

SYLLABUS 5 – PROFESSOR PERCIVAL’S FALL 2018 SYLLABUS

ENVIRONMENTAL LAW – FALL 2018

Class meets in Room 107

Mondays and Wednesdays 4:55-6:20pm

Professor Robert V. Percival

Email: RPercival@law.umaryland.edu

Office: Room 481

Phone: (410) 706-8030

Faculty Assistant: Kate Woods (KWoods@law.umaryland.edu) Room 494

Office hours: If you wish to guarantee that you can meet at a certain time, please make an appointment by contacting the professor by email. I will usually try to make sure that I am in my office and available to meet students on Thursdays from 2:00-3:00pm.

For more information about the Environmental Law Program, contact William Piermattei, Managing Director, in Room 488, (410) 706-8157, email WPiermattei@law.umaryland.edu.

INTRODUCTION

Welcome to Environmental Law. This will be a particularly exciting semester as environmental law becomes a focus of substantial political conflict. We will be closely following the legal and policy issues raised by the Trump administration’s efforts to roll back environmental regulation and to withdraw the U.S. from the Paris climate agreement.

Environmental law is increasing in importance throughout the world. In July 2018 three Maryland law students presented papers at the 16th Colloquium of the IUCN Academy of Environmental Law in Glasgow, Scotland. Three environmental law students will be selected to present papers at the 17th Colloquium in Kuala Lumpur, Malaysia in August 2019.

COURSE OVERVIEW AND OBJECTIVES

This course focuses on how legal institutions have been used to respond to environmental problems. While the common law had been used for centuries to address highly visible pollution problems, in the last 50 years the public law of environmental protection has grown dramatically to become a vast and complex field of law. Given its vast scope and enormous complexity, environmental law cannot possibly be covered comprehensively in a one-semester survey course. Thus, this course is designed to provide a basic introduction to the most important concepts in environmental law through selective coverage of topics. Many topics that are not covered in depth are the subjects of seminars that students are encouraged to take.

The course begins with an introduction to environmental problems and the values that animate environmental protection policy. It then provides a structural overview of environmental law, tracing the legal system's transition from the common law to the modern regulatory state and reviewing issues of federalism and regulatory policy implicated by this development.

After examining how the regulatory process operates, the course then focuses on the problems regulatory policy faces in seeking to prevent harm in the face of scientific uncertainty and the question of how precautionary regulatory policy should be. It examines the principal models for determining how stringently to regulate and burden-shifting and informational approaches to regulation. The course examines the difficulty of implementing regulatory legislation by focusing first on federal hazardous waste legislation (the Resource Conservation and Recovery Act). The course then contrasts this regulatory approach with the liability approach employed by Comprehensive Environmental Response, Compensation, and Liability Act, which broadly extends principles of strict liability to broad classes of parties associated with releases of hazardous substances.

The course then reviews the structure of federal air and water pollution control programs, focusing on the questions whether the Clean Air Act should be used to regulate emissions of greenhouse gases and whether it delegates too much power to EPA. The course then considers the controversy over the jurisdictional reach of the Clean Water Act. This is followed by exploration of constitutional limits on land use regulations to protect the environment and a review of the National Environmental Policy Act, which requires federal agencies to assess and to consider the environmental consequences of major federal actions, and the Endangered Species Act, which seeks to preserve biodiversity. The course concludes by returning to the law of environmental standing before examining the rapidly developing field of international environmental law.

Students in this course can expect to develop enhanced skills and knowledge in five major areas: (1) Students should gain a good understanding of 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. (2) Because most federal environmental law is the product of legislation, students will have the opportunity to develop and enhance statutory analysis and interpretation skills. (3) Students should gain a basic understanding of the regulatory process that is used by administrative agencies to develop and promulgate regulations. (4) This course also will explore how principles of constitutional law affect the regulatory authority of Congress and the states. (5) Students should develop an enhanced ability to critique regulatory policy choices.

COURSE BLACKBOARD WEBSITE

This course relies on the Blackboard system to inform students of assignments and the course schedule. The course website posted on the Blackboard contains all the information that you will need for this class. In addition to this syllabus, the website contains a Discussion Board and External Links to webpages that will provide additional information about the subjects covered in this course.

REQUIRED COURSE MATERIALS

(1) Percival, Schroeder, Miller & Leape, *Environmental Regulation: Law, Science & Policy* (Aspen, 8th ed. 2018). This is the latest edition of the most widely used environmental law casebook in the country.

(2) *Environmental Law: Statutory and Case Supplement 2018-2019* (Aspen 2018). 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. It also contains a guide for finding additional research material on environmental regulation on the internet. There will be short assignments from it for most classes to give you experience applying statutory language.

I apologize for the prices of the books. In the past I have complained to my publisher about the prices, but to no avail. While I have no control over the prices of the books, in keeping with Maryland tradition, because the professor is the principal author of the required course materials, all royalties earned from the class's purchase of the books are used to fund a winetasting party for environmental law students. You are invited to attend this party, which will be held in Westminster Hall on Friday November 16, 2018 from 6:30-8:30pm. A large group of environmental alums regularly attend this party, which makes it a great networking event. This year the event will be preceded at by the annual Fedder lecture, which will be delivered by John Cruden, who was the assistant attorney general for the Justice Department's Environment and Natural Resources Division during the Obama administration.

FOR MORE INFORMATION

Global Environmental Law Blog and Casebook Website: The professor maintains a monthly blog on developments in Global Environmental Law at: www.globalenvironmentallaw.com and on a parallel website at www.globalenvironmentallaw.blogspot.com. He also maintains a casebook website that contains information about pending cases, photos of the sites of famous environmental cases, and updates based on events that occurred after publication of the latest edition of the casebook (organized by chapter) at www.erlsp.com. The Blackboard website's external links section also contains links to other webpages that can help you explore subjects in the casebook in more detail and photographs of some of the sites of famous environmental

cases. Students are encouraged to use these resources to learn more about topics that interest them. They also are encouraged to recommend to the professor other websites they have discovered that provide useful additional information on the subjects covered in the casebook.

CLASS PREPARATION, PROBLEM EXERCISES & DISCUSSION BOARD

Most of the material to be covered in this course is well-suited to the lecture and discussion method of teaching. Lectures generally will not be designed to repeat the material in the assigned readings, but rather to provide an additional perspective on it. However, since the professor is the principal author of the casebook, it should come as no surprise if the material covered in class tends to follow the casebook rather closely. Class discussion of the material is important and students should be prepared to be called upon in class, particularly those students who do not volunteer regularly to participate in class discussions.

To provide a focal point for class discussion, the professor will prepare a question before each class session. To prepare for class, the professor invites students to use the Discussion Board on the Blackboard website to post a response to the question after you have completed the reading for a class, but before the class meets. These responses will help jump-start our in-class discussion and, as students have discovered in the past, they ultimately provide excellent preparation for the final exam. Students are required to do post a response to the question on the Discussion Board for the first class of the year. For subsequent classes, posting on the Discussion Board is optional, but encouraged. To encourage students to make frequent postings, a drawing will be held toward the end of the semester where your chances of winning will depend on the number of times you have posted. The winners of the drawing will be taken to lunch by Professor Percival. The drawing will be held in class on Monday November 19. Students also are encouraged to use the Discussion Board to raise questions and to discuss issues that arise in class, in the readings, or in the news. Students also may email the professor directly with questions.

SMALL GROUP PROJECTS

Each member of the class is required to participate in one ungraded project. Students must either participate in a small group film project or prepare a brief (4-page) paper answering a question about environmental law. Students opting for the small group film assignment are asked to make a short film (5 to 7 minutes in length) to present the group's position on an important environmental policy issue that is the subject of current controversy. For the past eleven years the students, working in groups of three to six students, have produced wonderfully creative films.

Films made in class are submitted to an independent panel of judges who vote to award several prizes ("golden tree" awards) to the best films in various categories. The awards will be presented at the annual environmental film festival during spring 2019.

To assist the small groups in making this year's films, technology specialist John Brosnan and student filmmakers from past classes will be available to provide you with help and advice on your projects.

Students may use their own video equipment or they may borrow the school's video equipment. This exercise, which will not be graded, is designed to give everyone the experience of trying to translate and communicate often complex issues of legal policy into a form lay persons can understand. Students are encouraged to post their videos online – You Tube really can help change the world. In the past students have found that this exercise opened some new horizons for them and it also has enabled the professor to write more interesting recommendations for many students.

This year an Australian environmental law professor has encouraged us to enter our student films in the Fleurieu Film Festival in Australia. Entries must be on the topic of climate change. The films must be less than eight minutes long and focus on the topic "Climate Change – Hot Topic/Kool Films." A variety of prizes ranging from \$1,000 to \$5,000 will be awarded in February 2019. Details are available at <http://www.fleurieufilmfestival.com.au>. The Environmental Law Program will pay the \$25.00 entry fee for any students wishing to enter their film in this competition.

Those students who elect not to participate in a film project may instead write a 4-page memo responding to one of the Discussion Board questions or another question selected in consultation with the professor. This assignment also will be ungraded. Both projects should be completed by the last day of class (Weds. Nov. 28) when the films will be shown in class.

GRADING POLICY

Your final grade in the course will be determined by your grade on the final exam. The final exam will consist of essay questions based on material in the assigned readings and any material presented in class. During the exam, students may consult their notes and the required or recommended course materials, but no other materials (e.g., treatises or nutshells) may be brought to the exam. Student posting on the Discussion Board of the course website will not be graded, but past experience has demonstrated that students who respond to the discussion questions with regularity find themselves much better prepared for the final exam.

FIELD TRIP

Each year we try to schedule an optional field trip to the U.S. Supreme Court to watch the oral argument in an environmental case. On Monday October 1 at 10:00AM the Court will hear *Weyerhaeuser Co. v. Fish & Wildlife Service*, a case involving the question of whether designations of critical habitat under the Endangered Species Act may include land currently unoccupied by endangered species and whether such designations are subject to judicial review. To be able to see the argument, students will have to leave Baltimore on the first MARC train of the day to get in line at the Court. Following the argument, Professor Percival invites you to come to his home, which is in walking distance of the Court, for a lunch. Further details will be provided in class.

COURSE OUTLINE & LIST OF READING ASSIGNMENTS

CHAPTER 1: ENVIRONMENTAL VALUES

MON. AUGUST 27: Introduction to the Course, Environmental Problems, Environmental Justice and the Rationale for Collective Action. ASSIGNMENT: Read (1) pp. 1-26, 29-33 and 999-1004 in the casebook, (2) Executive Order 12,898 (“Federal Actions to Address Environmental Justice in Minority and Low-Income Populations”) in Chapter 1 of the Statutory and Case Supplement, and (3) post a brief response to the question on the Discussion Board of this website.

WEDS. AUGUST 29: Cost-benefit Analysis, Ecosystem Services and the Tragedy of the Commons. ASSIGNMENT: Read (1) pp. 33-47, and 52-64 in the casebook, and (2) Executive Order 13,771 (“Reducing Regulation and Controlling Regulatory Costs”) in Chapter 2 of the Statutory and Case Supplement. Postings of responses to questions on the Discussion Board is now optional.

MON. SEPTEMBER 3: LABOR DAY – NO CLASS

CHAPTER 2: ENVIRONMENTAL LAW: STRUCTURAL OVERVIEW

WEDS. SEPTEMBER 5: The Common Law Roots of Environmental Law: Private and Public Nuisance. ASSIGNMENT: Read pp. 65-93 in the casebook.

MON. SEPTEMBER 10: The Rise of the Regulatory State, Environmental Federalism, Standing, and Preemption of Federal Common Law. ASSIGNMENT: Read (1) pp. 93-127 in the casebook and (2) “Environmental Legislation in Historical Perspective” in the Introductory section of the Statutory and Case Supplement.

WEDS. SEPTEMBER 12: Environmental federalism, approaches to regulation and judicial review. ASSIGNMENT: (1) Read pp. 127-154, and 190-198.

CHAPTER 3: PREVENTING HARM IN THE FACE OF UNCERTAINTY

MON. SEPTEMBER 17: Risk Regulation in the Face of Uncertainty: How Precautionary Should Regulatory Policy Be? ASSIGNMENT: Read pp. 199-230 of the casebook.

WEDS. SEPTEMBER 19: Risk-Benefit Balancing, the New Toxic Substances Control Act, the Flint Lead Poisoning Scandal and Regulation by Revelation
ASSIGNMENT: Read (1) pp. 265-295, and 336-344 in the casebook, and (2) TSCA Legislative History Timeline and Outline of the Principal Provisions of the Toxic Substances Control Act in Chapter 3 of the Statutory and Case Supplement.

CHAPTER 4: REGULATING WASTE MANAGEMENT

MON. SEPTEMBER 24: Introduction to the Resource Conservation & Recovery Act and the Definition of "Solid Waste". ASSIGNMENT: Read (1) pp. 350-386 in the casebook and (2) RCRA Legislative History Timeline and Outline of Principal Provisions of the Solid Waste Disposal Act in Chapter 4 of the Statutory and Case Supplement, and (3) The Pollution Prevention Act in Chapter 4 of the Statutory and Case Supplement.

WEDS. SEPTEMBER 26: Introduction to CERCLA. ASSIGNMENT: Read (1) pp. 409-430 & 437-449 in the casebook and (2) CERCLA Legislative History Timeline and Outline of Principal Provisions of CERCLA in Chapter 4 of the Statutory and Case Supplement.

MON. OCT. 1: OPTIONAL FIELD TRIP TO THE U.S. SUPREME COURT to hear oral argument at 10:00am in *Weyerhaeuser Co. v. Fish & Wildlife Service*, an Endangered Species Act case. Class will be held in the afternoon at the normal time (see assignment below).

CHAPTER 5: AIR POLLUTION CONTROL

MON. OCTOBER 1: Introduction to the Clean Air Act, What Is an Air Pollutant and Controls on Mobile Sources. ASSIGNMENT: Read (1) pp. 524-563 and 569-571 in the casebook and (2) A Note on the 1990 Amendments to Section 111(d) and Outline of Principal Provisions of the Clean Air Act in Chapter 5 of the Statutory and Case Supplement.

WEDS. OCTOBER 3: Establishing and Revising National Ambient Air Quality Standards. ASSIGNMENT: Read (1) pp. 571-600 in the casebook and (2) § 109 of the Clean Air Act in Chapter 5 of the Statutory and Case Supplement.

MON. OCTOBER 8: Nonattainment, Prevention of Significant Deterioration, and Multi-State Air Quality Problems. ASSIGNMENT: Read (1) pp. 610-627 and 640-655 in the casebook and (2) Executive Order 13,783 (“Promoting Energy Independence and Economic Growth”) in Chapter 5 of the Statutory and Case Supplement.

CHAPTER 6: CONTROL OF WATER POLLUTION

WEDS. OCTOBER 10: Introduction to the Clean Water Act and the Scope of Federal Jurisdiction. ASSIGNMENT: Read (1) pp. 663-696 in the casebook, (2) Executive Order 13,778 (“Restoring the rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule”) in Chapter 6 of the Statutory and Case Supplement, and (3) National Association of Manufacturers v. Department of Defense in Chapter 11 of the Statutory and Case Supplement.

MON. OCTOBER 15: Regulation of Discharges from Point Sources, Water Quality Standards, Total Maximum Daily Loadings & the Section 404 Permit Program. ASSIGNMENT: Read pp. 696-704, 746-751, 772-793 in the casebook.

CHAPTER 7: LAND USE REGULATION AND REGULATORY TAKINGS

WEDS. OCTOBER 17: Regulatory Takings. ASSIGNMENT: Read pp. 832-874 in the casebook.

MON. OCTOBER 22: Regulatory Exactions, Judicial Takings and Evolving Conceptions of Property Rights. ASSIGNMENT: Read pp. 874-909 in the casebook.

CHAPTER 8: ENVIRONMENTAL IMPACT ASSESSMENT

WEDS. OCTOBER 24: Introduction to NEPA, When Must an Environmental Impact Statement Be Prepared? ASSIGNMENT: Read (1) pp. 911-927 and 943-968 in the casebook, and (2) NEPA Timeline and Principal Provisions of NEPA in Chapter 8 of the Statutory and Case Supplement.

MON. OCTOBER 29: What “Effects” Must Be Considered, Climate Change, Analysis in Uncertainty, Has NEPA Worked? ASSIGNMENT: Read (1) pp. 938-944, and 969-997 in the casebook, and (2) Executive Order 13,766 (“Expediting Environmental Reviews and Approvals

for High Priority Infrastructure Projects”) and Executive Order 13,807 (“Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure”) in Chapter 8 of the Statutory and Case Supplement.

CHAPTER 9: PRESERVATION OF BIODIVERSITY

WEDS. OCTOBER 31: Introduction to the Endangered Species Act, Federal Authority to Preserve Biodiversity, and Which Species Are Protected. ASSIGNMENT: Read (1) pp. 1004-1039 the casebook, and (2) Endangered Species Act Legislative History Timeline and Principal Provisions of the Endangered Species Act in Chapter 9 of the Statutory and Case Supplement.

MON. NOVEMBER 5: Protecting Endangered Species Against Private Action: §9 of the Endangered Species Act and the Future of Biodiversity Protection. ASSIGNMENT: Read pp. 1059-1083 in the casebook.

CHAPTER 10: ENVIRONMENTAL ENFORCEMENT

WEDS. NOVEMBER 7: Monitoring and Detecting Environmental Violations and Criminal Enforcement. ASSIGNMENT: Read pp. 1085-1101, 1107-1112, and pp. 1120-1139 of the casebook.

MON. NOVEMBER 12: Citizen Suits and Standing. ASSIGNMENT: Read pp. 1139-1141 and 1156-1188 in the casebook.

CHAPTER 11: PROTECTION OF THE GLOBAL ENVIRONMENT

WEDS. NOVEMBER 14: International Environmental Law and Protection of the Global Atmosphere. ASSIGNMENT: Read pp. 1205-1214, 1219-1240, and 1243-1250 in the casebook.

FRIDAY NOVEMBER 16: FEDDER LECTURE at 5:30pm by JOHN CRUDEN in the Ceremonial Moot Courtroom followed by ENVIRONMENTAL LAW WINETASTING in Westminster Hall from 6:30-8:30pm.

MON. NOVEMBER 19: Trade and the Environment & International Trade in Hazardous Substances, ASSIGNMENT: Read pp. 1250-1293 in the casebook.

WEDS. NOVEMBER 21: THANKSGIVING RECESS – NO CLASS

MON. NOVEMBER 26: Review Session – come prepared with questions.

WEDS. NOVEMBER 28: Presentation of Small Group Movie Projects in the Ceremonial Moot Courtroom. For those who elect to do the paper instead of the film project, the papers are due on this day.