pages 874-899 (Start at “Is the EIS Adequate?”)
- *Vermont Yankee Nuclear Power Corp. v. NRDC*
- *Marsh v. Oregon Natural Resources Council*

****No Class: Wednesday February 22nd****

13. February Air Pollution Control & Clean Air Act - 1

- Read pages: 447-472 (*Massachusetts v. EPA*) Stop at “Fuel Content”
- Discussion Questions: What is the state of the Clean Air Act’s authority to regulate GHG following *Mass. v. EPA*? After EPA’s endangerment finding? How do Justice Stephens and Justice Roberts differ in their approach to Massachusetts’ standing? Does this inform the merits discussion?

14. March Air Pollution Control & Clean Air Act - 2

- Read page 480-483 (Establishing NAAQS) (Stop at *Lead Industries*)
- Read: 493-502 (*Whitman*)
- Read: 526-540 *Utility Air Regulatory Group v. EPA* (2014)
- Summary of *West Virginia v. EPA* (reading to be distributed)

****Spring Break: March 6-10****

15. March Water Pollution Control - 1

- **Read: 577-600 (Stop at Rapanos)**
- Discussion Questions: Much of water pollution control centers on the Clean Water Act, but the Coastal Zone Management Act and Ocean Dumping Act are critical statutes. What approach did Congress take in passing the CZMA and Ocean Dumping Act? What is a federal consistency statement? Why would a state decide to opt-in or opt-out of the CZMA program? What are the implications of the CZMA for climate change and coastal governance issues?

16. March Water Pollution Control – 2

- Guest Speaker: Terri Montague.
- Read: 600-612 (Rapanos)
- *Sackett Reading* – Posted on Canvas
- Read 662-668 (Stop at *Arkansas v. Oklahoma*).
- Total Max Daily Load Reading: 685-687, Find the Chesapeake Bay program authority in the Clean Water Act.
- Discussion Questions: What is the holding of *Rapanos*? *Sackett*? In as plain language as you can, how would you describe what “waters of the United States” means to a non-lawyer?

17. March Preservation of Biodiversity/ESA -1

- Read: 901-923 (TVA v. Hill)
- Add Oral Argument (Oyez Section), TVA v. Hill
- Discussion Questions: What is the holding of *TVA v. Hill*? How is “take” defined under the ESA? Why do you think Congress chose to define take in this manner?

18. March Preservation of Biodiversity/ESA – 2

- Read: 923-930 (stop at *Weyerhaeuser*)
- Read pages 936-938 (Threatened Species and Climate Change)
- 951-955 (Private Action)

19. March Regulation of Toxic Substances: TSCA, RCRA, CERCLA

- PFAS Example: Nathaniel Rich, [The Lawyer Who Became DuPont’s Worst Nightmare, N.Y. Times](#) (Jan. 6, 2016).
- Read: 225-228 (Start at PFAS, TSCA, Chemical testing, stop at “How Safe is Safe?”)
- Read [CERCLA Liability, Congress Research Service \(this is short\)](#)
- Read [RCRA Overview](#) (EPA website)(this is short)
- PFAS and [Drinking Water](#)
- Discussion Questions: How was PFOS and PFOA allowed to enter the commercial mainstream and bypass several environmental laws? Of the laws discussed in this class, which ones are the best candidates to regulate PFAS? How?

20. April Protection of the Global Environment I

- Read pages 1073-1094: Stop at “Global Climate Change”

- Glasgow Just Security Reading
- Montreal Protocol Reading
- **Assignment #7 Look at the text of the Montreal Protocol and the readings from today's class.**
 1. The Montreal Protocol is considered as a successful model in addressing the ozone crisis. What aspects of the Montreal Protocol are particularly effective?
 2. Is the Montreal Protocol a good model for international climate governance? Why or why not?
 3. What lessons – if any - from the Montreal Protocol can be applied to international climate efforts?

21. April Protection of the Global Environment II

- Read pages: 1094-1113 (Stop at International Trade and the Environment)
- Read 1143-1148: The Chevron/Ecuador Litigation *Kiobel*, and ATS
- Read pages 1155-1163
- Download the text of the Paris Climate Agreement.
- *The Glasgow Climate Pact, Annotated*, Wash. Post (Nov. 13, 2021), <https://www.washingtonpost.com/climate-environment/interactive/2021/glasgow-climate-pact-full-text-cop26/>
- **Assignment #8: Look at the text of the Paris Climate Agreement and the readings for today's class.**
 1. How would you describe the international governance model for the Paris Climate Agreement and follow on Pacts and Accords (e.g. Glasgow)? Is this a good model for international climate governance?
 2. What are the strengths and weaknesses of such a system?
 3. Familiarize yourself with the term “loss and damage.” How would you describe loss and damage? Should the wealthier nations provide loss and damage to the poorer nations? What are the legal and policy challenges with such an approach?

22. April Environmental Progress and Prospects

- Read Chapter 12: 1165-1191
- Discussion Questions: How should we measure environmental progress? As you reflect on this course, what is one change that you would like to be seen made to an environmental law statute and why?

23. April: Capstone Class

- As part of your Capstone Assignment, please answer the following questions:
 1. Describe, analyze, and identify the underlying environmental problem. What is causing the problem and what is law's in addressing the problem?
 2. How did this environmental problem emerge and why has it not yet been addressed?
 3. Who are the impacted stakeholders (people, place, environment). In your estimate, is their voice being heard in addressing the problem? Why or why not?

4. What legal and/or policy solutions do you propose? What would be the *next action* to solve this problem? Please be as specific as possible.
5. How likely is this proposed action and solution likely to occur and be implemented? What are the barriers to implementation?
6. Finally, is there anything that Emory can do as a campus to address this problem? If you wanted Emory to take action, how would you do so?

24. April Review Class/Capstone Class

- Course Summary and Overview
- Discussion of Exam and Details