

THE LAW OF CLIMATE CHANGE

SPRING TERM – 2009
PROFESSOR DOUGLAS A. KYSAR

TUES/THURS: 9:45-11:00 AM
ROOM 128

DESCRIPTION

This course will explore legal and policy developments pertaining to climate change and the regulation of greenhouse gas emissions. Approaches considered will range in jurisdictional scale (state and local, regional, national, international), temporal scope (incremental measures, near-term targets, multi-decade emissions goals), policy orientation (voluntary initiatives, disclosures rules, subsidization, tort litigation, command-and-control regulation, cap-and-trade schemes, emissions taxes), regulatory target (industry and manufacturing, commercial and retail firms, financial and insurance companies, consumers and workers), and regulatory objective (stabilization of greenhouse gas concentrations, reduction of emissions levels or intensity, energy security, optimal balancing of costs and benefits, adaptation to unavoidable impacts). Although course readings and discussion will focus on existing and actual proposed legal responses to climate change, the overarching aim of the course will be to anticipate how the climate change conundrum will affect our laws and our lives in the long run.

LOGISTICS

We will meet twice weekly, on Tuesdays and Thursdays from 9:45-11:00 a.m. A small number of class sessions will need to be rescheduled.

Reading materials for the course will be made available through the course website.

There are no prerequisites for this course; to the extent that basic familiarity with existing environmental laws is necessary to appreciate certain aspects of climate-specific cases, statutes, and regulations, an effort will be made during class lectures to provide the requisite background.

EVALUATION

Grades will be based on two categories of evaluation. The first, comprising twenty percent of the grade, will be an assessment of class participation, taking into account such factors as attendance, preparation for class sessions, and willingness to participate during discussions.

The second component, comprising eighty percent of the grade, will be determined by a self-scheduled final exam. In lieu of the exam, you may instead complete a research project, the parameters of which we will work out together.

CONTACT INFORMATION

My office is in Room L45 and I will be holding office hours on most Thursdays from 11:00 a.m. to 1:00 p.m. I can be reached by email at douglas.kysar@yale.edu, or through Kristin Holder at (203) 436-8117 or kristin.holder@yale.edu.

ASSIGNMENTS

I. Introduction

1/27 An Overview of the Class

- No reading assignment.

II. Subnational

1/29 Civil Suits

- *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)
- *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 438 F. Supp. 2d 291 (S.D.N.Y. 2006)
- *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005)
- *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005)
- *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006)
- Complaint in *Kivalina v. ExxonMobil Corp., et al.*, No. C 08-01138 SBA (N.D. Cal. 2008)

2/3 Acting Locally

- Complaint and Settlement in *People of California v. San Bernadino County*
- Edmund G. Brown, Jr., *The California Environmental Quality Act: Addressing Global Warming Impacts at the Local Agency Level*
- King County, Washington Climate Plan
- *Okeson v. City of Seattle*, 150 P.3d 556 (Wash. 2007)
- PlaNYC
- PlaNYC 2008 Report
- U.S. Mayors' Climate Protection Agreement, Climate Action Handbook

2/5 State Energy Regulation

- *In re Quantification of Environmental Costs*, 578 N.W. 2d 794 (Minn. Ct App. 1998)
- Barry G. Rabe, *Race to the Top: The Expanding Role of the U.S. State Renewable Portfolio Standards* (Pew Center On Global Climate Change, June 2006)
- EPA, *Clean Energy-Environment Guide to Action* (2006)
- *In Re Otter Tail Power Company*, 744 N.W.2d 594 (S.D. 2008)

2/10 Comprehensive State Programs: The California Example

- Executive Order S-3-05
- A.B. 32
- Executive Order S-20-06
- Scoping Plan
- Scoping Plan Updates

2/12 Regional Integration

- The Climate Registry General Reporting Protocol
- RGGI
 - Program Overview
 - Memorandum of Understanding
 - Model Rule
 - Auction Design Memo
 - Auction Design Agreement
 - Leakage Memo

2/17 Federalism and Preemption

- Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621 (2008)
- The California Waiver Controversy
 - Assembly Bill 1493
 - *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, 2007 WL 135688 (E.D.Cal. Jan. 16, 2007)
 - EPA Waiver Denial Letter
 - EPA Waiver Denial Decision Document
 - Janet Wilson, EPA Chief is Said to Have Ignored Staff
 - CRS Report for Congress, *California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act*, March 2008

III. National

2/19 Federal Energy Regulation

- Energy Information Administration, Annual Energy Outlook 2008
- Energy Information Administration, Annual Energy Outlook 2009 Preview
- Congressional Research Service, Energy Policy: Historical Overview, Conceptual Framework, and Continuing Issues
- Congressional Research Service, Summary of Energy Policy Act of 2005
- Congressional Research Service, Summary of Energy Independence and Security Act of 2007
- Eric Toder, *Eliminating Tax Expenditures With Adverse Environmental Effects*
- Naomi Pena, *Biofuels for Transportation: A Climate Perspective*

2/24 Informational and Voluntary Approaches

- George B. Wyeth, "Standard" And "Alternative" Environmental Protection: The Changing Role Of Environmental Agencies, 31 Wm. & Mary Env'tl. L. & Pol'y Rev. 5 (2006)
- EPA, *Investing in Our Future, Energy Star and Other Voluntary Programs* (2007)
- EPA, *A Business Guide to U.S. EPA Climate Partnership Programs* (2008)
- FTC Carbon Offsets Announcement
- CalPERS SEC petition
- Alpha Natural Resources SEC No-Action Request
- EPA Greenhouse Gas Reporting Rule

2/26 Federal Use and Promotion of Science

- National Climate Program Act, 15 U.S.C. §§ 2901-2907 (2000)
- *Center for Biological Diversity v. Brennan*, 571 F.Supp.2d 1105 (N.D. Cal. 2007)
- Stuart Shapiro and David Guston, *Procedural Control of the Bureaucracy, Peer Review, and Epistemic Drift*, 17 J. Pub. Adm'n Res. & Theory 535 (2006)
- Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 Tex. L. Rev. 1601 (2008)
- Roger A. Pielke, Jr., Government Reform Testimony

3/2 Massachusetts v. EPA and the Clean Air Act

- *Massachusetts v. EPA*, 549 U.S. 497 (2007)
- *Greenwire Massachusetts v. EPA Roadmap available at http://www.eenews.net/Greenwire/domino_effect/2008/08/07/1*
- Environmental Protection Agency, Advance Notice of Proposed Rulemaking:

Regulating Greenhouse Gas Emissions Under the Clean Air Act, EPA-HQ-OAR-2008-0318, July 11 2008

3/5 *Massachusetts v. EPA* and the Clean Air Act

- Environmental Protection Agency, Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act, EPA-HQ-OAR-2008-0318, July 11 2008

3/10 The Endangered Species Act

- Pacific Coast Federation of Fishermen's Associations v. Gutierrez, 2008 WL 2223070 (E.D. Cal. May 20, 2008)
- The Polar Bear Listing
 - Interior's FAQ
 - Final Rule
 - 4(d) Rule
- Interagency Cooperation Under the Endangered Species Act

3/12 No Class

3/17, 3/19 Spring Break

3/24 Other Opportunistic Uses of Existing Federal Laws

- NEPA
 - *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545 (8th Cir. 2006)
 - *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007)
 - *Center For Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008)
- California CAA Petitions on Maritime and Aviation Emissions
- *In re Deseret Power Electric Cooperative*
- Center for Biological Diversity Clean Water Act Petition

3/26 Pending Legislative Proposals: The Policy Background

- Robert R. Nordhaus & Kyle W. Danish, *Designing a Mandatory Greenhouse Gas Reduction Program for the U.S.* (Pew Center on Global Climate Change, May 2003)
- Robert N. Stavins, *Addressing Climate Change With a Comprehensive US Cap-and-Trade System*, 24 Oxford Rev. Econ. Pol'y 298 (2008)
- Jonathan Leake, *The Fools' Gold of Carbon Trading*, The Times, Nov. 30, 2008

- The New Apollo Program: Clean Energy, Good Jobs (Sept. 2008)

3/31 Pending Legislative Proposals: The Nitty Gritty

*** To ensure timeliness, specific readings will be announced later in the semester ***

4/2 Nuclear Power, Carbon Storage, Geoengineering, and Other Unmentionables

- Fred Bosselman, *The Ecological Advantages of Nuclear Power*, 15 N.Y.U. Envtl. L.J. 1 (2007)
- Alexandra B. Klass & Elizabeth J. Wilson, *Climate Change and Carbon Sequestration: Assessing a Liability Regime for Long-Term Storage of Carbon Dioxide*, 58 Emory L. J. __ (2008)
- James R. Fleming, *The Climate Engineers*, Wilson Q. 46 (Spring 2007)
- David G. Victor, *On the Regulation of Geoengineering*, 24 Oxford Rev. Econ. Pol'y 322 (2008)
- Bill Joy, *Why the Future Doesn't Need Us*, Wired (April 2000)

IV. Supranational

4/7 The European Union

*** To ensure timeliness, specific readings will be announced later in the semester ***

4/9 The Ozone Example

- Vienna Convention for the Protection of the Ozone Layer (1985)
- Montreal Protocol on Substances that Deplete the Ozone Layer (1987)
- Donald Kaniaru, Rajendra Shendre, & Durwood Zaelke, *Landmark Agreement to Strengthen Montreal Protocol Provides Powerful Climate Mitigation*, 8 Sustainable Development L. & Pol'y 46 (2008)

4/14 The UNFCCC and the Kyoto Protocol: History and Basic Structure

- The United Nations Framework Convention on Climate Change (1992)
- The Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)
- The Marrakech Accords (2001)

4/16 The UNFCCC and the Kyoto Protocol: Key Issues

- "Overview of the CDM" and "Annotated Article 12 Section" from <http://cdmrulebook.org>

- Michael W. Wara & David G. Victor, *A Realistic Policy on International Carbon Offsets* (April 2008)
- Nick Atkinson, *That Sinking Feeling*, *Conservation* (April-June 2007)
- B. Schlamadinger et al., *A Synopsis Of Land Use, Land-Use Change And Forestry (LULUCF) Under The Kyoto Protocol And Marrakech Accords*, 10 *Envtl. Sci. & Pol'y* 271 (2007)
- GTZ, *Reducing Emissions from Deforestation in Developing Countries: The Way Forward* (2007)
- Scott Barrett, *Climate Treaties and the Imperative of Enforcement*, 24 *Oxford Rev. Econ. Pol'y* 239 (2008)

4/21 The Bali Roadmap and Expectations for Copenhagen

- The “Bali Roadmap”
- Pew Center on Global Climate Change, *Summary of Poznan Outcomes*
- Daniel Bodansky, *International Climate Efforts Beyond 2012: A Survey Of Approaches* (Pew Center On Global Climate Change, December 2004)

4/23 Linkages: Global Economy

- Information Office of the State Council of the People’s Republic of China, *China’s Policies and Actions for Addressing Climate Change* (Oct. 2008)
- National Development and Reform Commission, People’s Republic of China, *China’s National Climate Change Programme* (2007)
- Elizabeth C. Economy, *The Great Leap Backward?*, *Foreign Affairs* (Sept./Oct. 2007)
- Jiahua Pan, Jonathan Phillips, & Ying Chen, *China’s Balance of Emissions Embodied in Trade: Approaches to Measurement and Allocating International Responsibility*, 24 *Oxford Rev. Econ. Pol'y* 354 (2008)
- Bernd G. Janzen, *International Trade Law and the “Carbon Leakage” Problem: Are Unilateral U.S. Import Restrictions the Solution?*, 8 *Sustainable Development L. & Pol'y* 22 (2008)

4/28 Linkages: Human Rights

- Ed Pilkington, *Put Oil Firm Chiefs on Trial, Says Leading Climate Change Scientist*, *The Guardian/UK*, June 23, 2008
- U.N. Human Rights Council Resolution
- Male’ Declaration
- Inuit Petition to the Inter-American Commission on Human Rights
 - Petition
 - ICC Request for Hearing

- IACHR Response
- Hearing Testimony
- Petitions to the World Heritage Committee
 - Background to the Waterton Glacier Petition
 - Waterton Glacier Petition
 - World Heritage Committee Decision
 - UNESCO Report
 - UNESCO Policy Document

4/30 No Class

5/4 Makeup Class - *Darwin's Nightmare*

5/5 Linkages: Global Security

- The World Bank, State and Trends of the Carbon Market (2008)
- Thomas Finger, House Testimony, *National Intelligence Assessment on the National Security Implications of Global Climate Change to 2030* (June 25, 2008)
- U.S. Climate Change Science Program, *Abrupt Climate Change: Summary and Findings* (2008)

V. Conclusion

5/7 Where We've Been; Where We're Going

- Laurence Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974)