

## **Environmental Law and Policy 1, 11:374:460 (3 credits)**

This class is in person but some classes may be online, so for those classes, please locate a stable internet connection and make sure that you have access to a computer (or phone) with a camera, microphone, and speakers.

To get started with this class, go to Canvas, log in with your NetID and password, choose this class, and you should be on the home page.

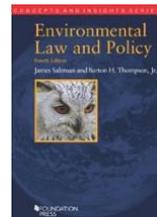
### **Professor Cymie Payne**

Cook Ofc. Bldg., 2<sup>nd</sup> floor, Cook Campus, 55 Dudley Road, New Brunswick – we can meet there or on Zoom

Office hours: To schedule a time to discuss what we are studying or anything else, please email me.

### **Course Book and Technology:**

James Salzman, Barton Thompson, Environmental Law and Policy (fifth edition, Foundation Press) ISBN: 978-1-68328-790-2 (be sure to get the correct edition: it has a snowy owl on the cover). It lists for on the [publisher's website](#) or the [campus bookstore](#) for \$53.00, e-book for \$39.75. Some Amazon sellers mark it up twice that, so be careful! This book was first used in this course in Fall 2020 so you may be able to score a used copy.



Other readings will be identified on the syllabus. These will be available on the web or University Library e-reserves.

### **Course Description:**

This course is intended to prepare students entering environmental science, policy and law professions to understand the laws, regulations, and court decisions you will encounter; and to introduce you to related history and regulatory theory so that you can identify, apply and begin to design governance tools to achieve sustainability goals.

This is an upper level course covering US law and policy governing air, water and other natural resources, biodiversity and public health. We consider environmental law and policy at local, state, regional, national and transnational scales, with a primary focus on US federal statutes: the Clean Air Act, Clean Water Act, National Environmental Policy Act, CERCLA (Superfund) and the Endangered Species Act. These statutes are representative of varied approaches to regulation and students who pursue a range of environmental and policy careers will most likely be working with them—many environmental professions exist because of these laws. Given the importance of the climate crisis, we will give special attention to greenhouse gas pollution. Given the importance of justice in the United States, we will also consider environmental justice through the lens of the legal instruments we study.

The class will examine sources of law, including the US Constitution, legislation, administrative rulemaking, formal and informal law, and evolving negotiated and market-based approaches to regulation. You will develop basic skills in legal research, case analysis, statutory interpretation and regulatory design.

### **Learning objectives** By the end of this course, you will be able to:

- Begin a job or advanced study equipped with basic understandings of essential legal concepts and American governing institutions.
- Identify different kinds of environmental risks and the appropriate federal laws to manage them.
- Analyze and interpret evidence.
- Engage with regulatory, legislative and other democratic processes as a citizen, an advocate, a scholar or a policy professional.
- Consider career options related to environmental governance.
- Understand the connections between law and other fields of society and scholarship.

You will meet the outcomes by participating actively in class discussions and activities and completing several practical applications of knowledge and skills to real-world problems.

### **Basis for Evaluation**

**10% Class participation:** Be prepared by reading the assignments, and take the opportunity to make thoughtful contributions to class discussion. This part of your grade reflects your interest in learning, your willingness to contribute your own ideas to the group learning process, at the same time that it provides an incentive for you to be present and acquire information and skills. You should attend every class. I realize that sometimes circumstances arise that make this difficult. I will excuse absences for reasons recognized by University policy and supported by appropriate documentation. If you have more than two unexcused absences, you should consider whether you are overextended and should drop the class and take it again during a semester when you have adequate time to do the work. If you have special circumstances, discuss a possible exception with me.

See [Canvas Syllabus](#), [Announcements](#), and [Modules](#) for directions about preparations for class and class activities. I am happy to provide individual feedback on your assignment if you send me an email to ask that we talk about it or for me to give you written comments.

#### **10% quizzes, discussions and other activities associated with individual classes.**

**20% 3 short written assignments** which allow you to learn and practice skills (weighted differently): Finding the Law; Comment Letter; and Environmental Review. See syllabus for the dates when assignments will be explained and when they are due; see [Canvas Assignments](#) for directions and to submit.

#### **60% 2 exams of equal weight.**

The final exam will be given online during the scheduled examination period, December 22, 8am-11am. No accommodations will be made for students who schedule travel at this time, although you will be able to take the exam off campus if you have an adequate internet connection.

Note: Exam, paper and course grades are based on individual performance; I do not curve grades in this class.

Note well: All assigned work must be completed to achieve a passing grade in this course, so please do not try to game the points.

### **Prerequisite:**

There is no prerequisite course. However, you will need to know, before the course starts, the basics of how the government of the United States works. This is essential knowledge for you to make sense of the law and policy that we will be studying. The material that you are expected to know can easily be reviewed (or learned) by spending thirty minutes with the most recent New Jersey Citizen's Guide to Government by the League of Women Voters ([here](#) or in Canvas Module: Class 1). Basic explanations of the function of the three branches of government, and local, state and federal government are given, along with the name and address of all elected NJ officials (you don't need to know who all the NJ officials are, but you should know who the governor and your state and federal representatives are).

### Part I – United States and New Jersey Government

We begin with the basic structure of the United States government and New Jersey state government. Those who preceded us decided that these were the best institutions they could design to ensure we would be free to live in dignity and to pursue happiness in our own way. For better or worse, they held private property – money, land, stuff – in high esteem and emphasized property rights in the U.S. Constitution. They also recognized that, like it or not, humans live in communities and that to maintain the benefits that federal and state governments were designed to provide, every citizen would have to take responsibility for voting, serving as representatives, reporting, informing themselves, and more. This would be the only way to balance public, collective interests with private interests.

1	<b>Class introduction –</b> If you need to remind yourself of how the federal and state government work, look at the League of Women Voters of New Jersey, New Jersey Citizen's Guide to Government
2	David R. Boyd, The Optimistic Environmentalist, Introduction, pp. xxi-xxv <ul style="list-style-type: none"><li>- What does Boyd mean when he says that he's an "optimistic environmentalist"? Are you?</li><li>- What does Boyd base his optimism on? What do you base your attitude on?</li><li>- What did you think of his approach – was it personal, statistical, from experience, theoretical?</li><li>- What is the sea otter story that he tells?</li></ul> Salzman and Thompson, An Introduction to Environmental Law and Policy – chapter 1, pp 3-16 <ul style="list-style-type: none"><li>- What are the tensions and conflicting interests that S&amp;T describe when they say the environmental field is "contentious"?</li><li>- What views of public lands did John Muir and Gifford Pinchot have? What is the difference between "preservation" and "conservation", as S&amp;T describe them? What legislative consequences did they have?</li><li>- What is the strongest legal protection of biodiversity in the world, according to S&amp;T? (ESA)</li><li>- Why were technological ways of dealing with pollution (e.g., dilution) inadequate? What kinds of law were used in response?</li><li>- What was the law used in the <i>Scenic Hudson</i> case? What did the court require the Federal Power Commission to do? How did the case benefit environmental advocacy and the Hudson River?</li><li>- What were the successes of the 1970s and 80s environmental laws, and what were their drawbacks?</li></ul> <p>Finding the law assignment explained</p> <p>Look at the two "Vocabulary and Concepts" on Kinds of Law and Court Systems posted in this module</p>

3	<p><b>Perspectives on Environmental Law and Policy – chapter 2, pp 17-50</b></p> <ul style="list-style-type: none"> <li>- As you review this discussion of the forces that shape environmental problems, their solutions, and the tool of environmental law, consider how you would make the tradeoffs that are often required and the decisions that have to be made under conditions of uncertainty.</li> <li>- Assume that the sole factory making iPhones was causing a significant decrease in air quality affecting those in a 50-mile radius of the factory. <ul style="list-style-type: none"> <li>• Would you be willing to pay an extra \$50 to purchase an iPod knowing that the factory was using the additional funds to clean the air by making the factory “clean”?</li> <li>• If you lived 25 miles away?</li> <li>• If you lived 1,000 miles away?</li> <li>• What if the factory were in a foreign country?</li> <li>• <i>Should</i> it matter where the factory was located?</li> </ul> </li> <li>- Is it possible to measure the importance of animal and/or plant preservation in light of the wants and needs of human beings?</li> <li>- Considering the four analytical frameworks, see if you can identify an issue or situation in which each of the theories should take precedence over the others.</li> </ul>
---	--

#### **Part II - Environmental Law made by Congress and the Judiciary**

*In the United States, legal rules allocating responsibility and obligations to provide a remedy for an injury can be created by judges, based on the judge’s interpretation of the U.S. or state constitutions and previous court decisions. This system is called “common law”. When industrialization began to impinge on communities, people turned to the state and federal courts for help. Common law still exists in parallel with the other sources of environmental law, which are the U.S. Constitution (and state constitutions), and legislation: laws that are passed by the U.S. Congress or state legislatures.*

*Administrative law is the main source of environmental law today. The environmental laws that we have are the reason our air and water is better today in many places than it was in the 1970s. Unfortunately, the financial costs of regulation are more evident than the health and environmental benefits, so there is usually vigorous lobbying and litigation by business interests and property owners in opposition to restrictions on their activities.*

*Our last president, representing those interests, vowed to dismantle environmental regulation. The extreme measures that his administration attempted created an unprecedented situation. Some of the laws that were targeted are central to our study. We will discuss the tools the executive branch used, how public interest non-profit organizations responded, what the courts have done so far, and the Biden Administration’s approach.*

4	<p><b>Toxic Torts, Plater, et al., chapter 3, pp 75-96.</b></p> <ul style="list-style-type: none"> <li>- Make a note of each tort covered in this reading – trespass, private nuisance, negligence,</li> <li>- For each, write down the elements that the plaintiff must prove in order to prevail (e.g., trespass requires proof that Defendant’s action caused a deposit of foreign matter on Plaintiff’s property, causing harm to the Plaintiff)</li> <li>- You may find it helpful for each case discussed in this reading, to make a note of the legal claim (e.g., negligence), the alleged facts that would support the elements of the claim (e.g., use of improper gas drilling techniques and materials)</li> <li>- Note the “terms of art” – normal language used in a particular way – such as “exclusive interest in exclusive possession of property” and “interest in use and enjoyment of property”</li> <li>- Note the positive and negative aspects of using tort law to address environmental harms</li> <li>- The <i>Boomer v Atlantic Cement Co.</i> case is iconic – what do you think of the tradeoff between the rights of property owners (and other residents) and the advantages of bringing new industries to a community?</li> <li>- Look at comment #4 on p 83 – this explains two important legal concepts: intent and reasonableness. Do these seem like fair and appropriate ways to manage pollution?</li> </ul> <p>Finding the law assignment due</p>
---	---

5	<p><b>Toxic Torts, Plater, et al., chapter 3, pp 96-107</b></p> <ul style="list-style-type: none"> <li>- Consider how the substantial harm requirement might be a problem for adequately addressing pollution. What about environmental problems where each potential plaintiff suffers only a small – <i>de minimis</i> – harm, but which is cumulatively large? Consider the road salt problem, where each driver's car is only damaged a little bit from the road salt used to deal with icy, snowy roads – or some of the effects of climate change, like a very hot, humid summer, that might make us annoyed but not enough to do something about it.</li> <li>- What is the logic of shifting the burden of proof in <i>Summers v Tice</i> (Commentary #2, pp 103-104)</li> <li>- How does the cost of litigation (hiring lawyers, consultants, experts, investigators, paying court fees) affect who can use toxic torts to protect their communities? How is it used as a weapon against activists?</li> <li>- Who should be held responsible if there are multiple parties that contributed to a polluted site, particularly in light of the previous question about costs to plaintiffs? Consider the challenge of proving a causal link between a particular contaminant and a particular responsible party (RP).</li> <li>- What are the pros and cons of toxic tort practice to manage pollutants? Is there a difference between its utility for well-known and novel pollutants?</li> </ul>
6	<p><b>The Practice of Environmental Protection, Chapter 3, Parts I-Instrument Choice and II-The Administration of Environmental Protection, pp 51-74 (24pp)</b></p> <p><b>The Practice of Environmental Protection, Chapter 3, Part III-Constitutional Issues, pp 75-86 (11pp)</b></p> <ul style="list-style-type: none"> <li>- Pay careful attention to the following, and consider how these issues might apply to regulation of GHG pollution, specifically limiting GHG emissions from fossil-fuel fired power plants and coastal retreat:</li> <li>- Congressional Powers</li> <li>- State Environmental Authority</li> <li>- Legislative Delegation</li> <li>- Regulatory Takings</li> </ul>
7	<p><b>The Practice of Environmental Protection, Chapter 3, Part IV-How Citizen Groups Shape Environmental Law, pp 86-90 (5 pp)</b></p> <p><b>Oliver A. Houck, Taking Back Eden: Eight Environmental Cases that Changed the World, chapter 1 (2010)</b></p> <p><b>Erin Grubbs, Jonathan S. Martel, Clean Air Act Citizen Suits Are Going Mobile (2022)</b></p> <p><b>&gt;&gt; Find and read Clean Air Act 42 U.S. Code § 7604</b></p> <ul style="list-style-type: none"> <li>- What does “participation” in environmental governance mean?</li> <li>- Who gets to participate? Consider what is involved in using the tools described in these readings – who would you want to empower to use them? How would you do that?</li> <li>- What are specific requirements for bringing a citizen suit, as described in these readings?</li> </ul> <p>Comment Letter Assignment Explained</p>
8	<p><b>Enforcement, Chapter 4, pp 91-114 (24 pp)</b></p> <ul style="list-style-type: none"> <li>- As you read this, bear in mind the constitutional requirement of due process and rule of law requirement of fairness</li> <li>- Work through question 2 on p. 111</li> <li>- Analyze the Problem Exercise: Audit Immunity Policies, p. 97</li> </ul>
9	<p><b>Clean Air Act, S&amp;T Chapter 5, pp 115-137 (23 pp)</b></p> <p>Before you begin the reading, download the “Analytical Framework for Environmental Statutes” In module 9) and use it to analyze the Clean Air Act as you read.</p>

10	<p><b>Clean Air Act: S&amp;T Chapter 5, pp 138-142 (5 pp)</b></p> <p><b>Watch The Regulators documentary (50 min), considering the questions below</b></p> <p>Law making is a group activity, involving government employees, public interest groups, individuals, representatives of industry, and others. As you watch "The Regulators", note who each of these people represents: Henry Nickel, Barbara Brown, David Hawkins, and Gordon Anderson. What is the role of the national parks and of coal in these negotiations? What is New Source Review? What is the current PSD rule (see text book, p. 125, for a more detailed explanation, see 83 FR 57324)? What role did Friends of the Earth play in launching this regulatory process? What do you think about the documentary's characterization of the government regulators as wielding enormous power?</p> <p>Comment Letter Assignment due</p>
11	<b>Review</b>
12	<b>Midterm – in class</b>
13	<b>Water Pollution I, Chapter 7, pp 175-206</b>
14	<b>Water Pollution II, cont.</b>
15	<b>Environmental Impact Assessment - National Environmental Policy Act, Chapter 12, pp 339-355</b>
16	<p><b>Protecting Wetlands, Chapter 10, pp 281-293 and other readings</b></p> <p><b>WOTUS, wetlands delineation</b></p>

17

**Listen to the U.S. Supreme Court oral argument in *Sackett v. EPA*.**

**Contribute to the discussion thread, responding with your own thoughts about the oral argument and the points below. I will use a post to the discussion thread to register as your attendance at the November 3 class.**

In preparation for class on Thursday, review the following (if you don't have the basic holdings of these cases clear in your mind, you'll get lost in the oral argument):

- CWA definition of navigable waters as waters of the United States including the territorial seas (you may want to have a copy of the Clean Water Act, as codified, to hand:  
<https://www.govinfo.gov/content/pkg/USCODE-2010-title33/pdf/USCODE-2010-title33-chap26.pdf>)
- *U.S. v. Riverside Bayview Homes, Inc.* (S&T, p. 284)
- *SWANCC* (S&T, p. 284)
- *Rapanos v US* (S&T, p. 285)

In place of class on Thursday, November 3, please listen to the U.S. Supreme Court oral argument in the case *Sackett v. EPA* (3 Oct 2022). The argument is just about the length of our class period. The audio recording is here: [https://www.supremecourt.gov/oral\\_arguments/audio/2022/21-454](https://www.supremecourt.gov/oral_arguments/audio/2022/21-454).

There is a transcript of the argument at the same site and you may find it useful to reference the transcript in thinking about the questions below.

You now know the basic concerns that the Court is addressing in this case: wetlands are simultaneously very important ecological systems and often located on private property whose owners would like to build on the wetland (after draining and filling the wetland). The historical failure to clarify the meaning in the statute and persistent political tension over individual freedom vs

As you listen, pay attention to a few things:

- The argument jumps from issue to issue as the justices question the advocates – see if you can follow the threads of the argument.
  - o What definition does the attorney for the Sacketts want?
  - o What definition does the government want?
- You can also learn something about the Supreme Court justices, by listening to their questions (the advocates helpfully mention the name of the justice who just spoke in most of their answers). Do the “conservative” and “progressive” justices sound neutral or political in their questioning? See if you can note examples in their questions.
- Observe when the lawyers and justices are interpreting the plain language of the statute or Congressional intent; when they are looking at precedent in their prior cases; when they are looking at agency practice; and when they are using logic, consistency, “ordinary meaning” of terms, and personal experience with boats and rivers.
- What does Justice Sotomayor mean when she says “Congress defined the term” – that is, why would Congressional definition be crucial to the outcome of this case?
- What is Justice Jackson’s point when she asks the Sacketts lawyer, “why is it that your conception of this does not relate in any way to Congress’s primary objective?”
- What is the answer to Justice Thomas’s question about Congress’s authority to regulate wetlands with only a significant nexus to a navigable water?
- What is the constitutional issue at stake here?

What’s your guess as to how the case will come out? Who will win? Will the Court come up with yet another definition ... and what might it be?

18	<b>The Endangered Species Act, Chapter 10, pp 293-314</b>
19	<b>Waste Management, Chapter 9, Part I-RCRA, pp 235-251</b>
20	<b>Waste Management, Chapter 9, Part II-CERCLA, pp 252-274</b>
21	<b>Waste Management, CERCLA</b> <b>Guest: David J. Singer, Principal, Porzio, Bromberg &amp; Newman</b>
22	<b>Cost Benefit Analysis in Agency Rulemaking and Review of Regulations</b> <b>see module for papers</b> <b>Review pp 38-42 in Salzman and Thompson (5 pp)</b>
23	<b>Environmental Justice</b>
24	<b>The Public Trust Doctrine</b>
25	<b>Global Air Pollution – Climate Destabilization</b>
26	<b>Global Air Pollution - Ozone Depletion and Climate Change</b>
27	<b>Global Air Pollution - Climate Litigation</b>
28	<b>Review</b>
	<b>READING DAY</b>
	<b>FINAL EXAM</b> this exam will be in-class and cumulative, emphasizing material covered in the second half of the semester  Please send me your accommodation letter well in advance if you need extra time or other accommodation on the final.

**Disability Services Statement:**

If you have a disability and require instructional and/or examination accommodation, please inform me early in the semester of accommodations you need. If you have not already done so, register with the Office of Disability Services, the designated office on campus to provide services and administer exams with accommodations for students with disabilities. The Office of Disability Services is located in the Kreeger Learning Center, 151 College Ave, Suite 123, New Brunswick phone number 732-932-2848.

**Academic Integrity:**

In my experience, the norm is for students in my classes to behave with deep respect for their own honor and integrity and for each other. The rare exceptions violate the mutual trust between students, and between students and faculty, and will not be tolerated. You can find a description of Rutgers academic integrity policy here: <http://academicintegrity.rutgers.edu/>. Please read it carefully so that you do not inadvertently engage in behavior that is a violation of the policy.

**Studying Together:**

Studying together is particularly helpful in this class. You will learn more by getting together with others to work through questions posed in the assigned reading and to create hypotheticals testing your understanding and applying the class material to environmental pollution, environmental justice and resource use issues that you encounter in the world. However, the written assignments, quizzes, and exams are not group work unless you are instructed by me that they are. This means that if you do collaborate on a written assignment or an examination, it will be treated as a violation of academic integrity. Please do not be confused. Ask me if you have a question about this.

**Late Work Policy**

Be sure to pay close attention to deadlines—there will be no make-up assignments or quizzes, or late work accepted without a serious and compelling reason and instructor approval. All discussion assignments must be completed by the assignment due date and time. Late or missing discussion assignments will affect the student's grade. There are no bonus assignments.

**Basic Needs Resources**

Any student who has difficulty affording groceries or accessing sufficient food, or who lacks a safe and stable place to live, is urged to contact the Rutgers Student Food Pantry and/or the Dean of Students (contacts below). Furthermore, please notify the professor if you are comfortable doing so, as they may be able to provide additional support.

**Rutgers Student Food Pantry**

<http://ruoffcampus.rutgers.edu/food/> (Links to an external site.)  
848-932-5500

College Ave Student Center, Room 115 (126 College Ave). Check their website for hours and additional locations.

The Rutgers Student Food Pantry is dedicated to helping all Rutgers students in need of food, no questions asked. Students will be provided with groceries that typically last about one week.

**Dean of Students Office**

<http://deanofstudents.rutgers.edu/> (Links to an external site.)  
848-932-2300

88 College Avenue, New Brunswick, NJ 08901

Mon-Fri, 8:30am-5:00pm

The Dean of Students Office at Rutgers University-New Brunswick provides solutions, services, and support to help students navigate Rutgers University. The Office serves as a student support network by providing advocacy, problem resolution, and critical incident intervention for those times when additional assistance is needed. Please call to schedule an appointment to meet with a representative from the Dean's office. [Just In Case Web App](http://codu.co/cee05e) (Links to an external site.) <http://codu.co/cee05e> (Links to an external site.)