ENVIRONMENTAL LAW

VERMONT LAW SCHOOL FIRST TERM – SUMMER 2018

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Class Meeting Time

9:00 – 12:00 (First week meets Tuesday through Friday; subsequent weeks meet Monday through Thursday)

Course Description

People in Flint, Michigan, discover that their drinking water has excess quantities of lead, a mineral likely to affect adversely the cognitive ability of all residents, but especially children. An enormous sea of sludge composed of coal waste from an electric power plant spills into the waters of North Carolina and Virginia. An explosion in a West Virginia coal mine kills workers trapped deep underground. An oil well explodes, pouring millions of gallons of oil into the Gulf of Mexico. Climate change threatens to change the way people live, irreversibly altering the oceans.

These events lead to questions: What is the human impact on the natural environment? What policy choices does society make about the environment and what drives those choices? What legal mechanisms affect the environment and how do they work?

Finding answers to these questions requires seeking information and having in-depth discussion, which is what we do in this course. This course covers the history of environmental values and policies, including a discussion of economics and the environment, common law roots, approaches to federalism, and environmental justice. We study both caselaw and major statutes. Among the regulatory mechanisms we study are the National Environmental Policy Act, Resource Conservation & Recovery Act, Toxic Substances Control Act, Clean Air Act, Clean Water Act, and Endangered Species Act. We also explore biodiversity protection, land use regulation, and environmental enforcement. Throughout the course, we ask questions about how concerns about environmental justice have or have not been taken into account.

Course Grade

The class requires the following from you:

1) Class Participation. Please read assigned material critically, think about it in advance, and be prepared to join in discussing it during class meetings.

2) Discussion Leader. Everyone will have an opportunity to lead class discussion on a specific topic or set of readings.

3) Final Exam. The exam will be comprehensive and include both readings and in-class discussion.

The course grade is based on the following:

1) Class participation: 10%

2) Discussion leader: 10%

3) Final exam: 80%.

Required Material

Environmental Law: A Conceptual and Pragmatic Approach, Driesen et al. (3rd ed., Aspen Publishers, 2016)

Secondary Material

Examples & Explanations: Environmental Law, Steven Ferrey (Aspen, 2013)

Black Letter Outlines: Environmental Law, Jeffrey M. Gaba (West Academic, 2016)

Selected Environmental Law Statutes, 2015 - 2016 (West, 2016)

Environmental Law and Policy, Jonathan R. Nash (Aspen, 2010)

Federal Environmental Law: The User's Guide, Olga L. Moya & Andrew L. Fono (West, 2011)

Reading Assignments

Reading assignments from the book we are using are listed below, and additional reading will supplement the book. The web links listed below are supplemental, and are not required reading unless I tell you otherwise in class.

I'll also announce any other adjustments to the reading assignment in class, and post that information on TWEN.

Note on Classroom Strategy

This course requires you to absorb a large volume of material in a short period of time. That may lead you to conclude that you are best served by trying to transcribe everything from the classroom either that the instructor says or that the instructor presents in a powerpoint. Neither strategy is productive. Instead, try to distill the discussion and the powerpoints so that you can integrate that information into your notes along with the material that you read.

There is research that indicates law students who use computers rather than paper to take notes in class retain less of the information.[1] Keep that in mind as you consider your strategy for maximizing the benefit you get from the course.

[1]See Warren Binford, *How the Be the World's Best Law Professor*, 64 Journal of Legal Education 556 – 558 (2015). Binford shows that there are multiple studies on the use of laptops or similar computers in class to take notes. These studies consistently show that students who use laptops do not perform as well as students who do not use laptops (note 75). Students who use laptops take more notes than students who take notes by hand, but learn less (note 79). Researchers think that the reason is because different parts of the brain are stimulated, based on whether a person is taking notes by hand or taking notes on a computer (note 80). Researchers have found that there is a correlation between taking high-verbatim notes (essentially transcribing what is said in the classroom) and low retention of the material (note 82). One study found that 90% of law students who use laptops go online for at least five minutes during class and approximately 60% of students are distracted for half the class (note 84).

Week & Class Number | Reading & Viewing Assignments

Week One

1 & 2 Evolution of Environmental Law 1 – 57

This section of the book introduces background on the nature of environmental problems, and discusses how the common law addresses environmental issues. The cases illustrate limitations on common law solutions, many of which are still viable but are also supplemented by more recent statutes.

- A Brief History of Climate Change
  - http://www.bbc.com/news/science-environment-15874560
- Why the Environmental Protection Agency Was Created
  - http://time.com/4696104/environmental-protection-agency-1970-history/
- EPA Terms (Bloomberg BNA) - Environmental Protection Agency glossary terms with definitions to reference throughout the course.
  - http://esweb.bna.com/eslw/1000/split_display.adp?fedfid=12001406&vname=eslwrefet&split=0

3 Administrative Law & the Environment 59 – 84

Administrative Law is an area of law that has grown along with the regulatory state. It encompasses the rules governing agency decisionmaking. This section of the book explains how EPA and other agencies implement that various statutes, like the Clean Air Act or the Clean Water Act, that Congress has put in place to safeguard the environment.

We will also consider what the goals and objectives of environmental statutes should be, and how those goals and objectives should be formulated to begin with.

- EPA Mission Page
  - https://www.epa.gov/aboutepa/our-mission-and-what-we-do
- Critics Say HONEST Act Undercuts EPA's Use of Science
  - https://www.marketplace.org/2017/04/10/sustainability/honest-act-seen-critics-undercutting-epa-s-use-science

4 Using the Effects of Pollution as a Way to Set Standards 85 – 134

There are many choices about how to write environmental laws so that they achieve an identified purpose. One way to write environmental laws would be to measure the effects that pollution has, and then base the standards on those effects. For example, if we want to control air pollution, we would ask "At what level does a certain pollutant have an adverse health effect on humans?" The answer to that could inform the choice about what level of that pollutant we can accept in the environment. For example, we might set a limit of a certain amount of sulfur dioxide in the air, because if the sulfur dioxide content gets any higher, then people have a hard time breathing. This is referred to as "effects-based standards," which is the topic of this section of the book.

- Pollution: Crash Course Ecology
  - https://www.youtube.com/watch?v=kdDSRRCKMiI
- What's at Stake in Trump's Proposed E.P.A. Cuts?
  - https://www.nytimes.com/2017/04/10/climate/trump-epa-budget-cuts.html?_r=0
- Flint Water Crisis Fast Facts
  - http://www.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/

Week Two

5 Using Technology as a Way to Set Standards 151 – 196

Different statutes approach standards differently. This may be because different media (e.g., water or land) have different characteristics. Or it may be that Congress had different ideas in different years when it passed various legislation. So standards for the Clean Water Act, as an example, are set primarily based on technology. Rather than asking what effect a pollutant has on human health or on the environment, the law sets a standard based on what can be achieved with technology. This can get complicated, depending on what technology is used: the least expensive? Most expensive? Most feasible? How do courts define these terms?

- Technology Wags the Law: How Technological Solutions Changed the Perception of Environmental Harm and Law (Forthcoming Book Chapter. May, 2016)
    - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749358
- The Evolving Regulations and Liabilities Entwined in Corporate Social Responsibility (Westlaw)
    - https://1.next.westlaw.com/Document/I668870b30ab711e798dc8b09b4f043e0/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad740110000015b7cd388ca55f6a6b1%3FNav%3DANALYTICAL%26fragmentIdentifier%3DI668870b30ab711e798dc8b09b4f043e0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c7b575eb28b6a9995bcc5784a63733ba&list=ANALYTICAL&rank=9&sessionScopeId=b4b9c373731b6df0de46ebb6b89f488f3a1c1f337d1dc46c926c0ad4411b916a&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29&libraryResultGuid=i0ad740140000015b7cd1e7ac1e935ba6

6 Setting Standards through Cost-Benefit Analysis 197 – 204;
TSCA paper posted on TWEN; 213 – 240

Another approach to setting standards seems logical: does the benefit outweigh the cost? If not, then it seems that the standard should be changed to the point where the two are at least equal. But this intuitive approach raises questions – such as how to quantify benefits (like a healthy lake) against costs, which typically are easily reduced to dollars. Nevertheless, cost-benefit approaches are favored by Congress.

- Flint Water Crisis Fast Facts
    - http://www.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/
- Beyond Zero-Sum Environmentalism (Environmental Law Reporter)

- https://elr.info/news-analysis/47/10328/beyond-zero-sum-environmentalism

7 Traditional Regulation and Economic Incentives 241 – 294

The first part of the reading for this class (pages 241 – 268) focuses on Traditional Regulation. Once the standards have been set, the next question is how to enforce the standards. One way to do that is referred to as traditional regulation. This traditional method of regulating polluters encompasses performance standards, work practice standards, and bans. Performance standards set a limit and measure, for example, how much a certain factory emits. Work practice standards tell an operator how to perform certain tasks. Bans simply forbid an activity.

- Regional Federal Administration
  - http://www.uclalawreview.org/wp-content/uploads/2016/01/Owen-final-article-no-bleed.pdf
- The Law of the Test: Performance-Based Regulation and Diesel Emissions Control (Westlaw)
  - https://1.next.westlaw.com/Document/I4b99a4a91f2911e798dc8b09b4f043e0/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad740110000015b7cd388ca55f6a6b1%3FNav%3DANALYTICAL%26fragmentIdentifier%3DI4b99a4a91f2911e798dc8b09b4f043e0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c7b575eb28b6a9995bcc5784a63733ba&list=ANALYTICAL&rank=15&sessionScopeId=b4b9c373731b6df0de46ebb6b89f488f3a1c1f337d1dc46c926c0ad4411b916a&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29&libraryResultGuid=i0ad740140000015b7cd1e7ac1e935ba6

The second part of the reading (pages 269 – 294) focus on economic incentives as a means of environmental protection. Instead of penalizing polluters for violating rules, economic incentives, such as pollutant taxes, attempt to create an environment that makes it economically rationale to engage in nonpolluting behavior.

- Environmental Econ: Crash Course Economics
  - https://www.youtube.com/watch?v=BlAfFgKQ5r8
- Beyond Zero-Sum Environmentalism (Environmental Law Reporter)
  - https://elr.info/news-analysis/47/10328/beyond-zero-sum-environmentalism

Especially in a wired 21st century, information is both readily available and a powerful way to shape behavior. Information about environmental factors (such as whether the bottle you drink water from exposes you to a risk of cancer) can affect choices that move polluters toward desired behaviors.

- Regulatory Paralysis by Preemption: GMO Food Labeling and Potentially More
  - http://lawprofessors.typepad.com/environmental_law/2017/03/regulatory-paralysis-by-preemption-gmo-food-labeling-and-potentially-more.html
- How much does science knowledge influence people's views on climate change and energy issues?
  - http://www.pewresearch.org/fact-tank/2017/03/22/how-much-does-science-knowledge-influence-peoples-views-on-climate-change-and-energy-issues/
- Many Americans are skeptical about scientific research on climate and GM foods
  - http://www.pewresearch.org/fact-tank/2016/12/05/many-americans-are-skeptical-about-scientific-research-on-climate-and-gm-foods/

Week Three

9 Preventing Pollution and Environmental Restoration 347 – 389

The first part of the reading for this class (pages 347 – 365) deals with preventing pollution. If you can prevent pollution, rather than dealing with its consequences, that can be not only cheaper but also beneficial to human health and the environment. Sometimes pollution prevention requires altering production methods; sometimes it requires abandoning production altogether. Congress has established a national policy that prioritizes prevention first, followed by recycling. Consumer recycling of bottles and cans is one example, but in an industrial setting there are also opportunities for recycling, when prevention is not an option.

- Little Streams and Legal Transformations
  - http://dc.law.utah.edu/ulr/vol2017/iss1/1/

The second part of the reading (pages 367 – 389) addresses environmental restoration: fixing what has been polluted, to the extent that is possible.

10 Government Responsibility for Environmental Protection 453 – 515

There are three levels of government that might have some responsibility for either enacting or enforcing environmental laws. These are the local, state, and federal governments. Who has what responsibility? What is the interaction between state and federal authority?

- Seven Reasons Why Gutting the EPA is Bad for Business
  - http://lawprofessors.typepad.com/environmental_law/2017/04/seven-reasons-why-gutting-epa-is-bad-for-business.html
- State Constitutions and Environmental Bills of Rights
  - http://knowledgecenter.csg.org/kc/content/state-constitutions-and-environmental-bills-rights
- The Constitutional Right to a Healthy Environment
  - http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html
- Regional Federal Administration
  - http://www.uclalawreview.org/wp-content/uploads/2016/01/Owen-final-article-no-bleed.pdf
- Little Streams and Legal Transformations (2017 Utah L.R. 1)
- EPA Enforcement Annual Results for Fiscal Year 2016
  - https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2016

- The Perils of Experimentation (126 Yale L.J. 636, on Westlaw); Read the introduction

11 Private Responsibility for Pollution Cleanup 409 – 452

Common law concepts are often evident in modern environmental statutes. CERCLA, for example, contemplates strict, joint & several liability. It extends the net to a wide array of potentially responsible parties – all of whom may be financially liable for cleaning up a pollution site. This section investigates how the statutes are deployed to hold private parties liable.

- EPA Basic Information About Clean Ups
  - https://www.epa.gov/cleanups/basic-information-about-cleanups
- Pipeline 150 Miles from Dakota Access Protests Leaks 176,000 Gallons of Oil
  - https://www.washingtonpost.com/news/morning-mix/wp/2016/12/13/pipeline-150-miles-from-dakota-access-protests-leaks-176000-gallons-of-oil/?utm_term=.6745b3fbef40
- 5 Years After the Gulf Oil Spill: What We Do (and Don't) Know
  - http://www.cnn.com/2015/04/14/us/gulf-oil-spill-unknowns/
- Superfund Enforcement: 35 Years of Protecting Communities and the Environment
  - https://www.epa.gov/enforcement/superfund-enforcement-35-years-protecting-communities-and-environment
- The Evolving Regulations and Liabilities Entwined in Corporate Social Responsibility (Westlaw)
  - https://1.next.westlaw.com/Document/I668870b30ab711e798dc8b09b4f043e0/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad740110000015b7cd388ca55f6a6b1%3FNav%3DANALYTICAL%26fragmentIdentifier%3DI668870b30ab711e798dc8b09b4f043e0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c7b575eb28b6a9995bcc5784a63733ba&list=ANALYTICAL&rank=9&sessionScopeId=b4b9c373731b6df0de46ebb6b89f488f3a1c1f337d1dc46c926c0ad4411b916a&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29&libraryResultGuid=i0ad740140000015b7cd1e7ac1e935ba6

12 Land Use Regulation

Zoning and Planning

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)

Covington v. Town of Apex, 423 S.E.2d 537 (N.C. App. 1992)

Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977)

Takings

Penn Central Transportation v. City of New York, 438 U.S. 104 (1978)

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)