

## **ENVIRONMENTAL LAW – FALL 2021**

Class meets in Room 108

Mondays and Wednesdays 4:55-6:20pm

Professor Robert V. Percival

Email: [rpercival@law.umaryland.edu](mailto:rpercival@law.umaryland.edu)

Office: Room 481

Phone: (410) 706-8030

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

*Office hours:* The professor will try to be in his office on Tuesdays from 11am-noon or you may make an appointment to meet at another time by contacting the professor by email at [rpercival@law.umaryland.edu](mailto:rpercival@law.umaryland.edu)

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

### **INTRODUCTION**

Welcome to Environmental Law and the return to in-person classes! I am so excited that I will get to meet you in person after nearly 18 months since I last encountered a student. It has been so strange to be writing letters of recommendation for some students that I have only met online.

This class is being held at a time of transition in environmental law as the Biden administration seeks to undo numerous actions by the Trump administration to roll back environmental regulations. President Biden has pledged to employ an “all of government” approach to combating the climate crisis and to make the pursuit of environmental justice a top priority. With Congress in gridlock on most environmental issues, fierce battles are being waged in the courts on how to interpret the environmental laws.

### **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, during 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 examines the legal barriers that have made it difficult to redress fundamental issues of racial and economic justice raised by the disproportionate exposure of minority and low-income populations to environmental harm. 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 (RCRA)). The course then contrasts this regulatory approach with the liability approach employed by Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)), which 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 how 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 exploring environmental enforcement and efforts to use international law to protect the planet.

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 other material 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, 9th ed. 2021). This is the just-released edition of what has been the most widely used environmental law casebook in the country. It was published on July 31, 2021, so it is the most up-to-date casebook in the field.

(2) *Environmental Law: Statutory and Case Supplement 2021-2022* (Aspen 2021). 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 reading assignments from it in several classes.

I apologize for the prices of the books. I was truly shocked when I heard how much the publisher was asking for them. I repeatedly have complained about the prices to the publisher, but obviously they have not listened to me. Because the professor is the principal author of the required course materials, all royalties the professor and his coauthors earn from the class's purchase of the books will be donated to the Maryland Public Interest Law Project (MPILP). For students unable to afford a personal copy of the casebook, the professor has arranged for the school's Thurgood Marshall Law Library to place copies on reserve.

#### ANNUAL FEDDER LECTURE AND PROGRAM WINETASTING

Every year on the Friday before Thanksgiving the Environmental Law Program hosts its annual Fedder Lecture and Winetasting Party, which usually attracts a large

number of environmental alums. This year the Fedder Lecture is scheduled for Friday November 19 at 5:30pm in the Ceremonial Moot Courtroom. We are really delighted that Brenda Mallory, chair of the White House Council on Environmental Quality, has agreed to present the Fedder Lecture. The Fedder Lecture will be followed from 6:30-8:30pm by the Environmental Law Program Winetasting. We are carefully monitoring the campus's COVID safety protocols and will comply with whatever requirements are in place on November 19.

#### FOR MORE INFORMATION

*Casebook Website:* The professor maintains a casebook website at [www.erlsp.com](http://www.erlsp.com) that includes 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. The website is hosted by GoDaddy which does not make it easy for me to keep it up-to-date (if anyone is experienced at website maintenance and wants to help, please let me know). The Blackboard website also will contain material that can help you explore subjects in the casebook in more detail. 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 AND THE DISCUSSION BOARD

Most of the material to be covered in this course is well-suited to the lecture and discussion method of teaching. Lectures will try to do much more than simply repeating material in the assigned readings. They will try to provide insights on how environmental laws and policies were developed and their impact in the real world. After two judicial clerkships, I started my practice career as a litigator for a national environmental group (the Environmental Defense Fund) so please forgive me if I occasionally tell war stories in class.

Because of the breadth and complexity of the environmental law field, much of the material we cover is really hard and you will have to do a lot of reading. My commitment to you is that I will do everything I can to help you understand it and to make it more enjoyable. 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. In order to help keep all of us safe all class sessions will be recorded and available for subsequent viewing on the Blackboard website so if you are not feeling well you should not hesitate to stay home and watch the recording later.

To provide a focal point for class discussion, the professor will prepare a Discussion Board question before each class session. To prepare for class, the professor invites students to post a short response to the question on the Discussion Board 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 post a response to the question on the Discussion Board for the first class of the year on August 23. Please try to make your post a few hours before class so that I have a chance to digest it before we the start class. After the August 23 class, posting on the Discussion Board is optional, but encouraged. Students may 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 PROJECT OR SHORT PAPER

In addition to the reading assignments students are asked either to participate in a small group film project or to prepare a brief (4-page) paper answering a question about environmental law (Discussion Board questions are fair game). 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 environmental issue. Since 2002 students have produced wonderfully creative films. You may view them online at: <https://digitalcommons.law.umaryland.edu/envirofilms/> The law school has a resident Emmy award-winning filmmaker on staff (John Brosnan) who enjoys helping students with their films.

A rough first cut of your film is due on the last day of class (November 21) when the student films are shown to the class in the Ceremonial Moot Courtroom. Students then may edit their films over Christmas break before submitting their final cuts of them to my assistant Kate Woods by January. Films made in class are submitted to an independent panel of judges who vote to award several prizes (we call them the "Golden Tree" awards) to the best films in various categories. The awards will be presented in March 2022. 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.

Those students who elect not to participate in a film project may instead write a 4-page memo on an environmental topic of your choosing (or you may simply use the topic of one of the Discussion Board questions). This assignment also will be ungraded. Both projects should be completed by the last day of class on Monday Nov. 22 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 consulted during 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.

### SUPREME COURT 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 and then gather for lunch at my home on Capital Hill, which is a short walk from the Court. In October 2019 we were able to reserve seats for several students to watch the argument in *County of Maui v. Hawaii Wildlife Fund*, which produced a major Clean Water Act decision we will study in this year's class. Due to the global pandemic the Court has been closed to the public since March 2020. If the Court elects to resume in-person arguments this fall, we will try to arrange an optional field trip.

### ENVIRONMENTAL LAW PROGRAM

We welcome you to the Environmental Law Program's extended family. Those students interested in qualifying for the certificate of concentration in environmental law will have completed an important requirement for it by successfully completing this course. It is our commitment to you that we will do everything we can to help advance your career path. My greatest pleasure as a professor is helping students get their dream jobs. A copy of our alumni directory, which will be posted on the Blackboard website, shows that our program has been enormously successful due to our terrific, devoted network of environmental alums.

### COURSE OUTLINE & PRELIMINARY LIST OF READING ASSIGNMENTS

#### CHAPTER 1: ENVIRONMENTAL VALUES

MON. AUGUST 23: Introduction to the Course, Environmental Problems and Values, Environmental Justice and Corporate Environmental Responsibility. ASSIGNMENT: Read (1) pp. 1-28 and 1181-1184 in the casebook; (2) § 101 of the National Environmental Policy Act, 42 U.S.C 4331, on pp. 1131-1132 of the Statutory and Case Supplement; (3) §§219-223 of Executive Order 14,008 on pp. 31-33 of the Statutory and Case Supplement; and (4) post a brief response to one of the questions on the Discussion Board of this website.

WEDS. AUGUST 25: Cost-Benefit Analysis and the Social Cost of Carbon, Ecosystem Services, the Tragedy of the Commons, ANWR and Pipeline Controversies. ASSIGNMENT: Read pp. 28-57 in the casebook. Postings of responses to questions on the Discussion Board is now optional.

## CHAPTER 2: ENVIRONMENTAL LAW: A STRUCTURAL OVERVIEW

MONDAY AUGUST 30: The Common Law Roots of Environmental Law: Private and Public Nuisance. ASSIGNMENT: Read pp. 59-93 in the casebook.

WEDS. SEPTEMBER 1: The Rise of the Regulatory State, Environmental Federalism, Displacement of Federal Common Law and Preemption of State Law, and Introduction to Environmental Standing. ASSIGNMENT: Read (1) pp. 93-130 in the casebook, and (2) “Environmental Legislation in Historical Perspective” on pp. xiii-xvii of the Statutory and Case Supplement.

MONDAY SEPTEMBER 6 – LABOR DAY (NO CLASS)

WEDS. SEPTEMBER 8: NO CLASS (Makeup on Friday November 19).

MON. SEPTEMBER 13: Environmental federalism, constitutional authority to protect the environment, approaches to regulation and the regulatory process. ASSIGNMENT: Read (1) pp. 130-149 and 160-184 of the casebook.

## CHAPTER 3: PREVENTING HARM IN THE FACE OF UNCERTAINTY

WEDS. SEPTEMBER 15: Risk Regulation in the Face of Uncertainty: How Precautionary Should Regulatory Policy Be? and Introduction to the PFAS Problem. ASSIGNMENT: Read pp. 185-215 and 225-228 of the casebook.

MON. SEPTEMBER 20: Risk-Benefit Balancing, the Toxic Substances Control Act, the Safe Drinking Water Act and the Flint Lead Poisoning Scandal and Regulation by Revelation

ASSIGNMENT: Read (1) pp. 231-245, 248-259, 279-286, and 290-298 and of the casebook, (2) TSCA Legislative History Timeline and Outline of the Principal Provisions of the Toxic Substances Control Act on pp. 94-95 of the Statutory and Case Supplement, and (3) EPCRA Legislative History Timeline and Outline of the Principal Provisions of the Emergency Planning and Community Right-to-Know Act on pp. 372-373 of the Statutory and Case Supplement.

#### CHAPTER 4: REGULATING WASTE MANAGEMENT

WEDS. SEPTEMBER 22: Introduction to the Resource Conservation & Recovery Act, What Is “Solid Waste,” Which Wastes Are Hazardous, Subtitle D and Coal Ash. ASSIGNMENT: Read (1) pp. 303-334 and 343-347 in the casebook, (2) RCRA Legislative History Timeline and Outline of Principal Provisions of the Solid Waste Disposal Act on pp. 403-405 of the Statutory and Case Supplement, and (3) the Pollution Prevention Act on pp. 610-613 of the Statutory and Case Supplement.

MON. SEPTEMBER 27: Introduction to CERCLA, Liable Parties: Owners and Arrangers, and CERCLA Remediation. ASSIGNMENT: Read (1) pp. 347-363, 370-382, and 390-395 in the casebook, (2) CERCLA Legislative History Timeline and Outline of Principal Provisions of CERCLA on pp. 511-512 of the Statutory and Case Supplement, and (3) Territory of Guam v. United States on pp. 1297-1300 of the Statutory and Case Supplement.

#### CHAPTER 5: AIR POLLUTION CONTROL

WEDS. SEPTEMBER 29: Introduction to the Clean Air Act, What Is an Air Pollutant and Controls on Mobile Sources. ASSIGNMENT: Read (1) pp. 447-480 in the casebook and (2) Clean Air Act Legislative History Timeline and Outline of Principal Provisions of the Clean Air Act on pp. 616-619 of the Statutory and Case Supplement.

MON. OCTOBER 4: Establishing and Revising National Ambient Air Quality Standards. ASSIGNMENT: Read (1) pp. 480-502 & 512-526 in the casebook and (2) § 109 of the Clean Air Act on p. 638-639 of the Statutory and Case Supplement.

WEDS. OCTOBER 6: Nonattainment, Prevention of Significant Deterioration, Regulation of Greenhouse Gas Emissions and Acid Deposition. ASSIGNMENT: Read (1) pp. 526-548 and 552-558 in the casebook, (2) Section 111(d) of the Clean Air Act on pp. 647 of the Statutory and Case Supplement, and (3) A Note on the 1990 Amendments to Section 111(d), on pp. 616-617 of the Statutory and Case Supplement.

## CHAPTER 6: CONTROL OF WATER POLLUTION

MON. OCTOBER 11: Introduction to the Clean Water Act and the Scope of Federal Jurisdiction. ASSIGNMENT: Read (1) pp. 582-612 in the casebook and (2) Legislative History Timeline and Outline of Major Provisions of the Clean Water Act on pp. 876-877 in the Statutory and Case Supplement.

WEDS. OCTOBER 13: Regulation of Discharges from Point Sources, Water Quality Standards, Total Maximum Daily Loadings & the Section 404 Permit Program. ASSIGNMENT: Read (1) pp. 612-637, 662-666, 685-700.

## CHAPTER 7: LAND USE REGULATION AND REGULATORY TAKINGS

MON. OCTOBER 18: Land Use and Regulatory Takings. ASSIGNMENT: Read (1) pp. 721-724, 741- 771 in the casebook, and (2) Cedar Point Nursery v. Hassid on 1335-1347 in the Statutory and Case Supplement.

WEDS. OCTOBER 20: The Parcel as a Whole, Regulatory Exactions, Judicial Takings and Evolving Conceptions of Property Rights. ASSIGNMENT: Read pp. 772-812 in the casebook.

## CHAPTER 8: ENVIRONMENTAL IMPACT ASSESSMENT

MON. OCTOBER 25: Introduction to NEPA, When Must an Environmental Impact Statement Be Prepared? ASSIGNMENT: Read (1) NEPA Timeline and Principal Provisions of NEPA on pp. 1129-1130 of the Statutory and Case Supplement and (2) pp. 813-823 and 845-874, 892-899 in the casebook.

WEDS. OCTOBER 27: What “Effects” Must Be Considered, Climate Change, Analysis in Uncertainty, Has NEPA Worked? ASSIGNMENT: Read (1) pp. 969-997 in the casebook.

## CHAPTER 9: PRESERVATION OF BIODIVERSITY

MON. NOVEMBER 1: Why Preserve Endangered Species, Introduction to the Endangered Species Act, What Species Are Protected, Critical Habitat Determinations, Delisting and Species Recovery Plans. ASSIGNMENT: Read pp. 901-914, 923-938 in the casebook and (2) Endangered Species Act Legislative History Timeline and Principal Provisions of the Endangered Species Act on pp. 1162-1163.

WEDS. NOVEMBER 3: Clarifying the Section 7 Consultation Process, Protecting Endangered Species Against Private Action: §9 of the Endangered Species Act, Incidental Takes, the Migratory Bird Treaty Act, Protection of Endangered Plants and the Future of Biodiversity Protection. ASSIGNMENT: Read: pp. 951-971 in the casebook

#### CHAPTER 10: ENVIRONMENTAL ENFORCEMENT

MON. NOVEMBER 8: Monitoring and Detecting Environmental Violations and Criminal Enforcement. ASSIGNMENT: (1) Read pp. 973-995, 999-1016 and (2) Visit the EPA's Most Wanted List at <https://www.epa.gov/enforcement/epa-fugitives>

WEDS. NOVEMBER 10: Citizen Suits and Standing. ASSIGNMENT: Read (1) pp. 1016-1018 and 1026-1058 in the casebook and (2) §505(a) & (b) of the citizen suit provision of the Clean Water Act on p. 1046 of the Statutory and Case Supplement.

#### CHAPTER 11: PROTECTION OF THE GLOBAL ENVIRONMENT

MON. NOVEMBER 15: International Environmental Law and Protection of the Global Atmosphere. ASSIGNMENT: Read pp. 1073-1113 in the casebook.

WEDS. NOVEMBER 17: Trade and the Environment and International Trade in Hazardous Substances, ASSIGNMENT: Read pp. 1113-1148 in the casebook.

FRIDAY NOVEMBER 19 (MAKEUP CLASS FOLLOWED BY FEDDER LECTURE AND ENVIRONMENTAL LAW PROGRAM WINETASTING): Review Session for the final exam – come prepared with questions.

MON. NOVEMBER 22: Presentation of Small Group Movie Projects (Class meets 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.