

ENVIRONMENTAL LAW (PS/ES 316)

POLITICAL SCIENCE DEPARTMENT | UNIVERSITY OF WISCONSIN OSHKOSH
9:00—12:00 M–F | SAGE 2221 | INTERIM 2017 | 3 CREDITS



*Professor Zyg Plater and colleagues discover the snail darter on a scuba trip in the Little Tennessee River. Plater later argued before the U.S. Supreme Court in *TVA v. Hill* on behalf of the endangered fish to stop construction of the Tellico Dam claiming Endangered Species Act violations.*

TEXT AND COURSE MATERIALS

Environmental Protection: Law and Policy, Sixth Edition
(2011) by Robert L. Glicksman et al.
ISBN: 978-0-7355-9430-2

This edition defrays student costs. There are environmental law developments since 2011, but this course focuses on foundations of environmental law. The sixth edition addresses foundations well and costs much less than the latest version. I reserve time at the end of the course to discuss contemporary cases. These readings will be available electronically at no additional cost to students.

COURSE OVERVIEW

This course examines U.S. (federal) environmental law and policy, including policymaking processes through institutions with emphasis on agencies and courts. The course also probes theoretical and underpinnings of environmental law, such as ecofeminism, economic systems, and ecosystem analyses. The course surveys environmental policy areas including biodiversity, air, water, toxic substances, and climate change. The main focus is common law; the approach is case-based. There are no pre-requisites, but students are encouraged to have working knowledge of or prior coursework in American government (PS 105) and environmental studies (ES 101 or PS/ES 261).

LEARNING OBJECTIVES

1. Evaluate competing legal theories of environmental law
2. Apply legal theories to contemporary environmental problems (legal analysis)
3. Analyze environmental issues through the lens of federalism
4. Effectively communicate theories and arguments orally and in writing using the IRAC method so that conclusions are supported using legal frameworks
5. Summarize legal arguments
6. Use legal language in conversation and writing
7. Identify legal issues in contemporary environmental policy

This course also emphasizes several political science department learning objectives: (1) oral and written communication, (2) critical thinking, and (3) theory (environmental, political, and legal)

PROFESSOR INFO

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ASSESSMENT AND GRADING

I use the 93/90/87 grading scale for this course.

A	93–100	B-	80–82	D+	67–69
A-	90–92	C+	77–79	D	63–66
B+	87–89	C	73–76	D-	60–62
B	83–86	C-	70–72	F	0–59

Participation (35%): The participation grade is based primarily on student preparation for and contributions to class discussions. This means reading materials and cases and taking notes (briefing cases) before you come to class. Participation comfort levels vary substantially. At one end of the spectrum, some students fear public speaking (more than death) and would prefer to remain anonymous in class. These students should work actively to overcome this fear. On the other end of the spectrum are gunners. Gunners are eager to speak and tend to dominate conversation. These students should be mindful that learning involves active listening and should provide others an opportunity to speak. Quality of participation is as important as quantity. Students receive the best participation grades when they think critically and assimilate complex ideas, including classmates' ideas, across a range of topics. Such participators contribute meaningfully to the learning of others, including the professor. I allow students to participate in determining their participation grades at the end of the term by writing a short, reflection essay evaluating their own performance and learning.

Final Exam (50%): The exam is an essay exam, an issue spotter. I will present you with a complex (often muddy) set of facts. Students identify legal issues in the fact pattern and analyze those issues using the legal rules and frameworks covered in class. This is called a *legal analysis*: applying law to a set of facts and reaching a legal conclusion.

Case Briefs (15%): Students brief cases throughout the course to prepare for class discussions. I collect and grade case briefs early in the term to ensure students understand parts of a case, later in the term to ensure students are preparing for and engaging in class discussion. *I do not accept case briefs after we have discussed them in class.* Students submit 15 case briefs, with no more than two case briefs per class period. Eligible cases to brief are in red on the syllabus.

CLASS GUIDELINES

I have four principles I ask students to observe in class. Be *honest, energetic, reliable, and respectful.*

INCLUSIVE EXCELLENCE

Every citizen is part of the environment regardless of race, gender, sex, sexuality, socio-economic status, national origin, ethnicity, physical or learning ability, and many other characteristics with which students commonly identify. Hence, this course uses inclusive excellence pedagogies and activities that foster input from everyone. *Input from all students is valued and expected.*

ATTENDANCE

Attendance is expected. I take attendance at the beginning of each class mainly to learn student names. Remember, participation is required. You cannot participate if you are absent. Absences are sometimes necessary. If you are absent, it is unnecessary to e-mail or contact me, unless it is an extended absence. Students should contact a classmate for missed notes or assignments. I do not supply notes or give one-on-one lectures. I am always happy, however, to meet with students to review unclear points.

ACADEMIC HONESTY

I assume all students will adhere to the academic integrity policy. Personal integrity is a hallmark of citizens who study and practice law. I trust no one will compromise personal integrity.

UWO Academic Integrity Policy

UWO is committed to a standard of academic integrity for all students. The system guidelines state, "Students are responsible for the honest completion and representation of their work, for the appropriate citation of sources, and for respect of others' academic endeavors." Students are subject to disciplinary action for academic misconduct, including suspension. Procedures related to violations of academic honesty are on the Dean of Students website at www.uwosh.edu/stuaff/policies-procedures. Questions about provisions in the code and procedures to implement the code should be directed to the Dean of Students Office.

NOTES ON PEDAGOGY

In this course, I assume students have no prior training in legal studies, though some invariably will. There are no prerequisites for this course, but prior coursework or familiarity with basic principles of American Government process and institutions as well as environmental studies is recommended. Even where students have prior coursework and familiarity with these subjects, there are differences in students' knowledge. This means two things:

1. Students are expected to bring prior experiences (including personal ones) to course discussions and be patient with others who have not had these experiences. In certain sections of the course, I review basics of environmental studies, American government, and legal studies.
2. Students will not leave the course prepared to practice environmental law. Far from it. Instead, students will have a familiarity with the legal foundations necessary to understand basic environmental law concepts as they are adjudicated in American courts.

To help achieve this end, I incorporate the most important environmental law cases as designated by academics and practitioners (see Salzman, James and J. B. Ruhl. 2009. "Who's Number One." *The Environmental Forum* (Nov/Dec: 36–40) available [here](#)). Cases on the syllabus that appear on either list (academic or practitioner) are marked with an asterisk (*). Along with the other legal principles I hope to convey in this course, the top-10 lists make the syllabus decidedly ambitious. We will try to read the "most important cases" on balance with the understanding that legal scholars and practitioners gain deeper understandings by readings sets of cases in the same area. We read sets of cases for skill-building when we examine court and agency interpretations of the Clean Water Act across several cases as well as examine oral arguments, opinion announcements, and agency interpretations of court decisions. This "deep dive" helps students examine legal issues across a number of institutions and legal actors (e.g., interest groups and scientists through amici briefs and testimony). The balance here is between breadth (top-10 lists) and depth (Clean Water Act). To ease breadth/depth tensions, I rely on skill-building in

my approach. That is, to engage students in a range of majors (political science, environmental studies, environmental health, pre-law) with a range of prior experiences, I, first, try to demystify the study of law by actually studying law (reading cases), and second, provide students with tools to engage law on their own, tempered with the wisdom to know when they might need further study or a lawyer.

This course is structured like a traditional law school course using the case method of teaching. I use the Socratic method of engagement, where instead of treating students as passive learners in an otherwise authoritarian classroom, students are actively engaged in conversation (democratically). Students, like citizens in a democracy, have essentially two choices: participate or not. Here, I provide incentive for students to participate by connecting the course grade to participation, knowing at the outset that requiring students to participate undermines a true democracy, which, in my view, includes the right not to participate, notwithstanding the "free-rider" problem pervasive in democracies. Still, I hope to foster a classroom where students not only feel comfortable participating, but view participation as a responsibility. Student learning, like democracies, functions only when citizens participate. Therefore, while some students may view it as their right not to participate, we cannot address the pressing environmental issues through law or other means until a sufficient number of citizens view it as our responsibility to act, which, if nothing else, involves active listening, raising questions, and engaging complex ideas.



Mono Lake experienced significant water level drops because of Los Angeles' diversions of tributaries feeding the lake from Sierra snowmelt.

CAMPUS RESOURCES

I want you to be successful. For campus services available to support your success, please visit www.uwosh.edu/home/resources. Here are a few key resources that may be helpful.

Center for Academic Resources: The Center for Academic Resources (CAR) provides free, confidential tutoring for students in most undergraduate classes on campus. CAR is located in the Student Success Center, Suite 102. Check the Tutor List page on CAR's website (www.uwosh.edu/car) for a list of tutors. If your course is not listed, click on a link to request one, stop by the Center, or call 424-2290. To schedule a tutoring session, simply email the tutor, let him/her know what class you are seeking assistance in, and schedule a time to meet.

Writing Center: The Writing Center helps students of all ability levels improve their writing. Trained peer consultants help writers understand an assignment, envision possibilities for a draft, and improve their writing process. They even help writers learn to identify their own proofreading errors. Students can make a free appointment or stop by to see whether a consultant is available. For more information, view their website (www.uwosh.edu/wcenter), call 424-1152, email wcenter@uwosh.edu, or visit them in Suite 102 of the Student Success Center.

Reading Study Center: The Reading Study Center is an all-university service whose mission is to facilitate the development of efficient college-level learning strategies in students of all abilities. The center offers strategies for improved textbook study, time management, note-taking, test preparation, and test-taking. For more info, email readingstudy@uwosh.edu, view the website (www.uwosh.edu/readingstudycenter), visit them in Nursing Ed Room 201, or call 424-1031.

Polk Library: Polk Library has many professional librarians who can help you find library resources for your research. Ted Mulvey, the Information Literacy Librarian, is available to assist you as you access, evaluate, and use information. Contact him at 424-7329 or mulveyt@uwosh.edu. You may also set up a research advisory session with a librarian at rap@uwosh.edu.

SCHEDULE AND ASSIGNMENTS

Changes to the schedule are inevitable and will be communicated in class or through e-mail.

May 15: Introductions, Course Overview

Introductions and Course Overview

What do we know about environmental studies and sustainability?

- Pillars of Sustainability (PPP+P+PP)
 - Web of Connectedness (values)
 - Anthropocentrism, Biocentrism, Ecocentrism
 - Normative and empirical models
- How to brief a case (handout on D2L), institutions of government, and sources of law

May 16: Foundations of Environmental Law: Part I (Theories, Roots, and Ethics)

Glicksman Ch. 1 (pp. 1–27)

- Economic Perspectives
- Tragedy of the Commons (Hardin)
- Free-rider Problem
- Polluter Pays and Coase Theorem
- Measuring Values
- Cost-Benefit Analyses
- Ecology as a discipline
- Ethics and Ecology

May 17: Foundations of Environmental Law: Part II (Common Law and the Constitution)

Glicksman Ch. 1 (pp. 22–42, 47–54)

Negligence, trespass, strict liability

Nuisance (public and private)

- *Georgia v. Tennessee Copper** (p. 31)
- *Walsh v. Town of Stonington* (p. 34)
- *Petsey v. Cushman* (p. 37)
- *Boomer v. Atlantic Cement Co.** (p. 1010)

Public Trust Doctrine (p. 47)

- *National Audubon Society v. Superior Court of Alpine County (Mono Lake)** (p. 49)

Constitutionally Rooted Environmental Claims and Environmental Justice (p. 51)

- *Kelo v. City of New London* (not in textbook)
- Wisconsin's *Kelo* Response (blight, and only if no intent to sell/lease to private entity), see [Wisconsin's Response to Condemnation for Economic Development](#), in *Wisconsin Lawyer*, State Bar of Wisconsin

May 18: Environmental Federalism (One of Dr. Thomas' Favorite F-words)

Glicksman Ch. 2 (pp. 92–122)

Constitutionalism/Tenth Amendment (lecture)

Commerce Clause (U.S. Const., Art. I, sec. 8)

- *Wickard v. Fillburn*, *Gonzales v. Raich*, *U.S. v. Lopez*, *U.S. v. Morrison* (not in textbook) showing that, beyond interstate commercial transactions, Congress has the authority to regulate: (1) channels of commerce, (2) instrumentalities, persons, and things in commerce, and (3) local activities, which in the aggregate, substantially affect interstate commerce

- *Gibbs v. Babbitt* (p. 92)

Constitutional Avoidance Doctrine

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers** (p. 105)

Using the constitutional avoidance doctrine, the Court interprets “navigable waters” and “Waters of the U.S.” not with *Chevron* using the Army Corp’s migratory bird rule, because doing so invokes federalism questions and shifts federal/state boundaries (encroachment on states’ right to regulate land and water use) without a “clear and manifest” statement from Congress that it intended to do so

- *Rapanos v. U.S.**, *Scalia plurality opinion* (p. 106)

State Cooperation

- *New York v. U.S.* (“commandeering” states’ legislative functions) (p. 109)

May 19: Administrative Law Principles of Environmental Law Part I

Glicksman Ch. 3

Standing

- *Sierra Club v. Morton** (p. 145) (standing)
- *Lujan v. Defenders of Wildlife** (p. 151)
- *Friends of the Earth v. Laidlaw** (p. 166) (mootness and standing)
- *Scenic Hudson** discussion (pp. 68–70)

Exhaustion of Administrative Remedies and Ripeness (p. 180-183)

Recovery of Attorney Fees (183-184)

May 22: Administrative Law Principles of Environmental Law Part II

Glicksman Ch. 3 (185–202)

Executive Control

Formal/Informal Rulemaking and Adjudication

Agency authority, nondelegation doctrine, and intelligible principles

- *Whitman v. American Trucking Assoc* (p. 419)

Standards of Review (p. 185)

- *Chevron v. NRDC** (p. 188–193)
- *Citizens to Preserve Overton Pk. v. Volpe** (p. 193)

May 23: National Environmental Policy Act (NEPA) and Review

Glicksman Ch. 4

We will think broadly about “environmental impact statements.” What are they? How are they used? When must they be prepared? What is their purpose? (skim chapter 4 broadly to get a feel for these questions). Focus on two sections:

- Discussion: *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission** (pp. 235–237)
- “Where is NEPA Today? A Critique and Recommendations for Reform” (pp. 328–331)

Review and Practice Exam

May 24: Biodiversity

Beep. Beep. I interrupt this program for messages from ecofeminist and ecoqueerist philosophies challenging hegemonic constructions of environmental language—protection, save the planet, conservation, sustainability.

Charles Ray Sculptures: QueerNatureCulture, Constructivism, Landscape Architecture (lecture)



Shelf (1981). Steel, painted found objects, human body. Charles Ray.

Beep. Beep. We return to our regularly scheduled program: heteronormativity, patriarchy, speciesism, and Western political-legal thought asking us to “conserve” and “protect” biodiversity. The textbook title is “Environmental Protection.”

Glicksman Ch. 5 (pp. 333-378, select pages)
Biodiversity Conservation
Endangered Species Act

- *Tennessee Valley Authority v. Hill** (snail darter) (p. 346)
- *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (habitat destruction) (p. 369)

May 25: Property Law & Environment Issues

- Property as bundle of rights
- *Lucas v. South Carolina Coastal Council** (regulatory taking) (p. 378)
- *Penn Central v. New York** (in notes after *Lucas*)
- *Dolan v. City of Tigard* (in notes after *Lucas*)
- *Kelo v. City of New London* (not in textbook)

May 26: Water

Glicksman Ch. 7

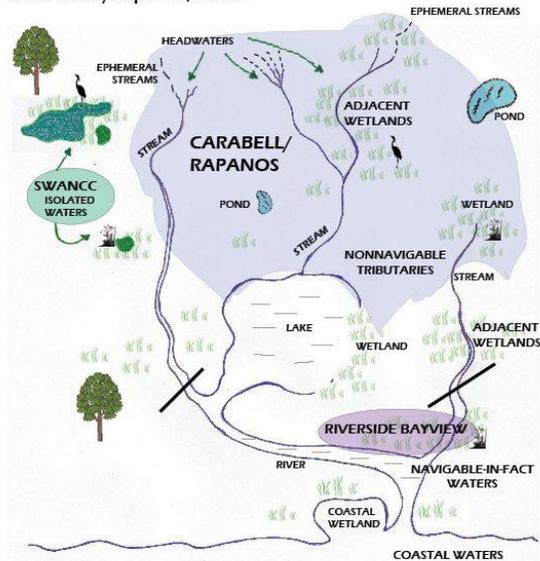
Clean Water Act Overview (554–557)

“Navigable waters” and “Waters of the U.S.”

- *U.S. v. Riverside Bayview Homes** (p. 567)
- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers** (p. 569) (revisited)
- *Rapanos v. U.S.** (p. 572) (revisited)

Deep dive: *Rapanos* oral arguments and opinion announcements; EPA “Guidance” (handout)

CWA Jurisdictional Areas Subject to Carabell/Rapanos, et. al.



Watershed graphic prepared by Assoc. of State Wetland Managers

Source: [Association of State Wetland Managers](#).

May 29: Toxic Substances/Hazardous Waste

Glicksman Ch. 8

- The Unifying Role of Harm in Environmental Law (Lin, pp. 714–719)
- Common Law Approach to Risk as Injury (pp. 719–724)

Admitting Expert Testimony

- *Daubert v. Merrill Dow Pharmaceuticals* (p. 724)
- *Ethyl Corp v. EPA** (“will endanger” and “significant risk of harm”) (p. 731)

May 30: Air

Glicksman Ch. 6 (skim intro, then pp. 414-418, 514-525)

Clean Air Act and NAAQS

- *Coalition of Battery Recyclers v. EPA* (p. 415)
- *Whitman v. Am. Trucking Associations** (p. 419)

Attainment Areas

Motor Vehicle Emissions

North Carolina v. EPA (p. 517)

May 31: Climate Change Law

Glicksman Ch. 12

- *Massachusetts v. EPA** (regulating greenhouse gases) (p. 1147)
- *Connecticut v. Am. Electric Power Co.* (p. 1187)

June 1: Contemporary Issues

Cases and readings TBD

Review and Course Evaluations

June 2: Assessments

Exam and Reflections

OTHER TOPICS (TIME PERMITTING)

Agricultural Pollution and CAFOs

- Nonpoint Source Pollution (p. 656-660)
- Watershed or “Place-based” Approaches to Water Protection (pp. 677–680)

Liability, Remedies, and Enforcement

Glicksman Ch. 9–10 (overview and CERCLA)

- *U.S. v. Bestfoods** (p. 901) (parent corporation liability for subsidiaries operating polluting facilities)
- *Gwaltney of Smithfield v. Chesapeake Bay Foundation** (p. 998) (federal Jx. and CWA citizens suits for past CERCLA violations)