

## GLOBAL CLIMATE CHANGE AND U.S. LAW

Professor Katrina F. Kuh  
Course No. 2856(A)  
Fall 2016  
Monday, 10:10am-noon  
Room 242

### *Contact Information*

Office: 236

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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.

Assistant: Jennifer Calautti, [Jennifer.Calautti@hofstra.edu](mailto:Jennifer.Calautti@hofstra.edu), Room 223, (516) 463-5878

### *Course Overview*

This course will explore domestic legal mechanisms for responding to global climate change. Topics covered will include common law tort actions, federal regulation of greenhouse gas (GHG) emissions under the Clean Air Act, proposals for a federal GHG-control statute, and mitigation measures adopted by local government. The course seeks to provide students with an understanding of the domestic legal options available to reduce GHG emissions and invites students to develop opinions about their viability, interplay, and desirability. No pre-requisites or co-requisites are required, but Environmental Law is recommended. The primary course requirement is the completion of a twenty-page research paper for which Writing I credit will be available.

### *Course Goals*

This course seeks to (1) educate students about domestic legal approaches for mitigating climate change, (2) provide a forum for students to engage in thoughtful discussion and collaborative analysis of domestic climate policy, and (3) assist students in producing a substantial and successful legal research paper. These goals incorporate the following Learning Outcomes for Graduating Law Students:

- write analytically and persuasively [4(a)]
- present analysis orally outside of litigation [5(h), 6(m)]
- use policy to analyze and persuade [5(i)]
- work collaboratively [6(j)]
- present written and oral communication in a manner that meets the standards of the legal profession [7(a)].

### ***Materials***

- Students will also be asked to access materials available from a variety of on-line sources. Students are expected to independently download these materials. Note that some of the materials are available only through the Hofstra Library web system (under “Online Resources,” “University Libraries” and in some instances through “Journal Finder”). If you have difficulty locating a source please check with the Deane Law Library staff.

### ***Class Attendance, Preparation and Participation***

- I will call on students regularly during class and will consider class preparation and participation when writing student recommendations and with regard to grading, as described below.
- The American Bar Association requires that you spend at least four hours per week, on average, outside of class studying for this 2-credit course. This is in addition to the two 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](http://www.lawschool.westlaw.com), assistance available at [west.twensupport@thomson.com](mailto:west.twensupport@thomson.com) or 1-800-486-4876). Please register for the course on TWEN.
- 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*

*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).*

- Schedule adjustment: Please note that there is no class on Monday, September 26. A make up class will be held, likely on Friday, September 23, from 10:10am-noon.

### ***Course Requirements and Grading***

- Course grades will be based upon a draft and final course paper, with class participation factored in as described above. The final course paper will satisfy the Writing I requirement. The final course paper must be a substantial writing of at least 20 pages that involves independent research and legal analysis and addresses a legal topic related to climate change.
- Paper topic proposals are due by e-mail to me on or before October 10. Paper drafts are due to me by e-mail AND in hard copy at the beginning of class on November 14. Paper drafts should also be e-mailed to student peer reviewers at the beginning of class on November 14. Final course papers are due by e-mail to me and also in hard copy at the beginning of class on December 5.
- Paper topic proposals should consist, at minimum, of a short (~ a paragraph) description of the topic that the student's paper will address. I will also review more developed outlines if available.
- Paper drafts must be timely submitted, evidence significant progress in researching and developing arguments related to the paper topic, and be at least ten pages in length. If a draft is submitted that does not meet these requirements, the score on the final paper may be adjusted downward.
- Final papers should set forth a clear thesis or argument and support that thesis or argument through reasoned analysis and appropriate reference to authority. Papers will be holistically graded based on factors including clarity of thesis, organization, sophistication of argument and analysis, use of supporting reference materials, and overall format and presentation (spelling, grammar, adherence to Blue Book citation).

## **Course Outline**

# **Global Climate Change and U.S. Law**

**Class #1 (August 22): Introduction and course overview – What is climate change? What are its causes and likely impacts? What is the status of existing U.S. and international efforts to control GHG emissions?**

Required:

- IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)], *available at* [https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf)
- ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION LAW SCIENCE & POLICY 1207-1235 (2013) (7th ed.) (posted to TWEN) and update to Chapter 11, Paris Agreement on Climate Change, *available at* [http://www.erlsp.com/Casebook/Ch.\\_11.html](http://www.erlsp.com/Casebook/Ch._11.html)

Supplemental:

- National Climate Assessment, U.S. Global Change Research Program, *available at* <http://nca2014.globalchange.gov/>

**Class #2 (August 29): Existing statutes – Does the Clean Air Act authorize/require the regulation of GHG emissions?**

Required:

- *Massachusetts v. E.P.A.*, 127 S.Ct. 1438 (2007)
- Regulating GHGs under the CAA, Statutory Supplement (posted to TWEN)

**Class #3 (September 12): Existing statutes – Does the Clean Air Act authorize/require the regulation of GHG emissions? (cont.)**

Required:

- *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014)
- ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION LAW SCIENCE & POLICY (2013) (7th ed.) update to Chapter 5 (p. 541 update ONLY) *available at* [http://www.erlsp.com/Casebook/Ch.\\_5.html](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> and read EPA's

explanation of the legal authority for the rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, pp. 243-247, *available from* <http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf>

**Class #4 (September 19): Assessing potential common law solutions (public nuisance).**

Required:

- The Complaint in *Native Village of Kivalina v. ExxonMobil Corp.*, *available at* <http://insideclimatenews.org/sites/default/files/Kivalina%20Complaint-1.pdf>
- Restatement (Second) of Torts §§ 821B, 826
- *American Electric Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527 (2011)
- Students will also be assigned to review and report on select issues in *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309 (2d. Cir. 2009), *rev'd*, 131 S.Ct. 2527 (2011), or *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D.Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir.)

Supplemental:

- David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. (2003)
- Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005)

**Class #5 (September 23): Assessing potential common law solutions (public trust).**

Required:

- CHRIS WOLD, DAVID HUNTER & MELISSA POWERS, *CLIMATE CHANGE AND THE LAW* 1039-49 (2d ed. 2013) (posted to TWEN)
- *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 2015-NMCA-063, 350 P.3d 1221 (N.M. Ct. App. 2015) ((please access via Lexis or Westlaw)
- *Kelsey, Cascade, Rose, Juliana et al. v. United States*, Order Findings & Recommendation on Motion to Dismiss, No. 6:15-cv-1517-TC (D. Oregon Apr. 8, 2016) *available at*

<http://static1.squarespace.com/static/571d109b04426270152febe0/t/575ad543cf80a1a925eb20a5/1465570630055/16.04.08.OrderDenyingMTD.pdf>

**Class #6 (October 10): Environmental law research tutorial; paper topic proposals due.**

- Paper topic proposals due to Professor Kuh by e-mail.
- A Deane Law Library Reference Librarian will conduct an environmental law research training session.

**Class #7 (October 17): Comparing policy options -- What is the best (most efficient, fair, effective) structure for a federal law designed to reduce GHG emissions?**

Required:

- Robert R. Nordhaus & Kyle W. Danish, *Designing a Mandatory Greenhouse Gas Reduction Program for the U.S.* (Pew Center on Global Climate Change May 2003), available at: <http://www.c2es.org/docUploads/USGas.pdf>
- Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10287, pp. 10287-10303 (2008)

Supplemental:

- Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169 (2008)

**Class #8 (October 24): Assess and critically evaluate proposed federal legislation to control U.S. GHG emissions.**

This class will review H.R. 2454, the American Clean Energy and Security Act of 2009.

- Congressional Research Service Report, *Greenhouse Gas Legislation: Summary and Analysis of H.R. 2454 as Passed by the House of Representatives (July 27, 2009)* (posted to TWEN). available at [http://assets.opencrs.com/rpts/R40643\\_20090727.pdf](http://assets.opencrs.com/rpts/R40643_20090727.pdf). Please read the one-page summary and review the table of contents that follows.
- Additionally, each student will be assigned a particular question to research about H.R. 2454, the American Clean Energy and Security Act of 2009, using the CRS summary as well as the bill text (as placed on the calendar in the Senate), available both as a pdf and in text form from <http://frwebgate.access.gpo.gov/cgi->

[bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2454eh.txt.pdf](http://www.twen.org/bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2454eh.txt.pdf) and posted to TWEN as well.

**Class #9 (October 31): Assess the role of local governments in responding to climate change.**

Required:

- Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669 (2010)

Supplemental:

- David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008)

**Class #10 (November 7): Does the U.S. have a duty/obligation (moral or otherwise) to significantly reduce its GHG emissions? To help developing nations with mitigation and/or adaptation? Evaluate and assess rationales for/against the adoption of stringent U.S. emission limits and the provision of climate aid to developing nations.**

Required:

- Byrd-Hagel Resolution, S.Res. 98, 105th Cong. (as passed by the Senate, July 25, 1997), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105\\_cong\\_bills&docid=f:sr98is.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:sr98is.pdf)
- Andrew C. Revkin, *Poor nations to bear brunt as world warms*, N.Y. TIMES, April 1, 2007, at 11.
- Eric A. Posner and Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1592-1612 (2008) (NOTE: Assignment is to read pp. 1592-1612 only.)
- Gardiner, S.M. (2004), "Ethics and global climate change." *Ethics* 114(3): 555, pp. 575-95 (available for Internet download through Academic Search Premier, EBSCO Host, Hofstra Library website) (also posted to TWEN) (NOTE: Assignment is to read pp. 575-95 only.)
- United Nations Framework Convention on Climate Change, Articles 2-4 and Annex I/II lists (pp. 4-9, 23-24), available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>

**\*\*\* DRAFT PAPERS DUE AT THE BEGINNING OF CLASS  
MONDAY NOVEMBER 14\*\*\*  
HARD COPY & E-MAIL TO PROFESSOR KUH  
HARD COPY & E-MAIL TO PEER REVIEWERS**

**Class #11 (November 14): DRAFT PAPERS DUE. Understanding the domestic debate over climate change – politics, business, science, worldview, and risk perception.**

Required:

- Jedediah Purdy, *Climate Change and the Limits of the Possible*, 18 DUKE ENVTL. L. & POL'Y F. 289, 289-298 (2008)
- Dan M. Kahan et al., The Second National Risk and Culture Study: Making Sense of - and Making Progress In -The American Culture War of Fact (2007), pp. 1-6 & p. 16, *available at* [http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1271&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1271&context=faculty_publications)
- Andrew C. Revkin, *Hacked E-Mail Is New Fodder for Climate Dispute*, N.Y. TIMES, Nov. 21, 2009.
- Gallup Politics, One in Four in U.S. Are Solidly Skeptical of Global Warming (April 22, 2014) (presenting the results of detailed polling of American regarding attitudes toward and beliefs about climate change), *available at* <http://www.gallup.com/poll/168620/one-four-solidly-skeptical-global-warming.aspx>
- Anthony Leiserowitz, Edward Maibach, & Connie Roser-Renouf, Global Warming's "Six Americas" An Audience Segmentation, *available at* <http://www.c2es.org/docUploads/SixAmericas.pdf> and Yale Program on Climate Change Communication, Global Warming's Six Americas (March 2016 update chart), *available at* <http://climatecommunication.yale.edu/about/projects/global-warmings-six-americas/>
- Frank Luntz, *The Environment: A Cleaner, Safer, Healthier America* pp. 137-141 (2002) (strategy memo to the White House for Republican Party candidates), *available at* <http://www2.bc.edu/~plater/Newpublicsite06/suppmats/02.6.pdf>

Supplemental:

- Boykoff, M. T., and J. M. Boykoff. 2004. Balance as bias: global warming and the US prestige press. *Global Environmental Change-Human And Policy Dimensions* 14 (2):125-136 (*available for Internet download from the Hofstra University Library website*)

- Aaron M. McCright, *The Social Bases of Climate Change Knowledge, Concern and Policy Support in the U.S. General Public*, 37 HOFSTRA L. REV. 1017 (2009)
- Union of Concerned Scientists, *Atmosphere of Pressure: Political Interference in Federal Climate Science* (2007),  
[http://www.ucsusa.org/scientific\\_integrity/abuses\\_of\\_science/atmosphere-of-pressure.html](http://www.ucsusa.org/scientific_integrity/abuses_of_science/atmosphere-of-pressure.html)

**Class #12 (November 21): Exchange and review of draft papers.**

- Students will break into small groups to review and comment on colleagues' draft papers.

**Class #13 (November 28): Assess opportunities for and obstacles to reductions of GHG emissions from changes in individual behaviors.**

- Michael P. Vandenbergh et al., *Individual Carbon Emissions: The Low Hanging Fruit*, 55 UCLA L. REV. 1701 (2008)
- Before coming to class, please calculate (and record) your carbon footprint using the Berkeley Institute of the Environment CoolClimate Carbon Footprint Calculator, available at <http://coolclimate.berkeley.edu/carboncalculator>

Supplemental:

- Michael P. Vandenbergh & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673 (2007)

**Class #14 (December 5): FINAL PAPERS DUE. Concluding lecture and discussion.**