

ENVIRONMENTAL LAW

POLITICAL SCIENCE 316 (001C) AND ENVIRONMENTAL STUDIES 316 (001C)
POLITICAL SCIENCE DEPARTMENT | UNIVERSITY OF WISCONSIN OSHKOSH
TTH 1:20–2:50 PM | SAGE 4218 | FALL 2021 | 3 CREDITS



*Professor Zyg Plater (left) 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 violations to the Endangered Species Act.*

COURSE OVERVIEW

This course focuses on U.S. (federal) environmental law, with particular focus on common law and administrative law. The course examines legal frameworks for environmental law in the federal court system, including how federal courts review the policies of administrative agencies that regulate the environment. The course also probes philosophical and social underpinnings of environmental law, such as ecofeminism, capitalism, collectivism, and cost-benefit analyses. One of the main course themes is examining environmental law and policy through a sustainability lens. Cross-listed: Political Science 316/Environmental Studies 316. Students may receive credit for only one of the two cross-listed courses. Students are recommended to have prior coursework or an equivalent understanding of basic principles of American Government (Poli Sci 105) and Environmental Studies (either Environmental Studies 101 or Poli Sci/Env Stds 261).

TEXT AND COURSE MATERIALS

Environmental Protection: Law and Policy, 7th Edition
(2015) by Robert L. Glicksman et al.
ISBN: 978-1454849353

This course focuses on foundations of environmental law, which the 7th edition addresses well and also costs much less than the latest edition. I reserve time at the end of the course for contemporary issues. These readings will be available electronically at no additional cost.

PROFESSOR INFO

Jerry D. Thomas
J.D., Chicago-Kent College of Law, IIT
Ph.D., University of Kentucky
M.P.A., University of South Carolina
thomasj@uwosh.edu
Sage Hall 4619 (office)
Office Hours: MWF 11:30-12:30 or by appointment

LEARNING OBJECTIVES

1. Evaluate competing legal theories of environmental law
2. Apply legal theories to contemporary environmental problems (legal analysis)
3. Effectively communicate theories and arguments orally and in writing using the IRAC method so that conclusions are supported using legal frameworks
4. Explain federalism's role in environmental law
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)

INCLUSION

Every person is part of the environment irrespective of race, gender, sex, sexuality, socio-economic status, national origin, ethnicity, veteran status, religion, physical or learning ability, political affiliation, and other characteristics with which students commonly identify. So, I use inclusive pedagogies to 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, but it is unnecessary to 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, but I am always happy to meet with students to review unclear points.

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	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 participants 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.* Eligible cases to brief are in red on the syllabus.

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. 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.

FREEDOM OF SPEECH

My classes are free speech zones. Say anything you want to say. No topic or viewpoint is off limits. Exercising freedom of speech carries the burden of being responsible for your speech. Similarly, exercising silence carries the burden of being responsible for your silence.

"Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."
– *Tinker v. Des Moines Independent Community School District* (No. 21) (393 U.S. 503, 513, 1969)

ACADEMIC INTEGRITY

Expectations for Academic Honesty: A college education is intended to develop your skills, knowledge, and confidence. Graded assignments are designed to work on these items. Thus, to gain the skills, knowledge, and confidence of a college-educated person all graded work is to be your own. When you are directed to work alone, an assignment or test must be done by you, its primary ideas are to be your own, and any outside materials should be dealt with properly (quoted when using someone's words, and cited when quoting or referencing them in any other way). When your teacher directs you to work in teams, the work is to be done by the team. More information can be found [here](#).

UWO is committed to academic integrity for all students. 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." We expect students to review and adhere to procedures related to academic honesty as outlined in Chapter UWS 14, Wisconsin Administrative Code, available on the Dean of Students website [here](#). Students should direct specific questions regarding the code (and institutional procedures approved to implement the code) to the Dean of Students Office.



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

STUDENT CONSUMER INFORMATION

Students should see the following URL for disclosures about essential consumer protection items required by the Students Right to Know Act of 1990 available [here](#).

ACCESSIBILITY SERVICES

UWO provides reasonable accommodations to students who have disabilities that may affect their ability to participate in course activities or meet course requirements. We accommodate *flexibly* and *individually*. Register with *Accessibility Services* or Project Success to get an accommodation recommendation form.

Accessibility Services

125 Dempsey Hall

(920) 424-3100

dean1@uwosh.edu

[Accessibility Services Website](#)

NOTE TO POLITICAL SCIENCE MAJORS

This course counts as an elective toward the political science major and minor. Majors are advised to take Political Methodology (245) in either their sophomore year or first semester of junior year. PS245 is a prerequisite for the senior capstone, Political Analysis (401) and cannot be taken concurrently.

CLASSROOM MASK REQUIREMENTS

All students are required to wear an appropriate face mask that covers their mouth and nose when they are in the classroom. Students who have a medical condition prohibiting them from wearing a face mask may present written documentation from their health care provider, stating that the individual cannot wear a face mask. Students must present this documentation to the Accessibility Center in the Dean of Students office. In these situations, face shields will be provided to that student through the Risk & Safety Office upon request from the Accessibility Center.

UWO procedure dictates that, during the COVID-19 pandemic, an instructor cannot begin class until all students are wearing a mask properly. If a student is non-compliant with the masking policy and also refuses to leave the classroom promptly when requested, the instructor is required to cancel class. Students responsible for class cancelation for these reasons will be referred to the Dean of Students office, and the student will be unable to attend class until they meet with the Dean of Students. The student may be dropped from the class by the Dean of Students.

GRIEVANCES

The Department of Political Science is committed to offering you a high-quality classroom experience, and we take your feedback seriously. If you have concerns about anything related to this course, assignments, or teaching method, you are encouraged to first speak with your instructor directly. If you are not comfortable speaking with the instructor, you are invited to speak with the Chair of the Department of Political Science, Dr. James Krueger. He can be reached at kruegerj@uwosh.edu. Should he be unable to resolve your concerns, he will guide you to appropriate resources within the College of Letters and Science.

SCHEDULE AND ASSIGNMENTS

Changes to the schedule are inevitable and will be communicated in class or through e-mail. If substantive changes are made, notification will be provided in a timely manner and a revised syllabus made available.

Week of Sept 6: Introductions, Course Overview

Introductions and Course Overview

- What we know about environmental studies
- Pillars of Sustainability (PPP+P+PP)
- Web of Connectedness (values)
- Anthropocentrism, Biocentrism, Ecocentrism
- Normative and empirical models
- Briefing cases (handout in Canvas), institutions of government, and sources of law

Week of Sept 13: 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

Week of Sept 20: Foundations of Environmental Law: Part II (Common Law & the Constitution)

Glicksman Ch. 1 (pp. 28–40, 48–55)

Negligence, trespass, nuisance (public and private)

- *Georgia v. Tennessee Copper** (p. 32)
- *Walsh v. Town of Stonington* (p. 35)
- *Petsey v. Cushman* (p. 38)
- *Boomer v. Atlantic Cement Co.** (p. 1074)

Public Trust Doctrine (p. 47)

- *National Audubon Society v. Superior Court of Alpine County (Mono Lake)** (p. 50)

Week of Sept 27: Environmental Federalism (One of Dr. Thomas' Favorite F-words)

Glicksman Ch. 2 (pp. 94–107)

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. 94)

Constitutional Avoidance Doctrine

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers** (p. 110)
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. 112)

State Cooperation

- *New York v. U.S.* (“commandeering” states’ legislative functions) (p. 114–124)

Week of Oct 4: Administrative Law Principles of Environmental Law Part I

Glicksman Ch. 3 (pp. 167-210)

Standing

- *Sierra Club v. Morton** (p. 169) (standing)
 - *Lujan v. Defenders of Wildlife** (p. 175)
 - *Friends of the Earth v. Laidlaw** (p. 190) (mootness and standing)
 - *Scenic Hudson** discussion (pp. 70–73)
- Exhaustion of Administrative Remedies (p. 205)

Week of Oct 11: Administrative Law Principles of Environmental Law Part II

Glicksman Ch. 3 (pp. 210-231)

Formal/Informal Rulemaking and Adjudication
Agency authority, nondelegation doctrine, and intelligible principles

- *Whitman v. American Trucking Assoc* (p. 450)

Standards of Review (p. 210)

- *Chevron v. NRDC** (p. 213)
- *Citizens to Preserve Overton Pk. v. Volpe** (p. 223)

Week of Oct 18: Review and Practice Exam

Week of Oct 25: Biodiversity

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.

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. 359-378, select pages)

Biodiversity Conservation (pp. 359-60)

Endangered Species Act (p 375)

- *Tennessee Valley Authority v. Hill** (snail darter) (p. 375)
- *Arizona Cattle Growers' Assoc. v. Salazar* (p. 381)
- *National Assoc. of Home Builders v. Defenders of Wildlife* (p. 388)
- *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (habitat destruction) (p. 401)

Week of Nov 1: Water

Glicksman Ch. 7

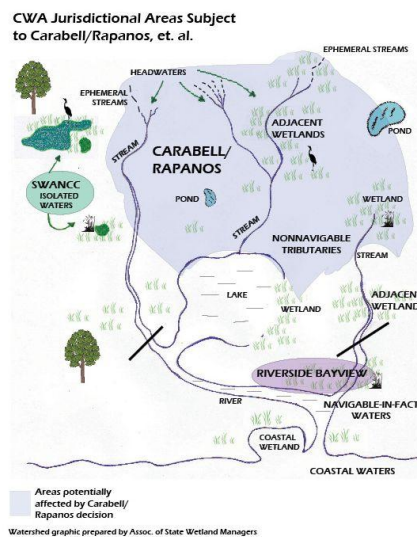
Introduction (skim pp. 601-610)

Clean Water Act Overview (610–614)

“Navigable waters” and “Waters of the U.S.” (p.614-616)

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers** (p. 616)
- *U.S. v. Riverside Bayview Homes** (This case is not excerpted in the textbook, but pay close attention to how it is discussed in other cases and the notes.)
- *Rapanos v. U.S.** (p. 619)

Definition of “Waters of the United States” Under the Clean Water Act (2014) (pp. 631-635)



Source: [Association of State Wetland Managers](http://www.aswm.org).

Week of Nov 8: Regulatory Takings, Expert Testimony, Risk

Property (bundle of rights) and Regulatory Taking

- *Lucas v. South Carolina Coastal Council** (regulatory taking) (p. 408)
- *Lucas* notes (pp. 411-418)

Admitting Expert Testimony

- *Daubert v. Merrill Dow Pharmaceuticals* (p. 782)

Precautionary Regulation of Risk

- *Ethyl Corp v. EPA** (“will endanger” and “significant risk of harm”) (p. 790)

Week of Nov 15: Air

Ch. 6 (skim intro, then pp. 436-443, 566-567)

Clean Air Act and NAAQS

- *Coalition of Battery Recyclers v. EPA* (p. 446)
- *Whitman v. Am. Trucking Associations** (p. 450)

Interstate Air Pollution (pp. 566)

- *EPA v. Eme Homer City Generation* (p. 567)

Week of Nov 22: Current Events & Thanksgiving Break

Readings TBD

Thanksgiving Break: Nov 24-28

Week of Nov 29: Climate Change Law

Glicksman Ch. 12

- *Massachusetts v. EPA** (regulating greenhouse gases) (p. 1212)
- *Am. Electric Power Co. v. Connecticut* (p. 1263)

Week of May 11: Assessments

Exam, Course Evaluations, and Reflections