ENVIRONMENTAL LAW

Professor Katrina F. Kuh
Course 3812(A)
Roosevelt 010
Monday 8:40AM -10:00AM & Wednesday 10:40AM-12:00PM

Contact Information

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Student meetings: Students are always welcome to stop by my office. Students are also welcome to schedule an appointment or telephone conference.
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Course Overview

This course explores domestic environmental law through the lens of emerging environmental debates and controversies. The course provides an overview of significant federal environmental statutes (including the Clean Air Act, Clean Water Act, Comprehensive Environmental Response, Compensation and Liability Act (Superfund), National Environmental Policy Act, Endangered Species Act, and Resource Conservation and Recovery Act), examines a range of approaches to addressing environmental harms (from common law suits to command and control regulation), and introduces students to contemporary issues in environmental law, including inter alia the use of public nuisance theories to address environmental harms and the response to climate change.

Course Goals

This course aims to equip students with a working knowledge of the most significant domestic environmental laws and prepare them to research and analyze environmental legal questions. These goals incorporate the following Learning Outcomes for Graduating Law Students:

• understand the roles and differing characteristics of sources of law: the common law, legislation, administrative regulations, and judicial interpretation of legislation, regulations, and constitutions [3(a)]
• understand the processes through which law is made and changed and how those processes differ from one source of law to another [3(b)]
• understand the different roles that state and federal law play in the process of lawmaking [3(c)]
• extract rules and policy from cases, statutes, and administrative regulations and analyzing, interpreting and arguing differing interpretations of rules and statutes [5(a)]
• identify legal issues in facts and applying rules and policy to facts [5(c)]
• construct arguments and identify flaws in an argument [5(e)].
Materials

- The required casebook is Percival, Environmental Regulation Law, Science and Policy (7th ed.).

- The syllabus also includes reference to some materials that are available on-line. Students should independently locate these materials using provided citations.

- I will periodically provide additional hand-out materials for individual class sessions.

Class Attendance, Preparation and Participation

- I will call on students regularly during class and will consider class participation when writing student recommendations and with regard to grading, as described below.

- The American Bar Association requires that you spend at least six hours per week, on average, outside of class studying for this 3-credit course. This is in addition to the three hours a week we spend in class.

- I reserve the right to adjust by one-half grade (B to B+ or B+ to B, etc.) the course grade of (1) any student whose contributions to class discussion and/or class participation are notable and exceptional (upward adjustment) or (2) any student who is unprepared when called upon or with otherwise poor class participation (downward adjustment). In-class use of the Internet may result in a downward adjustment.

- Students will occasionally be invited to use laptop computers during class exercises. However, during class discussion, I may request that students close and/or turn off laptop computers. Use of laptop computers and/or the Internet for purposes unrelated to class work is prohibited and may result in the downward adjustment of a student’s course grade.

- I will maintain a course TWEN site on Westlaw, available through www.lawschool.westlaw.com, assistance available at west.twensupport@thomson.com or 1-800-486-4876).

- A sign-in sheet will be available for each class. The sign-in sheet will be used to record and track attendance; falsification will be deemed a violation of the Code of Academic Conduct. Any student who misses 20% or more of scheduled classes (e.g., more than 6 classes) based on the sign-in sheet records is presumptively not in good and regular attendance and may be required to withdraw from the course or receive a failing grade, upon referral to and determination by the Office of Student Affairs. If you are unable to attend class due to illness, please send me an email, copied to my assistant, and your absence will be excused. I do not excuse absences for any reason other than student illness, although the Office of Student Affairs may do so if you are referred for excessive

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absences. I thus encourage you to retain documentation of any non-illness absence that you believe may ultimately be excusable (such as job interview, family emergency, or the like).

- Please note the following schedule adjustment:
  - Class will not be held on Monday, September 26 and Monday, October 10. Make-up classes will likely be held Friday, September 29 and Friday, October 7, 10:40am-noon (TBD).

**Examination and Grading**

- Course grades will be based upon a closed-book final examination, with class participation weighted as described above.

**Course Outline**

**Environmental Law**

**Introduction**

**Introductory Lecture**

- Percival, pp. 1-7, 53-54 (description of Deepwater Horizon oil spill), 146 n. 6 - 148 n. 7

**Using the Common Law to Prevent Environmental Harm: Nuisance**

**Introduction to Nuisance**

- Percival pp. 62-83 (*Madison v. Ducktown Sulphur, Missouri v. Illinois*)
- From Westlaw
  - *Stubbs v. City of Rochester*, 226 N.Y. 516 (1919)
  - Restatement (Second) of Torts §§ 821D, 822, 826-28, 829A

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Public Nuisance (cont.)

- Percival pp. 26-28, 83-89 (*Georgia v. Tennessee Copper Co.*)
- From Westlaw
  - Restatement (Second) of Torts §§ 821B, 840E

The Regulatory Process

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- Percival pp. 168-90 (*Sierra Club v. Costle, Chevron v. NRDC*)
- From TWEN weblinks:

Regulatory Process: Chemical Exposures and the (old) Toxic Substances Control Act

- Percival pp. 223-29, 242 (n.3)-244, 255-77 (*Corrosion Proof Fittings v. EPA*)

Regulatory Process: Reform--Frank R. Lautenberg Chemical Safety for the 21st Century Act

- Excerpts of TSCA as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (to be posted to TWEN or distributed in class)

Command and Control

Clean Water Act (CWA)

CWA: Scope of Federal Authority

- For use as a reference while reading the above cases and during class discussion:
  - Text of regulatory definition of waters of the United States, 33 C.F.R. § 328.3, Definition of Waters of the United States, prior to Aug. 28, 2015 (Professor Kuh will post to TWEN)

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National Pollution Discharge Elimination System (NPDES): Discharge, Point Sources

- Percival pp. 694-710 (National Mining Ass’n v. Army Corps of Engineers, South Florida Water Management District v. Miccosukee Tribe, Los Angeles County Flood Control District v. NRDC), 717-25 (United States v. Plaza Health Laboratories, Inc.)

NPDES: Effluent Limits, Water Quality Standards, POTWs, Nonpoint Sources

- 40 CFR § 405.12
- Please visit and peruse the Idaho Department of Environmental Quality’s TMDLs page (http://www.deq.idaho.gov/water-quality/surface-water/tmdls/).
- Handouts
  - SPDES Discharge Permit

Endangered Species Act (ESA)

ESA: Consultation

- Percival pp. 984-93 (TVA v. Hill), 1009-1015 (listing + critical habitat designation), 1029-34 (Thomas v. Peterson)

ESA: Take Prohibition

- Percival pp. 1015-16 (climate-threatened species); 1047-64 (Babbitt v. Sweet Home)

Resource Conservation and Recovery Act (RCRA)

RCRA: Overview and Solid Waste

- Percival, pp. 365-84 (American Mining Congress v. EPA)

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• Handouts
  o Uniform Hazardous Waste Manifest

**RCRA: Hazardous Waste**

• Percival pp. 384-99 (*City of Chicago v. Environmental Defense Fund*), 406-10 (Subtitle D)

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**Alternatives to Command and Control**

**Strict Liability:**
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

**CERCLA: Owners, Operators and Arrangers**

• Percival pp. 411-17, 420-49 (*New York v. Shore Realty Corp, United States v. Bestfoods, Burlington Northern & Santa Fe Railway Co. v. United States*)

**CERCLA: Strict, Joint & Several Liability, Remedy Selection and Natural Resource Damages**

• Percival pp. 449-63 (*Burlington Northern & Santa Fe Railway Co. v. United States*)
• Handout
  o Jackson Steel Site Proposed Plan (excerpt)
• From LexisNexis
  o Brian D. Israel, Natural Resource Damages: The Basics, 5-32B Environmental Law Practice Guide §§ 32B.01, 32B.02[1][a], 32B.07

**CERCLA: Allocation**


  **Market Mechanisms:**
  Clean Air Act (CAA)

**CAA: Overview and National Ambient Air Quality Standards**

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• Percival pp. 569-92 (Lead Industries Ass’n v. EPA, Whitman v. American Trucking Ass’n)
• Handouts
  o EPA, Nonattainment Status for Nassau County
  o EPA, What Are the Six Common Air Pollutants? (excerpts)
• From TWEN weblinks

Nonattainment, Prevention of Significant Deterioration, and New Source Review
• Percival pp. 608-24 (Environmental Defense v. Duke Energy Corp.)

CAA: Cooperative Federalism and Acid Rain
• Percival pp. 592-608 (Union Elec. Co. v. EPA, Virginia v. EPA, Alaska Dep’t of Env’tl Conservation v. EPA), 624-37 (Alliance for Clean Coal v. Bayh)

CAA: Climate Change
• Percival pp. 533-542 (Massachusetts v. E.P.A.)
• Please read the Percival Chapter 5 update for p. 541, PA’S ENDANGERMENT FINDING AND REGULATION OF GREENHOUSE GASES (GHGs): SUPREME COURT DECIDES UTILITY AIR GROUP; EPA PROPOSES NSPS FOR POWERPLANT EMISSIONS OF GHGs AND PROMULGATES CLEAN POWER PLAN FOR EXISTING POWERPLANTS, available from http://www.erlsp.com/Casebook/Ch._5.html.
• Please peruse EPA’s regulation of greenhouse gas emissions under the CAA, http://epa.gov/climatechange/EPAactivities/regulatory-initiatives.html

Information Strategies

National Environmental Policy Act (NEPA): Overview
• Percival, pp. 895-905 (Calvert Cliffs, Strycker’s Bay), 973-78

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**NEPA: Triggering Environmental Review**


**NEPA: Assessing the Adequacy of an EIS**

- Percival pp. 953-73 (Vermont Yankee Nuclear Power Corp. v. NRDC, Sierra Club v. United States Army Corps of Engineers, Marsh v. Oregon Natural Resources Council)

**Proposition 65 and the Emergency Preparedness and Community Right to Know Act (EPCRA)**

- Percival, pp. 327-34, 339-47
- Handout
  - Town of Hempstead, Consumer Confidence Report (Safe Drinking Water Act)

**Information and Environmentally Significant Individual Behaviors**