

ANTONIN SCALIA LAW SCHOOL
ENVIRONMENTAL LAW (LAW 218-R01-CRN14282)
SPRING 2022 SYLLABUS (revised to Dec. 14, 2021)

E. DONALD ELLIOTT

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This course introduces major concepts in environmental law with a focus on U.S. statutes, regulations and guidance for managing waste, air and water pollution, toxic substances, preservation of nature and endangered species, and global environmental resources. Alternative policy approaches, such as market-based incentives, information disclosure requirements, and voluntary programs will also be considered. Overarching legal and policy concepts, including federalism, administrative procedure, separation of powers, environmental justice, judicial review, and statutory interpretation will be explored throughout the semester.

Student Learning Outcomes/Objectives:

1. Students will learn the basic design and the key terms and concepts for all the major U.S. environmental laws.
2. Students will also be exposed to key policy issues and critiques of U.S. environmental law, including how economics and environmental justice values are incorporated.
3. Success and failures will be discussed, including the difficulty that the current system has experienced in dealing with climate change and protection of wetlands.

Grading: Grades will be based primarily upon a written final exam, but class participation also counts for up to 15% of a student's grade. The exam typically consists of a fact pattern, several short answer or true-false questions and an essay.

The **required texts** for the course are:

1. E. DONALD ELLIOTT AND DANIEL C. ESTY, ADVANCED INTRODUCTION TO U.S. ENVIRONMENTAL LAW (Nov. 2021), ISBN - 978 1 80037 491 1 (paperback or electronic version).

Available to order in paperback for \$24.95 (or \$19.96 to members) thru this link.
<https://www.e-elgar.com/shop/usd/advanced-introduction-to-u-s-environmental-law-9781800374911.html>

Electronic copies are also available for \$19.96 here.
<https://www.vitalsource.com/products/advanced-introduction-to-u-s-environmental-law-e-d-elliott-daniel-c-esty-v9781800374904?duration=perpetual>

2. JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (University of Michigan Press, 1980) ISBN-10: 0472063243; ISBN-13: 978-

0472063246. Retail price: \$20.95. Available to read for free on line:
https://www.nps.gov/parkhistory/online_books/sax/

Topics and Reading Assignments:

I. Introduction to the Course and to One Another.

Wednesday, January 19

1. This Syllabus.
2. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968),
http://www.garretthardinsociety.org/articles/art_tragedy_of_the_commons.html
3. E. Donald Elliott, *The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law*, 20 VA. ENVTL. L. J. 17 (2001),
https://digitalcommons.law.yale.edu/fss_papers/2218/

II. Monday, January 24- Recurrent Issues and the Role of Economics

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 2 - "Recurrent Themes in U.S. Environmental Law," pp. 13-30.
2. *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980)(OSHA Benzene), <https://supreme.justia.com/cases/federal/us/448/607/>
3. E. Donald Elliott, *Only a Poor Workman Blames His Tools: On Uses and Abuses of Benefit-Cost Analysis in Regulatory Decision Making About the Environment*, 157 U. Pa. L. Rev. PENumbra 178 (2009),
https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6111&context=fss_papers
4. Jonathan Cannon, *The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc.*, 34 HARV. ENVTL. L. REV. 425-460 (2012),
<https://harvardelr.com/wp-content/uploads/sites/12/2019/07/34.2-Cannon.pdf>
5. *Michigan v. EPA*, 576 U.S. ---, 135 S. Ct. 2699 (2015). No. 14-46 (June 29, 2015), https://www.supremecourt.gov/opinions/14pdf/14-46_bqmc.pdf

Wednesday, January 26 – Discussion with Guest Prof Ricky Revesz on the Role of Cost-Benefit Analysis in Environmental Decision-making.

1. Please review the 17 short blog posts in the Symposium on Michael Livermore and Richard Revesz's "Reviving Rationality,"
<https://www.yalejreg.com/topic/symposium-reviving-rationality/> but especially *The Future of Cost-Benefit Analysis*, by Michael A. Livermore & Richard L. Revesz, <https://www.yalejreg.com/nc/symposium-reviving-rationality-part-17/>

Monday, January 31 – An Alternative Rights-Based Theory.

1. E. Donald Elliott and Daniel C. Esty, *The End Environmental Externalities Manifesto: A Rights-Based Foundation for Environmental Law*, 29 NYU ENV'T L. J. 505 (2021) Available at: https://www.nyuelj.org/wp-content/uploads/2021/10/Elliott_Esty-Post-Proof.pdf

III. Wednesday, February 2 - Legal Structure and the Making of Environmental Law

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION Chapter 1 “How U.S. Environmental Law is *Really* Made,” pp. 1-12.
2. E. Donald Elliott, “Everything You Need to Know About Administrative Law in One Easy Lesson” (Slides to be shown in class and circulated thereafter).
3. *Chevron v. NRDC*, 467 U.S. 837 (1984),
<https://www.law.cornell.edu/supremecourt/text/467/837>
4. E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Re-Defined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1 (Spring 2005), https://digitalcommons.law.yale.edu/fss_papers/5095/.
5. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019),
https://scholar.google.com/scholar_case?case=13006095287647774922&hl=en&as_sdt=6&as_vis=1&oi=scholar Pay particular attention to Chief Justice Roberts’ concurrence which begins on page 2424.

Optional: Recommended for Additional Reading but NOT Required: Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511,
<https://pdfs.semanticscholar.org/8c49/b3ca75816c19140be369a96dcfdbe68593f.pdf>;
Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984 (1991),
http://digitalcommons.law.yale.edu/fss_papers/2204/; Liu, Frederick, "Chevron as a Doctrine of Hard Cases" (2008). *Student Prize Papers*. http://digitalcommons.law.yale.edu/ylsspps_papers/31

III. The Clean Air Act

Monday, February 7

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 3 - “The Clean Air Act: Successful but Slow,” pp. 31-35.
2. E. Donald Elliott, A Roadmap to the Clean Air Act (slides to be shown in class and circulated thereafter).
3. [Enforcement] CAA §113, 42 U.S.C § 7413,
<http://www.law.cornell.edu/uscode/text/42/7413>
4. E. Donald Elliott, *A Critical Assessment of the EPA’s Air Program at Fifty and a Suggestion for How It Might Do Even Better*, 70 CASE W. RES. L. REV. 895 (2020)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol70/iss4/6>
5. Schoenbrod, David (2010, September 3). The Clean Air Act Is in No Shape to Be Celebrated. *Huffington Post*. https://www.huffpost.com/entry/the-clean-air-act-is-in-n_b_704631.

Optional: Recommended for Additional Reading but NOT Required: E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. LAW, ECON. & ORG. 313 (1985),
http://digitalcommons.law.yale.edu/fss_papers/147/

Wednesday, February 9

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 4, “Climate Change: An ‘Existential Threat’ Not Yet Addressed,” pp. 46-64.
2. *Mass. v. EPA*, 549 U.S. 497 (2007),
<https://supreme.justia.com/cases/federal/us/549/497/>
3. Summary report on Glasgow Climate Change Conference (Oct 31-Nov 12),
<https://enb.iisd.org/Glasgow-Climate-Change-Conference-COP26-summary>

IV. The Clean Water Act

Monday, February 14-Protecting Surface Waters

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 5 – “Clean Water Act: Major Progress but Persistent Challenges,” pp. 65-76.
2. EPA, Summary of the Clean Water Act, <https://www.epa.gov/laws-regulations/summary-clean-water-act>

Wednesday, February 16 – Preserving Wetlands

1. *Rapanos v. United States*, 547 U.S. 715 (2006),
<https://supreme.justia.com/cases/federal/us/547/715/> (esp. Kennedy, J., concurring at pp. 779-80, discussing the “significant nexus” standard
<https://supreme.justia.com/cases/federal/us/547/715/concurrence2.html>
2. E. Donald Elliott, *Portage Strategies for Adapting Environmental Law and Policy During a Logjam Era*, 17 NYU ENVTL L.J. 24 (2008),
http://digitalcommons.law.yale.edu/fss_papers/2221/ esp. pp. 42-44 and footnotes discussing *Rapanos* as “Policy-Making by Default by the Courts”).
3. [Trump] EPA, Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (Feb 14, 2019),
<https://www.federalregister.gov/documents/2019/02/14/2019-00791/revised-definition-of-waters-of-the-united-states>. (The Federal Register notice is 67 pages long, but the only portion assigned is the “Background” section on pages 4155 to 4169 that reviews the history, the rationale and key provisions of the rule.)
4. EPA, Definition of “Waters of the United States”: Rule Status and Litigation Update, <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>.

V. Safe Drinking Water and Preventing Oil Spills.

Monday, February 21

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 6 – “Safe Drinking Water Act: Once Seen as a Problem Solved, But Now New Worries,” pp. 76-86.
2. EPA, Understanding the Safe Drinking Water Act,
<https://www.epa.gov/sites/default/files/2015-04/documents/epa816f04030.pdf>

Wednesday, February 23

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 11 – “OPA90: Why Economic Incentives Only Work Sometimes,” pp. 128-136.

2. 33 U.S.C. §§ 2701- 2720, <https://www.law.cornell.edu/uscode/text/33/chapter-40/subchapter-I> (focus esp. on §§ 2701 (definitions), 2702 (elements of liability), 2703 (defenses to liability), 2704 (limits to liability), 2706 (natural resource damages)).
3. National Academy of Sciences, *Macondo Well Deepwater Horizon Blowout: Lessons for Improving Offshore Drilling Safety* (2011), available for a free download at http://www.nap.edu/download.php?record_id=13273 , esp. Summary” pp. 3 – 9 (pp. 24-30 of pdf) and Chapter 6 “Regulatory Reform” pp. 111 – 127 (pp. 132 -148 of pdf).

Optional: Recommended for Additional Reading but NOT Required: E. Donald Elliott and Mary Beth Houlihan, *A Primer on the Law of Oil Spills* (2010). Available at SSRN: <http://ssrn.com/abstract=2007604>; *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), <http://laws.findlaw.com/us/000/07-219.html>.

VI. Controlling Hazardous Substances and Hazardous Waste

Monday, February 28

1. ELLIOTT & ESTY, *ADVANCED INTRODUCTION*, Chapter 7 – “Hazardous Waste: Extreme Measures in the Wake of a Crisis,” pp.87-101.
2. BROWSE the detailed and complex RCRA regulations for identification and management of hazardous waste, <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-regulations>

Wednesday, March 2

1. CERCLA §§106 and 107(a) and (b), and (e), 42 U.S.C. §§9606 and 9607, <https://www.law.cornell.edu/uscode/text/42/9606>
<https://www.law.cornell.edu/uscode/text/42/9607>
2. *Burlington N. & S. F. R. Co. v. United States*, 556 U.S. 599 (2009), <https://supreme.justia.com/cases/federal/us/556/599/>
3. E. Donald Elliott, *EPA In The Trump Era: The Superfund Enforcement Initiative*, Law360, https://digitalcommons.law.yale.edu/fss_papers/5109/

VII. Regulating Chemicals -TSCA and REACH

Monday, March 7

1. ELLIOTT & ESTY, *ADVANCED INTRODUCTION*, Chapter 8 – Regulation of Chemicals: From Toxic Substance Control to Chemical Safety, pp. 102-112.
2. EPA, Summary of the Toxic Substances Control Act, <https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act>
3. 15 U.S.C. §§ 2601- 2629, esp. Subchapter 1, §§ 2603 (Testing -TSCA §4), 2604 (Pre-Manufacturer Notifications – TSCA §5), 6 and 8, <https://www.law.cornell.edu/uscode/text/15/chapter-53/subchapter-I>
4. Richard Denison, A primer on the new Toxic Substances Control Act (TSCA) and what led to it, <https://www.edf.org/sites/default/files/denison-primer-on-lautenberg-act.pdf>

Optional: Recommended for Additional Reading but NOT Required: *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 22 ELR 20304 (5th Cir., 1991)
<http://openjurist.org/947/f2d/1201/corrosion-proof-fittings-v-environmental-protection-agency> (setting aside TSCA §6 rule banning 5 uses of asbestos, 54 Fed. Reg. 29,460 (1989), on grounds that despite ten years of rulemaking, EPA had not compiled substantial evidence to support its action and had failed to consider less restrictive alternatives).

Wednesday, March 9

1. Robert V. Percival, *Who's Afraid of the Precautionary Principle?*, 23 PACE ENVTL. L. REV. 21 (2006) <http://digitalcommons.pace.edu/pelr/vol23/iss1/3>
2. European Commission, REACH IN BRIEF (October 2007),
3. http://ec.europa.eu/environment/chemicals/reach/pdf/publications/2007_02_reach_in_brief.pdf
4. Ortwin Renn and E. Donald Elliott, *Precautionary Regulation of Chemicals in the US and EU in THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE UNITED STATES AND EUROPE* 223-256 (eds. Jonathan B. Wiener, Michael D. Rogers, James K. Hammitt & Peter H. Sand)(RFF Press, 2011)(pdf to be distributed by email prior to class)

Monday, March 14 – No Class – Spring Recess

Wednesday, March 16– No Class – Spring Recess

VIII. Regulation of Pesticides and Workplace Safety.

Monday, March 21-FIFRA

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 9 – FIFRA: From Misbranding to Reasonable Certainty of No Harm, pp. 113-123.
2. BROWSE particularly the table of contents but also a couple of chapters to get a feel for the matters addressed, EPA, Office of Pesticide Programs Label Review Manual, https://www.epa.gov/sites/default/files/2021-02/documents/full-lrm_2-22-21.pdf

Wednesday, March 23-OSHA

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 10 – Occupational Safety and Health Act: Making Environments Safe on the Job, pp. 124-127.
2. OSHA at a Glance, <https://www.osha.gov/sites/default/files/publications/3439at-a-glance.pdf>

IX. Preserving Nature: Endangered Species Act, National Parks and Wilderness

Monday, March 28

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 12 – From Protecting Endangered Species to Promoting Biodiversity and Healthy Ecosystems, pp. 137-149.

2. *TVA v. Hill*, 437 U.S. 153 (1978), <https://supreme.justia.com/cases/federal/us/437/153/case.html>
3. *Babbitt, Secretary of the Interior v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), <https://supreme.justia.com/cases/federal/us/515/687/>
3. Alisha Falberg, *The Pricelessness of Biodiversity: Using the Endangered Species Act to Help Combat Extinction and Climate Change*, 33 UCLA J. ENVTL. L. & POLICY 135 (2015), <https://escholarship.org/uc/item/5065j9n9>

Wednesday March 30

1. ELLIOTT & ESTY, *ADVANCED INTRODUCTION*, Chapter 13 – National Parks and Wilderness Preservation: “America’s Best Idea,” pp. 150-158.
2. JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980), *passim* but esp. pp. 47-77 (Chapters 3 and 4).

X. The National Environmental Policy Act and Information Disclosure

Monday, April 4

1. ELLIOTT & ESTY, *ADVANCED INTRODUCTION*, Chapter 14 – NEPA and Information Disclosure: Techniques Copies Around the World, pp. 159-170.
2. JAY E. AUSTIN, JOHN M. CARTER II, BRADLEY D. KLEIN AND SCOTT E. SCHANG, *JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT* (ELI 2004). <http://www.eli.org/research-report/judging-nepa-hard-look-judicial-decision-making-under-national-environmental-policy-act>
OR <https://www.eli.org/sites/default/files/eli-pubs/d14-12.pdf>
3. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), <https://supreme.justia.com/cases/federal/us/555/7/>

Wednesday, April 6

1. PHILIP K. HOWARD, *TWO YEARS NOT TEN YEARS: REDESIGNING INFRASTRUCTURE APPROVALS* (2015), <https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf>
3. [Trump] White House Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy, 85 Fed. Reg. 43304 (July 16, 2020), <https://www.federalregister.gov/documents/2020/07/16/2020-15179/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental>
4. Jonathan D. Simon *et al.*, Biden Administration Proposes to Walk Back Key Trump Era NEPA Regulation Changes, *THE NATIONAL LAW REVIEW* (October 12, 202), <https://www.natlawreview.com/article/biden-administration-proposes-to-walk-back-key-trump-era-nepa-regulation-changes>

XI. Property Rights and Environmental Justice

Monday, April 11

1. *Andrus v. Allard*, 444 U.S. 51 (1979),
<https://supreme.justia.com/cases/federal/us/444/51/case.html>
2. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),
<https://supreme.justia.com/cases/federal/us/505/1003/case.html>
3. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002),
<https://supreme.justia.com/cases/federal/us/535/302/case.html>
4. *Koontz v. St. Johns River Water Management*, U.S.S.C. No. 11–1447 (June 25, 2013), http://www.supremecourt.gov/opinions/12pdf/11-1447_4e46.pdf
5. E. Donald Elliott, *How Takings Legislation Could Improve Environmental Regulation*, 38 WILL. & MARY L. REV. 1177 (1997),
http://digitalcommons.law.yale.edu/fss_papers/2215/

Wednesday, April 13

1. Christopher H. Foreman, Jr., *The Clash of Purposes: Environmental Justice and Risk Assessment* (March 20, 1998),
<http://www.brookings.edu/research/articles/1998/03/20environment-foreman>
2. Alan Ramo, *Book Review: The Promise and Peril of Environmental Justice*. By Christopher H. Foreman, Jr., 40 SANTA CLARA L. REV. 941 (2000),
<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1133&context=pubs>
3. EPA's EJ Home Page, <https://www.epa.gov/environmentaljustice>
3. Summary of Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629; February 16, 1994, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>
4. EPA's National Environmental Justice Advisory Council,
<https://www.epa.gov/environmentaljustice/national-environmental-justice-advisory-council>
5. EPA's EJ 2020 Action Agenda, <https://www.epa.gov/environmentaljustice/ej-2020-action-agenda>

XII. Evaluating U.S. Environmental Law.

Monday, April 18

1. Elliott & Esty, *Advanced Introduction*, Chapter 16 "The best and worst," pp. 186-190.
2. Josh Ulan Galperin and E. Donald Elliott, Report to the Office of the Chairman, Administrative Conference of the United States on Improving Notice of Significant Regulatory Changes (link or pdf to be provided prior to class).

Wednesday, April 20

1. E. Donald Elliott, *U.S. Environmental Law in Global Perspective: Five Do's and Five Don'ts from Our Experience*, (March 1, 2010). NATIONAL TAIWAN UNIVERSITY LAW REVIEW, Vol, 2, 2010. Available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3716&context=fss_papers or <http://ssrn.com/abstract=1709966>
2. Daniel C. Esty, Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability, 47 ENVTL. L. 1 (2017), https://digitalcommons.law.yale.edu/fss_papers/5186

XIII. Beyond Traditional Environmental Regulation.

Monday, April 25

1. ELLIOTT & ESTY, ADVANCED INTRODUCTION, Chapter 16, Beyond Traditional Environmental Governance: Corporate Sustainability, Performance Benchmarking, Private Standard Setting, and Public-Private Partnerships, pp. 171-185.
2. Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4615&context=clr>.
3. EPA, Safer Choice, <https://www.epa.gov/saferchoice/learn-about-safer-choice-label>

Saturday, April 30 – noon – Final Exam