Environmental Law
ENST 382.01- Spring 2015

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Ofc. Hours: W 1-2:30 pm, Th 11-12:30

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Purpose:
The purpose of this class is to introduce the student to the history, law and theory of environmental regulation in the United States using public and private land regulation mechanisms as case studies. Basic principles of constitutional and administrative law relevant to environmental regulation, substantive public land use law and the history of environmental problems and their regulation will be covered.


Readings on Moodle- marked with MOODLE in syllabus

Tentative Syllabus:
Readings are identified below. There is a copy of an old hard copy Faculty Pac on reserve-some but not all of the readings are in that faculty pac. The readings are on E-Reserve and there are no new hard copies for sale. The E-Res web address is http://MOODLE.lib.umt.edu. The password is “warming”.

STUDENTS MUST COMPLETE ALL THREE PAPERS TO PASS THE COURSE!!!!

• Jan 27 Class Intro


• Feb 3-5 Federalism- The balance of State and Federal Power; MOODLE: Power Relationships Between Federal and State Government;

• Feb 10- Administrative Law; MOODLE: The Administrative Law of Environmental Law; Gardner: Chapter 2 pages 25-34

• Feb 12 Democracy in Environmental Regulation- The National Environmental Policy Act and Access to Information MOODLE: Chap 02: National Environmental Policy Act (NEPA) Paper 1 due

• Feb 17- The Clean Air Act MOODLE: Clean Air Act

• Feb 19- The Clean Air Act and Climate Change Regulation MOODLE: Massachusetts v.
EPA and EPA Factsheet - Reading Note 1 due

- Feb 24 Discussion Day

- Feb 26 - Climate Change- international regulatory approaches: MOODLE: Designing International Environmental Regulation, Guide to Climate Agreements, Bali Roadmap, Copenhagen Decision Summary, Copenhagen Accord, Cancun COP 16 Agreement-

Reading Note 2 due

- Feb 26 Paper 1 Returned- Students must meet with paper reviewer prior to revision!

- March 3- Discussion Day

- March 5- The Endangered Species Act MOODLE: ESA(Listing, Critical Habitat, Consultation & Recovery)

March 5 Paper 1 Revisions due

- March 10- The takings clause and environmental regulation: Gardner Chap 11 pages 177-190; MOODLE: Regulatory takings; Gest

- March 12- Discussion Day

- March 17- Takings clause continued

- March 19- TBA

- March 24 Wetlands regulation- the importance of definitions: Gardner Chap 3 and Chap 4 pages 35-71

- March 26- Private Conservation: HCPs, Land Trusts and Conservation Easements MOODLE: Plum Creek HCP- USFWS; Plum Creek Views: HCPs; HCPs: A Sweet Idea Gone Sour Paper 2 due

- April 3-5 No class- Spring Break

- April 7 Mitigation Banking- Gardner Chap 6 and 7 pages 93-126

- April 9 Discussion Day

- April 14 The Mining Law of 1872 MOODLE: Wilkinson Chap 2

- April 19 Montana mining regulation- The State Constitution and Reclamation MOODLE: Montana Constitution and Metal Mine Reclamation Act- Reading Note 3 due

- April 21 Discussion Day

- April 23 Guest Speaker

• April 30 Discussion Day

• May 5 Discussion Day

• May 7 Montana’s approach - State Trust Lands, the Forestry Practices Act and Streamside Protection Act MOODLE: Managing Montana’s Trust Lands; Revenue from Trust Lands; Forest Management on Trust Lands

• Tuesday, May 12, 8-10 am, Test 1

Grading:

Three papers (of at least seven pages each), three reading notes and one test will be given in the course of the term. The grade will be based on the three best scores of the papers and final and the reading notes (90% total) plus 10% class participation and will be on a plus/minus system. All students must complete 3 papers (reading notes do not count as papers) to pass the course. The final exam will be cumulative over the material for the entire term. The final exam is optional, for those seeking to improve their grade following the papers. Grading will be on a curve. If all of the class is doing well the curve may be "high" with more students getting higher grades, or if the converse is true the curve may be "low".

Papers:
The paper topics will be supplied by the instructor. They will relate to some aspect of the course covered in that section of the course. Papers will be expected to be approximately 7 pages in length, typewritten and double-spaced. They will require the student to reference outside sources to support the positions taken in the paper. Paper 1 will be revised following comments and resubmitted for final grading. Papers with major writing errors will not receive an "A". Papers containing plagiarism or material not written by the student that is not attributed will receive an "F" and the student will be referred to the appropriate academic discipline procedure. All writing is to be the student’s own work, with references properly documented to outside sources.

Papers are due at the beginning of class on the due date. Late papers will receive a grade reduction of one "-" per day they are late (an "A" paper will receive an A- for one day late, a B+ for two days late, a B for three days, etc.). No after-the-fact excuses will be accepted. The late paper penalty can only be waived by prior approval of the instructor before the beginning of the class in which it is due. If you are sick, call or e-mail before the due date to get an extension.

Following the return of the first draft of Paper 1, each student must schedule an appointment with the Teaching Assistant or Instructor to review their comments on the paper before the revision is turned in. Failure to meet with the Teaching Assistant or Instructor that reviewed the first draft will result in a full grade deduction on the final grade for the revision and will result in a lower score for class participation.

Reading Notes

Reading notes will be short 1 page typewritten assignments covering some aspect of the reading
assigned. Prompts for these assignments will be distributed one week before the reading note is due.

Final:

The final will be short answer essay. No early or late makeups will be allowed, unless specifically authorized by University policy (e.g., multiple exams on the same day).

Class Participation

Attendance will be taken and participation will be noted and accounted for during the class. A large part of the class participation grade will be based on the student’s performance in the class discussion leader role on the assigned day. Each student will be assigned one class day to participate as a discussion leader as part of a group of up to 5 students.

Office Hours:

The Instructor and the Teaching Assistant will be available for consultation during their scheduled office hours. These are the hours where "drop-ins" can see the teaching staff. If you want to meet in another time contact the teaching staff by phone or e-mail or during office hours and schedule an appointment.

The Final Date to Drop this class without an instructor signature is 2/13/15.

Course Goals

The goals of the course include:

1. Understanding of the need for regulation of environmental impacts.

2. Understanding the various methods of regulation possible and the contexts in which they are appropriate.

3. Developing written communication skills.

4. Understanding the current land use regulatory framework.

5. Understanding the relationship between government and private property.

6. Understanding the relationship between different branches of government under the US Constitution.

Expectations of Students

By the end of the course students are expected to demonstrate the following skills:

1. Coherent, logical writing on topics of environmental regulation.

2. Ability to identify the issues surrounding environmental regulation in a particular context, including the relevant agencies and actors.
3. Ability to discuss and analyze possible regulatory alternatives for land use regulation.

4. Basic composition and grammar skills at a level commensurate with upper-division undergraduates.

5. Demonstrate an informed knowledge of the regulatory systems currently in use for land use in the United States.

6. Show basic research skills for locating and analyzing outside sources.

7. Ability to formulate and articulate a well-supported and reasoned argument.

**Niche in the EVST Major**

Environmental problem solving in the United States requires knowledge of regulatory mechanisms and the alternatives for avoiding or mitigating environmental impacts. This course serves as a basic introduction to the regulatory framework for land use and environmental protection in the United States. It also provides basic knowledge of regulation under the governmental system in place in this country. Students in an Environmental Studies major should be knowledgeable of regulation and the options for a given problem in order to be effective problem-solvers.

**Disability modifications**

The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and Disability Services for Students. If you think you may have a disability adversely affecting your academic performance, and you have not already registered with Disability Services, please contact Disability Services in Lommasson Center 154 or call 406.243.2243. I will work with you and Disability Services to provide an appropriate modification.

**Student Conduct Code**

Plagiarism or other misconduct as defined in the *Student Conduct Code* will result in sanctions possibly including receiving a failing grade for the course and referral to a formal misconduct process.

**ENST 382**

*Spring 2015*

**Writing Assignment #1**

First Version Due: 2/12/2015 at 9:40 am in class

**Topic:** California passes a dramatic set of new motor vehicle emission standards to combat global warming through the reduction of greenhouse gases in the “GHG Reduction Act.” The legislation requires all vehicles sold in California to bear a label identifying the average GHG emissions per mile and to achieve a 30% reduction over 2015 levels for that model vehicle by 2025 by a 3% or more reduction per model year. Reductions greater than 3% in any one model year can be credited against following model years. The California legislature states the purpose of the legislation is to avoid economic costs to the state and its citizens that result from global warming (i.e., the rise in sea level along coasts, drought in agricultural regions, landslides in hillside communities) and to provide consumers with the best possible information to make car purchasing decisions.

The federal government passes legislation that mandates “Ten in Ten”, meaning that automotive manufacturer fleet gas mileage averages must increase by 10 mpg in ten years. That increase need only be accounted for at the end of the ten year period (there are no interim targets). Congress states that the purpose of the law is to curb global warming and prevent the worst environmental impacts predicted by scientists, while allowing the auto industry to adjust in a cost-effective manner that preserves jobs. The
10 in 10 statute is silent on labeling requirements.

Ten other states have joined California in requiring labeling and the reduction of emissions for all vehicle types. Giant Motors Corporation files suit in federal court claiming that it should be able to sell cars in California without the labels required by California law and that it should not have to comply with California emissions rules. GMC builds light duty trucks in a plant in California, but produces all of its cars in plants scattered across the United States and Canada.

Answer either Question Set #1 OR Question Set #2 in your paper. DO NOT ANSWER BOTH!

**Question Set #1**

a. Are the emission standard and the labeling requirements of the GHGRA pre-empted by the 10 in 10 legislation? What are the possible theories for finding pre-emption? How do they apply to these facts? What is your conclusion as the court?

b. What should the rule be as a matter of policy- should the state be able to regulate this area in this way?

**Question Set #2**

a. Is the GHG emission labeling provision of the GHGRA barred by the Commerce Clause of the United States Constitution? What are the possible theories for finding a violation of the Commerce Clause or surviving Commerce Clause analysis? How do they apply to these facts? What is your conclusion as the court?

b. What should the rule be as a matter of policy- should the state be able to regulate this area in this way?

To fully address the topic, discuss the following in the report:

1. From a policy standpoint (refer to the list of issues discussed in class) decide whether the states or federal government should regulate in this case. Use the list of issues discussed in class to support your position and explain why.

2. Answer whether federal regulation in this area is constitutional under the US Constitution using the cases and constitutional provisions in the reading, discussed in class, or found in your own research. Be sure to explain how the cases you use are similar to this situation.

3. Include information relevant to the issue from one cited outside source other than what is in the assigned reading or discussed in class. You can use newspapers, magazine articles (like Time or US News and World Report), cases, books, law review articles, internet sites or statements from politicians or groups. Attach a copy of the page which has the point you are using to the end of the report. Extensive (more than a couple of lines is too much) quotation is not preferred. We'd like to see your thinking on the issue. Provide a full citation of the source at the end of the report or in a footnote and refer to it in the body by the appropriate method. I will identify in class the preferred method.

4. Good writing is part of your grade (see the syllabus). Grammatical and composition errors will reduce your grade on the final paper. Treat this paper as a final assignment, even though you will be required to rewrite it. Your initial performance will also be factored into your grade.

5. Emotional responses and opinions are okay, but make sure you cover the law and policy aspects of the topic outlined above.

You will be required to meet with the member of the teaching staff that grades your paper between the return of the draft and the due date for the final. Please keep your drafts to use in this meeting and to turn in with your final paper.

**Question set #1a key**

**Preemption**

Supremacy clause- should state that it makes federal law supreme- 5 pts

 Four tests
Express conflict-4
Field occupancy-4
Practical impossibility-4
Implied, conflict- purposes test-4
Analysis:

Express conflict 4 pts- Federal statute is silent on whether the states can regulate- no express conflict

Field occupancy 8 pts- can argue this- Federal law deals with gas mileage but not labeling of vehicles for sale, therefore there isn’t field occupancy. If they say the feds occupied mpg standards and therefore the state is pre-empted in that field give them most of the credit, but not all because this really isn’t field occupancy

Practical impossibility 6 pts- you can comply with both by meeting the more stringent CA standard, so this is not the situation here and the state law is not pre-empted on this ground

Implied, nonexpress- 16 pts total purposes of state and fed (12 of the 16 pts)- Fed purpose is: “to curb global warming and prevent the worst environmental impacts predicted by scientists, while allowing the auto industry to adjust in a cost-effective manner that preserves jobs “State purpose is “to avoid economic costs to the state and its citizens that result from global warming (i.e., the rise in sea level along coasts, drought in agricultural regions, landslides in hillside communities) and to provide consumers with the best possible information”.

Federal law covers environmental and cost to industry issues. California law focuses on costs to the state and consumer information purposes. One line of reasoning is that there is not overlap on environmental issues and the cost focus of the two levels of regulation is different- industry versus state govt and the population, not the auto industry. The argument would be that these are different enough analogizing to the Pacific Gas and Electric case and that the presumption of concurrency requires the court to find a way for the state law to survive if at all possible. The other line of reasoning is that both the federal and California law have economic purposes and this is enough overlap to satisfy that prong of the implied conflict test. As long as they support it well and explain it completely give them full credit.

Frustrating the policy objectives of Congress(4 of the 16 points)- an argument even if a separate purpose. Requiring better mpg doesn’t frustrate the purpose of curbing global warming, but it does with the economic allocation Congress has made- giving the consumer the burden instead of the auto industry. Thus, the mpg frustrates, but the labeling doesn’t- it just provides info to consumers about that model. The best argument is that there is purpose overlap and policy frustration on mpg, but not on labeling.

If they don’t raise this separately, but just mention it give full points because of how I lectured about it.

Conclusion (overall)- 3 pts

Question set #2a key

Commerce Clause

Commerce Clause is from the US Constitution- states cannot invade the area of interstate commerce given to the federal government- 5 pts

Tests:

Virtually per se 8
Balancing 8

Exceptions

Quarantine 2
Market Participant 2

Analysis

Virtually per se- 5 pts- No discrimination between in-state and out-of-state explicitly. It applies as much to the GMC trucks built in CA as those made in Michigan. Thus, there is no per se discrimination based on the state of origin of the vehicle or manufacturer.

Balancing- 20 pts weigh the burden on interstate commerce against the local benefit

Burden- MPG: Requires manufacturers to build just for California separate from many other states (even if 10 other states have joined). Given the size of the CA market it will drive building for much of the rest of the
country. On the other hand, CA has had special standards for pollution for years without it being too much of a burden. (5 pts of the 20)

Labeling: Same arguments really for burden. (5 pts of the 20)

Benefit- MPG: CA residents have lots of coastline property, the ag industry is tied to climate and lots of landslide prone developed areas. There are real costs to residents, business and the state from global warming that are perhaps unique to CA in their extent and prevalence. My conclusion is that the burden on interstate commerce is not excessive in comparison to the local benefit and that the state law is valid on the mpg side of the law. It is okay if they come out differently and say that it is a burden (especially citing only one model made in California- all other models must be made with California standards at other plants or build a separate plant) (5 pts of the 20)

Labeling: (5 pts of the 20) CA consumers get good information that will both help them avoid costs personally and to the larger community. Printing a label just for California market is not that big a deal in terms of burden- they can just slap them on at California dealerships. They can reason it out differently though and get full credit.

Exceptions to commerce clause:

Market participant: doesn’t apply- state is regulating business, not manufacturing or selling vehicles- 2 pts

Quarantine: global warming and oil consumption is not a disease, despite what we might argue about an addiction, so quarantine doesn’t really apply even tho there are certainly indirect health consequences- 3 pts

Conclusion- Is it barred by commerce clause- can go separate with MPG or labeling or not- 3 pts

Points for both Q1 or Q2 papers

Policy:

They should review the various policy points relevant to the issue that I laid out in class:

- local interests- see the state purposes
- national interests- see federal purposes and commerce clause issues
- competitiveness & consistency within the nation
- political balance
- protectionism
- discrim/divisiveness
- economic isolation (3 points for listing them all)

As long as they discuss 3-4 and apply facts to them correctly, give full credit (7 pts)

Conclusion: Fed or state better? (2)

Citation- 5 pts
- Proper citation and use of outside sources

Writing 25 pts
- Presence of an introduction describing the setting of the case
- Clear statement of the legal issue
- Clear exposition of the law applicable to the issue
- Well developed factual development and application of the law to those facts in a reasoned and coherent fashion
- Coming to a conclusion that follows from the analysis and clearly stating the position
- Organization and coherence- do topics follow one another logically without jumping around and are their clear transitions and/or organizing headings to guide the reader through the material
- Proper sentence structure
- Proper grammar and spelling
Discussion Day Topics

Instructions: Each student must participate in leading a class session on a topic listed below as part of the course. The class will be lead by a group of students, with each group member responsible for presenting content and facilitating discussion/learning activities. It is required that part of the class session involves an activity for the class (debate, role play, game, etc). Initial resources for the issue will be provided by the instructor and teaching assistant that students will then be responsible for developing. Groups are encouraged to discuss their plans with the instructor or teaching assistant before the discussion date.

- Feb 24- Keystone Pipeline and NEPA- what did the US State Department need to do to comply with the National Environmental Policy Act in the Keystone XL Pipeline project decision and did they do it?

- March 3- California Cap and Trade system for greenhouse gases- what is the cap and trade system that California is implementing and how effective has it been to date?

- March 12- Wolverine listing decision- what was the proposal to list the wolverine under the Endangered Species Act and what decisions did the USFWS make? Were they defensible under the ESA?

- March 17- Yellowstone Grizzly Bear delisting- why was the delisting decision struck down by the courts and what has the USFWS done to respond. Will it be enough?

- April 9- Fracking regulated in Montana? What federal or state law/regulations regulate the practice of fracking to get oil or natural gas? Are they effective?

- April 21- Smith River mine proposal- what is it and what process will it need to go through to get approval- where is it in the process and what are the issues?

- April 30- Flathead National Forest Plan Revision- collaboration required? Review the new rules requiring collaboration in forest planning for the US Forest Service and examine the Flathead National Forest process.

- May 5- Colt Summit project Lolo NF- how was a collaborative involved in developing the project, why did a court stop the project and how was the USFS able to move ahead finally?
Hi Fracking Group for 382!

You are receiving this e-mail because you signed up to do a presentation and lead activities on April 9 in ENST 382 Environmental Law on hydraulic fracturing to develop oil and gas deposits in Montana.

Here are some sources to get you started:

http://www.sourcewatch.org/index.php/Montana_and_fracking

http://bogc.dnrc.mt.gov/frac.asp


Len
Hi All:

Sorry I didn’t get to this last Friday, but better late than never I guess. See the following resources and the attached 2012 USFS planning rules.

http://www.swanview.org/articles/blog/flathead_skews_forest_plan_revision_process/180

https://www.merid.org/~media/Files/Projects/FNF/Process%20Workshop/Process%20Workshop%20Summary-final

http://fnfplanrevision.blogspot.com

https://groups.google.com/forum/#!categories/fnfplanrevisioncollaboration/publicфорум is a site that is an e-collaboration forum- kind of different- I don’t know what to make of it!

Len