

**DEPARTMENT OF LEGAL STUDIES AND BUSINESS ETHICS
THE WHARTON SCHOOL, UNIVERSITY OF PENNSYLVANIA**

**LGST 215/815
ENVIRONMENTAL MANAGEMENT, LAW AND POLICY**

**PROFESSOR MICHAEL P. VANDENBERGH
SPRING 2020**

I. INSTRUCTOR

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Office Hours: Tuesdays 1:00-2:00 and by appointment

II. CLASS MEETING TIMES AND LOCATION

Mondays and Wednesdays 12:00—1:20 pm
Location: F55 JMHH

III. COURSE OBJECTIVES

The catalogue describes the course as follows:

LGST215 - ENVT'L MGMT LAW & POL

This course provides an introduction to environmental management by focusing on foundational concepts of environmental law and policy and how they affect business decisions. The primary aim of the course is to give students a deeper practical sense of the important relationship between business and the natural environment, the existing legal and policy framework of environmental protection, and how business managers can think about managing their relationship with both the environment and the law.

Learning Outcomes

My objective is to work with you to improve your ability to do the following:

- Understand the relationship between business and the natural environment.
- Think critically and avoid confirmation bias, motivated reasoning and solution aversion.

- Evaluate cases, statutes, regulations and informal standards.
- Analyze problems that involve complex environmental, economic, social, and legal challenges.
- Understand the standard justifications for public environmental governance, the actors who can intervene (e.g., international, national, or subnational governments or private sector organizations), and the rationales for intervening by these actors (e.g., economic efficiency, justice, etc.).
- Understand the standard instruments or tools used to address environmental problems (e.g., common law, prescriptive regulation, market leveraging via taxes and subsidies, informational regulation).
- Understand the core elements of the most important federal pollution control statutes and the common forms of private environmental governance.
- Understand the influences of public and private environmental governance on business managers' decision-making.
- Develop creative new responses to environmental problems for business managers.

Students are not expected to have any previous experience with environmental law or policy.

IV. TEXT AND READINGS

The assigned text for this course is:

- PERCIVAL, SCHROEDER, MILLER, AND LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY (8th ed.) (“Percival”).
- Coursepack (available from Wharton Reprographics through Study.net)

V. ASSIGNMENTS AND GRADING

Class Participation: This class will be interactive, with a focus on engagement and critical thinking, so attendance and participation are particularly important. I have included a question for each class on the syllabus.

Attendance: Regular attendance is required. Each student is permitted three “free” absences during the term for any reason without a penalty if you provide me with advance notice (an e-mail before class). These can be used for minor illness, job interviews, or extracurricular activities without penalty. Beyond those three absences, I mark absences either as excused or unexcused. Reasons for excused absences include family or personal medical emergencies and religious holidays. Job interviews and extracurricular activities are not excused absences. A significant number of unexcused absences will have a negative impact on your grade.

General Guidelines for Assignments: I have given you plenty of time to complete the writing assignment, so it must be handed in on time. If a paper is late for any unexcused reason, it is penalized one grade level for each 24-hour period or portion that it is late (for instance, and A would become an A-; and A- would become a B+, and so on). Excused

reasons include a death in the family, serious illness or family emergency. Please make an effort to notify me in advance, circumstances permitting.

Grading: The final grade will be based on a short paper (25%), a short midterm exam (25%), and a final exam (50%). The midterm exam will be a one-hour exam with multiple choice questions. The final exam will be a two-hour, open book exam. The exam will include several essay and short answer questions that address the concepts discussed in class and in the reading. I also reserve the right to make upward or downward adjustments in grades based on class participation (e.g., to change a B+ to an A- based on strong classroom participation). At some point during the semester, I will give you an opportunity to submit a short self-evaluation. It will have no effect on your grade.

Citations, Collaboration and Plagiarism: Submissions must represent only the student's own creative work and effort. I take plagiarism and cheating very seriously and will deal with such actions according to University policy. Students may use computer-assisted spelling or grammar programs and may discuss general ideas of paper topics with others. But no writing coaches, relatives, or other personal assistance may be relied upon for the actual writing. The work must be your own.

As with any paper, you must use a consistent citation method for sources. Any source you quote or rely on must either be footnoted, with source and page references, or noted parenthetically, for example (Sax 1980 at p. 7) with the full citation provided in a bibliography (e.g., Joseph L. Sax, *Mountains Without Handrails: Reflections on the National Parks* (University of Michigan Press 1980)). Please reference all sources used. No statement that relies on a source should fail to reference the source. Please use a citation system consistently (e.g., the Chicago Manual of Style or the APA citation system). With respect to grading, I will give credit to well-organized, well-written, and well-reasoned papers. The paper should deal with material critically and thoughtfully.

VI. CLASSROOM EXPECTATIONS

- We will start and end class on time.
- You must display your name tent.
- You must turn off all phones and other electronic devices, but laptops may be used for notetaking.
- Drinks in reusable containers are permitted.

VII. COURSE OUTLINE

Please note: Assignments are subject to revision as the course proceeds, depending on changes in the law and our progress.

I. Introduction**A. Governance and the Environment: Core Concepts**

Class 1: (WED, 1/15) Introduction to Environmental Management, Law and Policy

Reading:

Percival at 1335-41

Walmart's Project Gigaton at

<https://www.walmartsustainabilityhub.com/project-gigaton>

CARBON DISCLOSURE PROJECT at <https://www.cdp.net/en>

Royal Bank of Canada—Financing Oil Sands [Course Pack #1]

Question: What are the drivers of business managers' decision-making regarding greenhouse gas emissions reductions?

Martin Luther King Day Monday, 1/20: No class.

Class 2: (WED, 1/22) Introduction to the Legal System: Anatomy of a Lawsuit

Reading:

Edmunds v. Duff, 280, 280 Pa. 355 (1924) [Coursepack #2]

Orin Kerr, How to Read a Legal Opinion, available at:

<https://ssrn.com/abstract=1160925>

Question: When does the decision of one court bind another court in the US legal system?

Class 3: (MON, 1/27) Common Law Responses to Environmental Problems: Public and Private Nuisance

Reading:

Percival at 66-77, 80-89

Question: Why did the federal government and the states adopt environmental statutes despite the existence of common law nuisance actions?

Class 4: (WED, 1/29) Ecology, Common Pool Resources and Economics

Reading:

Percival at 1-7, 29-37, 41-43, 52-56

Question: How should policymakers decide which environmental problems to address?

Class 5: (MON, 2/3) Actors and Actions: Who Can Intervene and What Tools Are Available?

Reading:

Percival at 127-32, 137-47

Sarah E. Light & Michael P. Vandenbergh, *Private Environmental Governance in ENVIRONMENTAL DECISION MAKING*, ENCYCLOPEDIA OF ENVIRONMENTAL LAW (Robert Glicksman & LeRoy Paddock eds., 2016) (entire chapter)) (available at <https://ssrn.com/abstract=2645953>)

Question: Who has the ability and motivation to address environmental problems and what instruments or tools can they use?

B. Environmental Assessments and Disclosure

Class 6: (WED, 2/5) Public Governance: The National Environmental Policy Act (NEPA)

Reading:

Percival 911-27

NEPA Sections 101 and 102 (all statutory provisions are available at <http://uscode.house.gov/>)

Question: Does NEPA apply to major corporate actions?

Class 7: (MON, 2/10) Public Governance: NEPA Timing and Scope

Reading:

Percival 927-34 and 962-71

NEPA Section 102

Question: If a government program manager wants to promote a project, how can the manager use the timing and scope of the EIS to reduce the environmental risks disclosed in the Environmental Impact Statement?

Class 8: (WED, 2/12) Private Governance: The Equator Principles

Reading:

THE EQUATOR PRINCIPLES, EQUATOR-PRINCIPLES.COM (2006), available at <https://equator-principles.com/about/>

Michael P. Vandenbergh, *Private Environmental Governance*, 99

CORNELL L. REV. 129 (2013) (available at <http://ssrn.com/abstract=2237515>)
Moody's Investors Service, Moody's Approach to Climate Risk (Nov. 2018) at <https://www.mainstreamingclimate.org/wp-content/uploads/2016/10/Moodys-Presentation-Climate-Risk-Trends.pdf>

Question: Does compliance with the Equator Principles require a borrower to reduce environmental harms or just to disclose them?

II. Hazardous Materials

A. Statutory Framework

Class 9: (MON, 2/17) Federal Statutory Framework: RCRA and CERCLA

Reading:
Percival 345-356

Question: What gap was Congress attempting to fill by enacting CERCLA after RCRA?

B. Comprehensive Environmental Response Compensation and Liability Act (CERCLA)

Class 10: (WED, 2/19) CERCLA Liability Scheme: Responsible Parties I

Reading:
Percival 409-15, 419-30
CERCLA Sections 101(14), (20)(A)-(D), (22), and 101(35); 104(a) and (b), 107(a) and (b))

Question: Can a potentially responsible party be liable for response costs based solely on its status as an owner or operator?

Class 11: (MON, 2/24) CERCLA Liability Scheme: Responsible Parties II and III

Reading:
Percival 430-49
CERCLA Section 107

Question: When is a company liable for the response costs of its subsidiary?

Class 12: (WED, 2/26) Preparation for Negotiations: Liability Scheme, Allocation, Enforcement and Remediation

Reading:

Percival 449-58

CERCLA Sections 101(32), 107 and 113

Clean Water Act Section 311

Question: What provision of CERCLA provides for joint and several liability for responsible parties?

Class 13: (MON, 3/2) Mock Negotiations

Reading:

Handout (team assignments and fact pattern for mock negotiations will be provided at the beginning of class 12)

Question: What is your group willing to compromise to achieve a negotiated settlement?

III. Corporate Social Responsibility

A. The Decisional Space of Corporate Managers

**** Note: Midterm will be given at the beginning of class 14 ****

Class 14: (WED, 3/4) Midterm and Constraints on Management Discretion

Reading:

Stine Jacobsen, *World's Largest Container Shipper Maersk Aims to be CO2 Neutral by 2050*, REUTERS, December 5, 2018, at

<https://www.reuters.com/article/us-maersk-emissions/worlds-largest-container-shipper-maerskaims-to-be-co2-neutral-by-2050-idUSKBN1O40QW>

Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NYU L. REV. 733 (2004), available at

<https://www.corporation2020.org/documents/Resources/Elhauge.pdf>;

Milton Friedman, *The Social Responsibility of Firms is to Increase Its Profits*, NY TIMES MAGAZINE, Sept. 13, 1970 at

<http://umich.edu/~thecore/doc/Friedman.pdf>;

Business Roundtable, Statement on the Purpose of a Corporation at

<https://opportunity.businessroundtable.org/wp-content/uploads/2019/08/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf>

Question: Is the social responsibility of firms to increase profits and is a business manager legally vulnerable for failing to do so?

**** Note: Spring Break 3/7-3/15 ****

B. The Role of Investors

Class 15: (MON, 3/16) Investor Pressure on Corporations: Guest Lecture, Andy Mims, Partner, The Sustainability Group, Loring Wolcott and Coolidge, Boston, MA

Reading:

CALPERS & CALSTRS, THE IMPORTANCE OF CORPORATE CLIMATE ENGAGEMENT, at <https://www.calpers.ca.gov/docs/corporate-engagement-climate-change.pdf>;

The Carlyle Group, Press Release, Carlyle Expands Sustainability Initiatives with Global Carbon Neutrality (Nov. 14, 2018) at <https://carbonfund.org/2018/11/14/carlyle-expands-sustainability-initiatives-carbon-neutrality/>;

BlackRock, Investors Underappreciate Climate-Related Risks in Their Portfolios – BlackRock Report (Apr. 4, 2019) at <https://www.blackrock.com/corporate/newsroom/press-releases/article/corporate-one/press-releases/investors-underappreciate-climate-related-risks-in-their-portfolios>

BlackRock, Environmental Sustainability at <https://www.blackrock.com/corporate/responsibility/environmental-sustainability>

Class 16: (WED, 3/18) Investor Pressure on Corporations: Government Disclosure Standards

Reading:

U.S. Securities and Exchange Commission, Commission Guidance Regarding Disclosure Related to Climate Change (Release Nos. 33-9106; 34-61469; FR-82) (Feb. 8, 2010), available at <http://www.sec.gov/rules/interp/2010/33-9106fr.pdf> (codified at 17 C.F.R. Parts 211, 231, and 241))

Madison Condon, *Externalities and the Common Owner*, 94 WASH. L. REV. (forthcoming 2020) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378783;

5 Reasons We're Making a Fuss about Finance, Greenpeace International, at

<https://www.greenpeace.org/international/story/16408/finance-banks-japan-campaign-people-power-ethical-investing/>

Question: Does the SEC climate guidance require disclosure of climate risks if they are not material to a reasonable investor?

IV. Water, Air and Toxics**A. Clean Water Act**

Class 17: (MON, 3/23) Clean Water Act (CWA) Framework and Scope: “Waters of the US”

Reading:

Percival 657-73, 683-96

CWA Sections 101(a) and (b), 502(6), (7), (12), and (14))

County of Maui v. Hawaii Wildlife Fund, Amicus Brief available at

http://www.supremecourt.gov/DocketPDF/18/18-260/108624/20190719111022537_Amici%20Curiae%20Brief%20for%20Aquatic%20Scientists%20and%20Scientific%20Societies.pdf;

Question: Can EPA require a CWA permit for the discharge of a pollutant from a pipe to the ground if the pollutant poses a high risk of migrating through the ground to a navigable surface water?

Class 18: (WED, 3/25) Non-Point Sources and TMDLS

Reading:

Percival 772-85, Handout

CWA Section 303(d)

Question: Why are non-point sources so difficult to regulate?

B. Clean Air Act

Class 19: (MON, 3/30) Clean Air Act (CAA) Framework, Scope, and Air Pollutant Definition

Reading:

Percival 521-39

CAA Sections 108(a); 109(a)-(d)); 202(a); 302(g))

Question: What is one major difference between the Clean Air Act statutory framework and the Clean Water Act framework?

Class 20: (WED, 4/1) Greenhouse Gas Regulation – Stationary and Mobile Sources

Reading:

Percival 539-40, 553-63 and 1227-34

CAA Sections 202(a)(1), 111(a), 111(b))

Question: Why did environmental groups petition EPA to regulate

greenhouse gases under the mobile source provisions of the Clean Air Act (Title II) rather than under the National Ambient Air Quality Standards provisions (Title I)?

Class 21: (MON, 4/6) Emissions Trading: From SO₂ to CO₂

Reading:

Percival 173-74 and 627-37

CAA Sections 112(a), (b)(1), (c)(1)-(2), (d); 404(e); 501; 502(b))

Question: Why do economists typically prefer cap-and-trade systems and carbon taxes to prescriptive regulations?

Class 22: (WED, 4/8) Public Greenhouse Gas Regulation – The International Process

Reading:

Percival 1234-50

David Victor, *Faced with Government Inaction, Private Firms Emerge as Major Players in Climate Change Mitigation*, *SCIENCE* at

<http://blogs.sciencemag.org/books/2017/12/18/beyond-politics/> (review of MICHAEL P. VANDENBERGH & JONATHAN GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* (Cambridge University Press 2017))

Question: What design feature of the Paris Agreement induced almost every nation in the world to sign on when efforts over the preceding two decades were unable to do so?

Class 23: (MON, 4/13) Private Climate Governance

Reading:

Science Based Targets Initiative at <https://sciencebasedtargets.org/>

Renewable Energy Buyers Alliance at <https://rebuyers.org/>

Climate Action 100+ at <http://www.climateaction100.org/>

We Are Still In at <https://www.wearestillin.com/about>

Michael P. Vandenberg & Jonathan M. Gilligan, *Beyond Gridlock*, 40 *COLUM. ENVTL. L.J.* 217, 217-30 (2015), available at

<http://ssrn.com/abstract=2533643>

Sarah E. Light, *The New Insider Trading: Environmental Markets within the Firm*, 34 *STAN. ENVTL. L.J.* 1, 1-5 (2015), available at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591875.

Question: Is private climate governance likely to complement or compete with public governance in the United States?

Class 24: (WED, 4/15) Public Governance of Toxics: FIFRA, TSCA, and EPCRA**Reading:**

Percival 265-69, 280-82, 336-39
FIFRA Sections 3(a), 4(a), and 6
TSCA Sections 4, 5 and 6

Question: Is the party that bears the burden to demonstrate the safety of a chemical the same under FIFRA and TSCA?

Class 25: (MON, 4/20) Private Governance of Toxics: Supply Chain Contracting**Reading:**

Elizabeth Sturken, *Walmart Effect: Retailers Lead the Way on Chemical Safety at a Critical Time*, Environmental Defense Fund, (October 10, 2017) at <https://www.edf.org/blog/2017/10/10/walmart-effect-retailers-lead-way-chemical-safety-critical-time>
SAFER CHEMICALS, HEALTHY FAMILIES, WHO'S MINDING THE STORE — A REPORT CARD ON RETAILER ACTIONS TO ELIMINATE TOXIC CHEMICALS (Target) (2018), available at <https://retailerreportcard.com/retailer/target/>

Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 141-47 (2013) (available at <http://ssrn.com/abstract=2237515>)

Question: What is motivating retailers to regulate toxics and how does private regulation of toxics affect public regulation of toxics?

Optional Supplemental Reading: DOUGLAS S. KENNEY ET AL., UNIV. OF COLO. SCH. OF LAW, EVALUATING THE USE OF GOOD NEIGHBOR AGREEMENTS FOR ENVIRONMENTAL AND COMMUNITY PROTECTION 5 (2004), available at http://reviewboard.ca/upload/project_document/EA0809-001_Good_Neighbor_Agreements_Evaluation_Report.PDF

Class 26: (WED, 4/22) Environmental Issues in Commercial Transactions

Reading: Michael P. Vandenberg, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005) (focus on pp. 2043-56) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=729363

Question: Why do firms conduct Phase I environmental assessments, and why might historical use of hazardous materials at a facility induce a corporation to decline to purchase or lease the facility even if there is no liability arising from federal, state, or local laws?

Class 27: (MON, 4/27) Environmental Issues in Commercial Transactions: M&A
Mock Negotiation (Guest Facilitators)

Reading:

A negotiation fact pattern and draft agreement will be distributed at the end of the prior class.

Re-read CERCLA Sections 101(35) and (40), 107, and 113

Problem: What are your client's goals in the negotiation, what additional due diligence do you plan to conduct, if any, and what terms do you propose to add or delete from the draft transactional document?

Class 28: (WED, 4/29) On the Horizon: New Opportunities

Reading:

Michael P. Vandenberg & Benjamin Raker, *Private Environmental Governance and the New Private Advocacy*, 32 NAT'L RES. & ENV'T. 45-49 (Fall 2017), at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235445

Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STANFORD LAW REVIEW, at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228536

Question: What is the most promising unexploited opportunity for a private governance initiative that focuses on investors or corporations?

VIII. INSTRUCTOR BIO

Michael P. Vandenberg is David Daniels Allen Distinguished Chair of Law at Vanderbilt University Law School, where he is the co-director of the Energy, Environment and Land Use Program and director of the Climate Change Research Network. An award-winning teacher, Professor Vandenberg teaches courses in environmental law and property. He has published numerous articles and book chapters on environmental law, private environmental governance and household energy use. *Beyond Gridlock*, his article on private climate governance with physicist Jonathan Gilligan, won the Morrison Prize as the top sustainability article in North America in 2015. His book with professor Gilligan, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE*, was published by Cambridge University Press in 2017, won the 2018 Chancellor's Award for Research, and was identified in the ENVIRONMENTAL FORUM as one of the top environmental law and policy books of the last 50 years. Prior to joining the Vanderbilt faculty he was a partner at Latham & Watkins in Washington, D.C., and he served as the Environmental Protection Agency Chief of Staff from 1993-95. He has been a visiting professor at Harvard University and the University of Chicago, and his research has been discussed in major media outlets such as National Public Radio's All Things Considered, *National Geographic*, *USA Today*, and the *Washington Post*. He is a member of the American College of Environmental Lawyers and the Board on Environmental Change and Society of the National Academies of Science, Engineering and Medicine.