

GLOBAL WARMING AND THE AMERICAN LEGAL SYSTEM

Golden Gate University Law School

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Ken Alex and Janill Richards

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SUMMARY

This course explores possible legal solutions to the growing problems associated with climate change and the limits of the the American legal system's ability to address those problems. We will consider U.S. environmental statutes and common law, including the law of public nuisance. We will evaluate how environmental law operates in the U.S., and whether it can be used to meet the challenge of global warming.

COURSE OUTLINE

Class 1: How do we attack a new environmental problem with existing tools?

Topics and questions:

1. Does global warming change the environmental movement?
2. What is the role of the legal system in addressing global warming?
3. Should the courts, as opposed to other branches of government, respond to the issue of global warming?

Readings:

1. Michael Shellenberger and Ted Nordhaus, *The Death of Environmentalism / Global Warming Politics in a Post-Environmental World* (Essay) (2004).
www.thebreakthrough.org/images/Death_of_Environmentalism.pdf
[Note: This essay was released at an October 2004 meeting of the Environmental Grantmakers Association. You can read more about the essay and the response to the essay at <http://www.grist.org>.]
2. Carl Pope, *Response to 'the Death of Environmentalism': THERE IS SOMETHING DIFFERENT ABOUT GLOBAL WARMING* (Essay) (2004).
http://www.sierraclub.org/pressroom/messages/2004december_pope.asp
3. Barry Commoner, *A Reporter at Large: The Environment*, The New Yorker, June 15, 1987.
4. *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907)
5. Justin R. Pidot, *Global Warming in the Courts / An Overview of Current Litigation and Common Legal Issues*, Georgetown Environmental Law & Policy Institute, Georgetown University Law Center (2006).
http://www.law.stanford.edu/program/centers/enrlp/pdf/GlobalWarmingLit_CourtsReport.pdf

Optional additional readings:

1. Adam Werbach, Is Environmentalism Dead? (Speech) 2004.
<http://www.grist.org/news/maindish/2005/01/13/werbach-reprint/>

Class 2: What do we know about climate change?

Topics and questions:

1. What is the state of the science?
2. Is there a scientific and political consensus that climate change is real?
3. How does the use of modeling affect our certainty about the problem?

Readings:

1. Intergovernmental Panel on Climate Change, 4th Report, Climate Change 2007: The Physical Science Basis, Summary for Policymakers (2007)
<http://www.ipcc.ch/SPM13apr07.pdf>
2. Chris Mooney, *Beware 'Sound Science.' It's Doublespeak for Trouble*, Washington Post, Feb. 29, 2004, at B02.
<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A13994-2004Feb27¬Found=true>
3. James L. Connaughton, Chairman, Council on Environmental Quality, Open Letter on the President's Position on Climate Change, Feb. 2007.
<http://www.whitehouse.gov/news/releases/2007/02/20070207-5.html>
4. William J. Broad, *From a Rapt Audience, a Call to Cool the Hype*, N.Y. Times, Mar. 13, 2007.
<http://www.nytimes.com/2007/03/13/science/13gore.html?ex=1174795200&en=3b5cd02d28dca77e&ei=5070>
5. Climate Change Update, Senate Floor Statement by U.S. Sen. James M. Inhofe (R-Okla.), January 4, 2005.
<http://inhofe.senate.gov/pressreleases/climateupdate.htm>
6. Patrick J. Michaels, *Is the Sky Really Falling? A Review of Recent Global Warming Scare Stories*, Cato Institute, Aug. 23, 2006 (Website).
<http://www.cato.org/pubs/pas/pa576.pdf>
7. Met Office (UK), Types of climate models (Website).
<http://www.metoffice.gov.uk/research/hadleycentre/models/modeltypes.html>

Optional additional readings:

1. Intergovernmental Panel on Climate Change, 4th Report, Climate Change 2007: Frequently Asked Questions (2007)
http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_FAQs.pdf
2. Spencer Weart, General Circulation Models of the Atmosphere, American Institute of Physics (Website).
<http://www.aip.org/history/climate/GCM.htm>

Class 3: What expert and causation issues will face the courts face?

Topics and questions:

1. Will federal courts allow expert testimony about global warming under the *Daubert* standard?
2. What legal causation issues face plaintiffs bringing global warming claims?
3. How can plaintiffs prove harm from global warming?
4. How does the traditional standard of proof in civil cases apply to global warming claims?

Readings:

1. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
2. Brief of amicus Climate Scientists in support of petition for certiorari in *Mass. v. E.P.A.*, 415 F.3d 50 (D.C.Cir. 2005).
<http://209.200.74.155/doc/ClimateScientistsAmicusFinal.pdf>
3. Myles Allen, Pardeep Pall, Daithi Stone and Peter Stott, *Scientific Challenges in the Attribution of Harm to Human Influence on Climate*, 155 U. Pa. L. Rev. ___ (2007). [Forthcoming]

Optional additional readings:

1. *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753 (8th Cir. 2003).
 2. *Dura Automotive Systems v. CTS Corp.*, 285 F.3d 609 (7th Cir. 2002).
 3. *In re TMI Litigation*, 193 F.3d 613 (3rd Cir. 1999).
- [Note: This is a very long decision. You may focus your reading at the pages corresponding to headnotes 12 through 20.]

Class 4: The Kyoto Protocol

Topics and questions:

1. What is the Kyoto Protocol and how does it work?
2. What is the United State's role in the Kyoto Protocol?
3. What is the relationship of AB 32 to the Kyoto Protocol?
4. Has there been any litigation related to the Kyoto Protocol?

Readings:

1. The Kyoto Protocol
<http://unfccc.int/resource/docs/convkp/kpeng.pdf>
2. President Bush Discusses Global Climate Change, Press Release, June 11, 2001.
<http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>
3. David M. Ackerman, Legislative Attorney, American Law Division, Congressional Research Service, CRS Report for Congress, *Global Climate*

Change: Selected Legal Questions About the Kyoto Protocol, Oct. 1, 2002.

www.ncseonline.org/nle/crsreports/98-349.pdf

4. Robert E. Fabricant, General Counsel, US EPA, EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act Memorandum, Aug. 28, 2003.

http://www.whitehouse.gov/ceq/foia/epa_caa/ceq22.pdf

5. Assembly Bill No. 32

http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.pdf

6. Office of the Governor, Governor Schwarzenegger Signs Landmark Legislation to Reduce Greenhouse Gas Emissions, Press Release, Sept. 27, 2006.

<http://gov.ca.gov/index.php?/press-release/4111/>

7. Union of Concerned Scientists, AB 32 As Passed Fact Sheet, Jan. 17, 2007.

http://www.ucsusa.org/assets/documents/global_warming/AB-32-as-passed-fact-sheet.pdf

Additional optional readings:

1. Susan R. Fletcher, Specialist in Environmental Policy, Resources, Science, and Industry Division, Congressional Research Service, CRS Report for Congress, *Climate Change: The Kyoto Protocol and International Actions*, Jan. 24, 2007.

<http://fpc.state.gov/documents/organization/80734.pdf>

2. Joe Nation, Global Warming Response — Markets or Taxes? / Coordinate carbon trading markets, San Francisco Chronicle, Joe Nation, Mar., 2007.

<http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2007/03/23/EDGRJN7C2F1.DTL>

3. Whitehouse, Climate Change Report, 2001.

<http://www.whitehouse.gov/news/releases/2001/06/climatechange.pdf>

[Note: You may focus your reading on Tab 2, Analysis of the Kyoto Protocol.]

Class 5: Habitat, Species, and Global Warming **Guest Lecturer, Kassie Seigel, Center For Biological Diversity**

Topics and questions:

1. How does global warming affect species and habitat?
2. What legal tools related to biological impacts can be used in the fight against global warming?

Readings:

1. The Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*

[Note: Please focus your reading on Sections 4 and 7.]

<http://www.fws.gov/endangered/esaall.pdf>

2. U.S. Fish & Wildlife Service, *Consultations with Federal Agencies / Frequently Asked Questions* (Website).

http://www.fws.gov/angered/consultations/sec7_faq.html

3. U.S. Fish & Wildlife Service, *Listing a Species as Threatened or Endangered Section 4 of the Endangered Species Act* (Brochure), December 2005.

<http://www.fws.gov/angered/listing/listing.pdf>

4. Center for Biological Diversity, Before the Secretary of the Interior, Petition to List the Polar Bear as a Threatened Species Under the Endangered Species Act, Feb. 15, 2005 (Executive Summary).

<http://www.biologicaldiversity.org/swcbd/species/polarbear/ExecutiveSummary.pdf>

5. 12-Month Petition Finding and Proposed Rule To List the Polar Bear (*Ursus maritimus*) as Threatened Throughout Its Range; Proposed Rule, 72 Fed. Reg. 1064 (Jan. 9, 2007).

<http://www.biologicaldiversity.org/swcbd/SPECIES/polarbear/Proposed-Rule.pdf>

Additional optional readings:

1. Center for Biological Diversity, Before the Secretary of the Interior, Petition to List the Polar Bear as a Threatened Species Under the Endangered Species Act, Feb. 15, 2005 (complete petition).

<http://www.biologicaldiversity.org/swcbd/SPECIES/polarbear/index.html>

Class 6: Can global warming plaintiffs sue the federal government under federal statute?

Topics and questions:

1. What federal statutes might serve as a basis for suing the federal government to take action to address global warming? [Note: We will continue our Class 5 discussion about the ESA.]

2. What are some of the legal hurdles facing plaintiffs under federal statutes?

Readings:

1. Review readings 1, 2, and 3 from Class 5.

2. *Massachusetts v. U.S. EPA*, __ U.S. __, 127 S.Ct. 1438 (2007).

3. U.S. EPA, Climate Change - Health and Environmental Effects, Coral Reefs (Website).

http://www.epa.gov/climatechange/effects/eco_coral.html

4. Center for Biological Diversity, Conservation Group Petitions to Regulate Carbon Dioxide Under Clean Water Act, Ocean Acidification From Carbon Dioxide Emissions Threatens Marine Life, Press Release, Feb. 28, 2007.

<http://www.biologicaldiversity.org/swcbd/press/ocean-acidification-02-28-2007.html>

5. Center for Biological Diversity, Petition to regulate carbon dioxide pollution under the federal Clean Water Act, Feb. 27, 2007.

<http://www.biologicaldiversity.org/swcbd/programs/marine/acidification-cwa-peti>

tion.pdf

Additional optional readings:

1. *Bennett v. Spear*, 520 U.S. 154 (1997) (ESA standing case).
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2. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000) (CWA standing case).
3. Elizabeth Kolbert, *The Darkening Sea*, *The New Yorker*, Nov. 20, 2006.

Class 7: What obligations does the National Environmental Policy Act place on the federal government?

Topics and questions:

1. Does NEPA obligate the federal government to assess the global warming impacts of federal projects?
2. Is NEPA a useful tool in the fight against global warming?

Readings:

1. Council on Environmental Quality, *NEPA's 40 Most Asked Questions*, Question #19, Mitigation Measures. <http://www.nepa.gov/nepa/regs/40/11-19.HTM#19>
2. *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997 (S.D.Cal. 2003).
3. Friends of the Earth, Lawsuit against Export Import Bank (Website).
<http://www.climatelawsuit.org/>
4. *Friends of the Earth v. Watson, et al.*, Case No. C02-4106 (N.D. Cal.), Order Denying Defendants' Motion for Summary Judgment, Aug. 23, 2005.
<http://www.climatelawsuit.org/documents/ruling82305.pdf>
5. People of the State of California, et al., Comments on Proposed Light Truck Corporate Average Fuel Economy Standards, Nov. 22, 2005.
http://ag.ca.gov/newsalerts/cms06/06-046_0b.pdf?PHPSESSID=9573de8f517664e065a2fba278aeffd
6. NHTSA, Average Fuel Economy Standards for Light Trucks Model Years 2008-2011, 71 Fed. Reg. 17,566 (Apr. 6, 2006). [Note: The decision is very long. You may focus your reading on the Executive Summary.]
7. *People of the State of California, et al. v. NHTSA*, Petition for Review (9th Cir., Aug. 17, 2006).

Optional additional readings:

1. Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act*, Executive Summary (1997).
<http://www.nepa.gov/nepa/ccnepa/exec.pdf>
2. Council on Environmental Quality, *Guidance on the Consideration of Past*

Actions in Cumulative Effects Analysis, June 24 2005.

http://www.nepa.gov/nepa/regs/Guidance_on_CE.pdf

3. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468 (9th Cir. 2000) (general discussion of mitigation).

4. *Mayo Foundation v. Surface Transportation Board*, 472 F.3d 545 (8th Cir. 2006).

Class 8: Common Law Public Nuisance (Part I)

Topics and questions:

1. Does the state or federal common law of nuisance apply to global warming?
2. Who/what is the proper defendant or set of defendants in a global warming nuisance case?
3. What types of jurisdictional hurdles will plaintiff claiming nuisance face? [Note: Please be prepared to discuss, at least in general terms, federal question jurisdiction, the political question doctrine, and standing.]
4. How does the plaintiff prove causation and harm?
5. What equitable considerations, if any, will a court face in ruling on a global warming nuisance claim?

Readings:

1. Review *Georgia v. Tennessee Copper*, 206 U.S. 230 (1907) from Class 1.
2. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (“*Milwaukee I*”)
3. *Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981) (“*Milwaukee II*”)
4. Matthew F. Pawa, Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power Company*, 16 Fordham Envtl. L. Rev. 407 (2005).

Optional additional readings:

1. Thomas R. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293 (2005).

Class 9: Common Law Public Nuisance (Part II)

Topics and questions:

Continued discussion from Class 8.

Readings:

1. *Connecticut v. American Elec. Power Co., Inc.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005).
2. *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir.2005).
3. *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.*, 221 Cal.App.3d 1601 (1990).

4. *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003).
5. *Comer v. Nationwide Mutual Insurance Company*, 2006 WL 1066645 (S.D. Miss. 2006).
6. Ken Alex, article for Stanford Symposium [Forthcoming]

Optional additional readings:

1. Second Circuit Briefs in *Connecticut v. American Elec. Power Co., Inc.* [Note: The set of briefs is lengthy; feel free to skim them.]
<http://www.pawalaw.com/html/cases2.htm>

Class 10: Industry Challenges to State Regulation

Topics and questions:

1. What types of actions are states, particularly California, taking to address global warming?
2. What types of legal challenges will state statutes and regulations face in court? [Note: Be prepared to discuss, in at least in general terms, preemption by federal law, foreign policy preemption, and the Commerce Clause.]

Readings:

1. California Air Resources Board, Timeline, California Global Warming Solutions Act of 2006, Sept. 25, 2006.
<http://arb.ca.gov/cc/factsheets/ab32timeline.pdf>
2. California Air Resources Board, Climate Change Emissions Control Regulations, Fact Sheet, Dec. 12, 2004.
http://www.arb.ca.gov/cc/factsheets/cc_newfs.pdf
3. California Public Utilities Commission, PUC's Energy Leadership (webpage)
http://www.cpuc.ca.gov/static/061211_egyleadership.htm
4. Climate Action Team, Proposed Early Actions to Mitigate Climate Change in California, April 20, 2007.
http://www.climatechange.ca.gov/climate_action_team/reports/2007-04-20_CAT_REPORT.PDF
5. *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51 (2002).
6. *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 413 (2003).
7. *Minnesota v. Clover Leaf Creamery, Co.* 449 U.S. 456 (1981).

Optional additional readings:

1. Memorandum Opinion and Order on Defendants' Motion for Summary Judgment on the Issue of Ripeness and/or Mootness and Order for Stay of Proceedings, *Central Valley Chrysler-Jeep, Inc., et al. v. Witherspoon, et al.* (E.D. Cal.), Jan. 16, 2007.
2. Memorandum Opinion and Order (1) Granting in Part and Denying in Part

Defendant and Defendant-Intervenors' Motion for Judgment on the Pleadings and (2) Limiting Discovery of Global Warming Science Documents (E.D. Cal.), Sept. 25, 2006.

Class 11: Other state law claims and initiatives

Topics and questions:

1. Can traditional state law claims, such as claims under the California Environmental Quality Act, serve as effective tools in the fight against global warming?
2. What other less traditional roles may states play in the absence of federal leadership?

Readings:

1. California Environmental Resource Evaluation System (CERES), The California Environmental Quality Act, Summary (Website).
http://www.ceres.ca.gov/topic/env_law/ceqa/summary.html
2. California Environmental Resource Evaluation System (CERES), The California Environmental Quality Act, Frequently Asked Questions (Website).
http://www.ceres.ca.gov/topic/env_law/ceqa/more/faq.html#require
3. *Kings County Farm Bureau v. City of Hanford*, 221 Cal.App.3d 692 (1990).
4. Letter from California Attorney General to County of San Bernardino re DEIR on San Bernardino County General Plan, October 23, 2006.
5. Matt Weiser, *Levee suit cites global warming: Officials who OK'd Delta homes illegally failed to consider sea level rise, groups say*, Sac. Bee, Aug. 18, 2006.
6. Center for Biological Diversity, Conservation Group Challenges City of Banning's Approval of Black Bench Project For Failure to Mitigate Greenhouse Gas Emissions, Press Release, Nov. 21, 2006.
<http://www.biologicaldiversity.org/swcbd/PRESS/black-bench-11-20-2006.html>
7. Office of the Governor, Governor Schwarzenegger, British Prime Minister Tony Blair Sign Historic Agreement to Collaborate on Climate Change, Clean Energy, Press Release, July 31, 2006.
<http://gov.ca.gov/index.php?/print-version/press-release/2770/>
8. Office of the Governor, Governors Schwarzenegger, Pataki Discussing Efforts to Curb Global Greenhouse Gas Emissions in New York City, Speech, Oct. 16, 2006.
<http://gov.ca.gov/index.php?/speech/4451/>

Optional additional readings:

1. TBA

Class 12: Intentional Torts: wrongful death, trespass and property destruction

Topics and questions:

1. Are human populations at risk from global warming?
2. Are certain communities at special risk?
3. Does global warming create the potential for large-scale economic and social instability?
3. Where people face loss of their land and property, what legal tools, if any, may provide remedies? Are there any analogous situations?
4. For some communities, is there more at stake than loss land and property?
5. What problems will victims of land and property loss face in seeking legal redress?

Readings:

1. The World Bank, Climate changes and impact on coastal countries / Risk of sealevel rise: High stakes for developing countries, Feb. 12, 2007 (Website).
<http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:21215328~pagePK:64165401~piPK:64165026~theSitePK:469382,00.html>
2. United Nations, Global Warming Triggers Glacial Lakes Flood Threat Himalayas, United Nations Chronicle (Online Edition) (Website).
http://www.un.org/Pubs/chronicle/2002/issue3/0302p48_glacial_lakes_flood_threat.html
3. Heat Waves, Climate Change, and Health Fact Sheet, The Center for Health and the Global Environment, Harvard Medical School (Sept. 2006).
<http://chge.med.harvard.edu/publications/bulletin/documents/heatfact06.pdf>
4. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Alien Torts Claim Act case).
5. Petition to the Inter American Commission on Human Rights (IACHR) Seeking Relief From Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Submitted by Sheila Watt-Cloutier, with the Support of the Inuit Circumpolar Conference, on Behalf of all Inuit of the Arctic Regions of the United States and Canada, Dec. 7, 2005. [Note: This is a lengthy document. You may read only the Summary.]
http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf
6. Invitation by Organization of American States for Inuit Representatives to Address the Commission on Global Warming and Human Rights, Feb. 1, 2007.
http://www.earthjustice.org/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf
7. *Human rights body reconsiders Inuit climate change petition*, Canadian Broadcasting Corp. News, Feb. 6, 2007 (Website).
<http://www.cbc.ca/canada/north/story/2007/02/06/climate-hearing.html#skip300x250>
8. Testimony of Sheila Watt-Cloutier to the Inter-American Commission on Human

Rights, Mar.1, 2007.

http://www.earthjustice.org/library/legal_docs/testimony-before-iachr-on-globalwarming-human-rights-by-sheila-watt-cloutier.pdf

9. Interview with Sheila Watt-Cloutier, The World, BBC News, PRI, WBGH, Mar. 1, 2007.

<http://www.theworld.org/?q=node/8409>

Optional additional readings:

1. Yan Jianping, David Wheeler and Craig Meisner, *The impact of sea level rise on developing countries : a comparative analysis*, The World Bank, Policy Research Working Paper, Feb. 1, 2007.

http://econ.worldbank.org/external/default/main?ImgPagePK=64202988&entityID=000016406_20070209161430&pagePK=64165259&theSitePK=469382&piPK=585673

Class 13: Final class: What do you think about the ability of the US legal system to handle the problem?

COURSE REQUIREMENTS

1. Write a 10 to 20 mid-term page paper on the important legal issue(s) associated with global warming litigation.
2. Read and understand the assigned course materials.
3. Attend classes and participate in class discussions.
4. Write a 3 to 5 page final paper on your view of whether U.S. environmental law is able to – or should – address global warming.

POSSIBLE PAPER TOPICS (AMONG MANY)

1. Scientific proof problems: *Daubert*, causation, modeling
2. Proof of harm: speculative nature of damages
3. Jurisdiction: harms in other countries, political question
4. Causation: extractive industries (coal, oil); autos
5. Redressability: is there a solution that defendants can provide?
6. Federal common law: is it appropriate?
7. State nuisance law: does harm fit? What remedies?
8. Toxic tort model: harm, damages, jurisdiction, redress, causation. Good analogy?