

ENVIRONMENTAL DISPUTE RESOLUTION
Spring 2014
Prof. Paula M. Young

CONTACT INFORMATION:

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Please feel free to contact me at any time you have a question or comment.

You can reach the Westlaw student representatives if you have troubles with TWEN.

COURSE MATERIALS:

SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS' GROUPS* (Jossey-Bass 2001).

Supplemental Materials.

Simulations

GOALS OF THE COURSE:

When students complete this course, they will know:

- The relevance and prevalence of consensual processes (multi-party negotiation, mediation, negotiated rule-making, consensus-building, collaborative governance, and group facilitation) in solving environmental problems;
- The role of environmental litigation and adjudication to enforce standards, interpret laws, and to attribute liability;
- How to effectively prepare for and participate in an environmental problem-solving process;
- What consequences process selection has on the outcomes that are possible;
- How environmental conflicts differ from other conflicts and how they can be managed effectively;
- The central elements of effective advocacy, and the different ways organizations manifest them;
- The purpose and effective elements of public comments to administrative agencies;
- Judicial review of administrative decisions;

- The role of arbitrators and administrative law judges in administrative decision-making;
- Basic theory and practice of administrative adjudication;
- Basic theory and practice of administrative rulemaking;
- Basics and basis of judicial review;
- The basic structure of government, and the federal/state separation.

LEARNING OBJECTIVES:

Upon completion of this course, students will be able to:

- Demonstrate proficiency with a variety of problem solving techniques;
- Advocate, as lawyers, for the use of consensual processes, when appropriate;
- Identify elements of a process that will improve its effectiveness;
- Advocate for clients without undermining relationships and promoting hostility;
- Run and participate effectively in meetings;
- Make effective and persuasive presentations;
- Ask insightful, clear, probing, and useful questions and follow up questions;
- Respond effectively and appropriately to questions; and,
- Speak and advocate orally in a clear and convincing manner.

SUMMARY OF STUDENT GRADING:

Any student who needs special accommodations based on a legally protected disability must contact me as early as possible so I can make appropriate arrangements.

I will determine your final course grade by your point totals from the activities listed below. The maximum possible points for each course component are:

Class Participation:

- | | |
|---|------------|
| • In-class discussions of assigned readings and discussion questions | 165 points |
| • Application of theory to simulations throughout course | 200 points |
| • Simulations | 250 points |
| ○ Success at strategically conveying your confidential information; | |
| ○ Success at conveying your interests and needs; and | |
| ○ Success at working collaboratively to meet your interests and needs while serving the broader public interest | |

Written Assignments:

- | | |
|---|------------|
| • Assigned discussion questions | 75 points |
| • Simulation pre-planning documents (3 total) | 210 points |

TOTAL Possible Points:

900 points

TWEN SITE:

I have set up a virtual classroom on TWEN. You may access this website through the www.lawschool.westlaw.com home page.

You must register at the site before January 31, 2013. I WILL DEDUCT CLASS PARTICIPATION POINTS IF YOU ARE NOT SIGNED UP BY THAT DATE. THE TWEN SITE WILL CLOSE TO REGISTRANTS AFTER THAT DATE.

COURSE DESCRIPTION:

This course explores the characteristics of environmental disputes, how they arise, and how we choose to resolve them. We will examine a range of consensual and non-consensual processes (litigation, arbitration, multi-party negotiation, mediation, negotiated rule-making, consensus-building, collaborative governance, and group facilitation) and evaluate the consequences of process selection. We will explore and examine the advantages and disadvantages of different process choices in environmental disputes.

This is a skills course that relies heavily on simulations to:

- practice the ways interested parties can create a problem-solving climate;
- explore the role of parties (and their lawyers) as a process advocate, and;
- gain first-hand experience of the effect of process on parties.

Students will have a chance to practice and explore the skills needed to use collaborative practices in typically adversarial interactions.

For top-down learners who need to see the big picture, the course is divided generally into four modules: (1) Context for the Disputes and the Various DR Alternatives; (2) Negotiating Theory and Distributive Bargaining; (3) Consensus-Building Theory and Practice; (4) Application of the Theory to the Simulations.

Active Learning

As you have come to expect in a class taught by me, I am asking you to use more of the creative right-side of your brains rather than the analytical left-sides of your brains. In addition, you will not get by in a passive learning role. For the kinetic learners, we will have several moments in most classes when we will all be moving around the room or watching movement in the room. For the tactile learners, we use structured simulations and role-plays to isolate and emphasize specific analytic points and essential skills. I will also use objects, maps, photographs, and other images to illustrate concepts discussed in the readings.

You will perform the simulations in alone, in pairs, or groups. The simulations will likely involve students from other courses who have agreed to serve as expert, neutral fact-finders. We will also have a few guest appearances from other ASL professors who will add to our discussions.

Finally, I try to make the class as relaxed and risk-free as possible. You are learning new skills, and we should be gentle with each other as you do so. You will work hard in the class, but I also expect you will have some fun.

Assigned Readings

Your thorough preparation of the assigned readings is essential for us to engage in rigorous class discussions and effective simulation. Simulations are an integral part of the course. These simulations will give you an opportunity to try out preparation tools and tactical moves, to experiment with new approaches, and to reflect on your performances. Because time is scarce, it is essential to read through the assigned readings, handouts, and simulation materials prior to class. Feel free to call or e-mail me if you have any questions about the hand-outs. Students may earn, or lose, points on the final grade through consistent, intelligent contributions to class discussions and simulations, or the lack thereof. (See grading section above.)

Readings serve to provide the underlying theory and background information. The readings will also help you develop intuition about more complex real-world situations. The focus of the articles and other readings will be more top-down than bottom-up learning. The articles will give you the bigger picture on a topic, and we will then work more specifically with the concepts in class.

You will find outlines for most of the readings on the TWEN site.

TWEN Postings

Plan to circulate a copy of your assigned discussion questions to your colleagues via the TWEN site. You can also create email groups to facilitate communication required by the simulations.

Simulations

I have planned four simulations over the course of the semester. You will be assigned a simulation role. These simulations are an essential vehicle for learning in the class. One major requirement of the course, therefore, is that you conscientiously prepare for, carry out, and be ready to share insights from the simulations with the class.

In our class discussions, I am primarily interested in your faithful and creative participation, the quality and originality of your discussion of particular strategies, and your reflections on how you might have done better. Failure to prepare and carry out

these simulations will adversely affect your class participation grade and will harm other participants, whose learning experience depends on you being available and prepared.

Many of the simulations include confidential instructions. **Do not show these confidential instructions to others, unless otherwise instructed.** You may choose to discuss or reveal some of their content -- indeed, communicating your interests clearly is essential to effective negotiation and consensus building -- but you must not physically show others your actual confidential instruction sheets. This rule largely mirrors reality because, for strategic reasons, in most situations you will not likely reveal all of your underlying interests and available information to your negotiating counterparts.

The instructions for the simulations are designed to be self-explanatory. **Please follow the instructions carefully.**

Though most of the simulations are extreme simplifications of reality, they intend to isolate and illuminate particular aspects that do arise in real negotiation situations. For those simulations that have fixed quantitative goals, you should take the numbers as representative of your true interests and try to do as well as you can, subject to whatever considerations of responsibility, reputation, and ethics you expect would shape your behavior in a similar real-world negotiation.

For those simulations with more complex, less quantitative goals or mixed interests, you should think hard about what interests you would care about, and what trade-offs you would be willing to make, in the specified situation.

Some general rules for role players include the following:

1. Stay in the role. Each role is important and is intended to be a learning experience for the role player, the other participants, and observers.
2. If you have difficulty identifying with the role, ask for help and advice.
3. It is okay to be original and add to the four corners of the document -- just don't change the fundamental intent. Remember only you can make it real. Creativity counts for something.

So, you may embellish the facts if consistent with the ones provided and not in a way that throws any major curve-balls at the other participating parties.

4. Observers (if any) should be prepared to comment, raise questions, and provide answers to the various issues that the role-play introduces.

MORE ABOUT GRADING COMPONENTS:

Class Participation:

Your class participation grade will consist of three parts.

In-Class Discussion of Assigned Readings and Discussion Questions

You will receive an individual grade for your class participation that does not fall within the types of class participation I describe next. I will base your in-class participation grade primarily on how enthusiastically you demonstrate your understanding of the assigned readings and the discussion questions. Our goal is to learn from one another. For this approach to work, each of you must speak up in class, on a frequent basis. I expect you to make comments based on the readings and based on your prior experiences.

I also expect you to ask questions of me and your fellow students. Often a good question is just as valuable as a good statement.

You must be physically present to participate, so I will also factor unexcused lateness or absences into your participation grade. (See discussion of the attendance policy below.)

Application of Theory to Simulations Throughout Course

As noted above, I will assign you a simulation role, give instructions (often including confidential information), and ask you to prepare and carry out a simulation during class. I will pay attention to whether you have adequately prepared for the simulation by reviewing the relevant simulation material, reading the assigned readings, and completing any required pre-simulation preparation documents. I will then pay attention to how you apply that information in the simulation experience.

Simulations

Throughout the semester, you will serve as a representative of an interested party in consensus building simulations. The simulations are:

I rely on four original simulations to teach the course:

- Icky Stuff (about a dangerous by-product of a manufacturing process);
- To Hell with Your Angels' Share (about widespread property damage resulting from a fungus that grows in the presence of ethanol fumes arising from aging whiskey);
- Proposal to Reintroduce Red Wolves into the Central Appalachian Mountains of Southwestern Virginia (as the name suggests); and,

- The East River Wind Farm Project (about the attempt of Dominion Power to locate a wind farm on a ridge of the Appalachian Mountains located about an hour from the law school).

You will earn class participation points for your performance in these simulations based on the following:

- Success at strategically conveying your confidential information;
- Success at conveying your interests and needs; and
- Success at working collaboratively to meet your interests and needs while serving the broader public interest

In assessing all your work, I will consider the following levels of understanding you display:

Levels of Understanding

- Students reach a high level of understanding when they can
 - Apply the information,
 - Detail the analysis, and
 - Conclude.
- A lesser level of understanding occurs when students
 - Apply the information,
 - Come to conclusions, but
 - Give no detail in the analysis.
- An even lesser level of understanding occurs when students':
 - Work is descriptive, even if detailed.
- The lowest level of learning occurs when students':
 - Work is descriptive, but without detail.

Written Assignments:

Assigned Discussion Questions

Over the course of the semester, I will assign you one or more set of class discussion questions. From the assigned readings for a class session, you will develop about ten discussion questions. You will then send a copy to me and send a copy to your colleagues via TWEN email.

Simulation Pre-planning Documents

To ensure that you allocate sufficient attention to planning for the Simulations, you will develop and turn in a Pre-Planning Document for three of the four simulations using a

format provided by me. This document should help you analyze the scenario by providing structure for your thinking, assist you in planning a strategy, and increase your leverage in the simulation by enhancing your information and confidence. You will turn in a copy of the Pre-Planning Document as instructed by me.

ATTENDANCE POLICY:

Attendance is mandatory. If you miss more than four classes, I will either dismiss you for excessive absences or fail you. I will also factor tardiness and absences into your class participation grade. If you do need to miss a class and you have a valid excuse, please write me a note or send me an e-mail in advance of class. Excused absences will still count against the four-class absence.

I treat non-preparedness as an absence. I will circulate an attendance sheet every day. If you do not initial the sheet you will be marked absent. If I call on you and you are unprepared you will also be marked absent.

In addition, a student will violate the Code of Academic Conduct when:

(7) requesting that another person sign a student's name on the attendance sheet during a class that he or she did not attend, arrived late for or left early for, or signing another student's name on an attendance sheet.

OTHER CLASSROOM MATTERS:

Use of computers in class: The law school faculty adopted a provision of the Academic Standards providing that:

Use of computers during class periods for any purpose other than note-taking is prohibited. The instructor may establish a more restrictive computer use policy.

I interpret this rule to cover smart phones and tablets.

In keeping with this policy, not only will I refer any violator of this rule to the Dean for appropriate disciplinary action, but I will also count any violator as absent for the day. Please note that Article III, B of the Academic Standards provides: "Any student who has reason to believe a violation of the Code of Academic Conduct has occurred must report that belief to the Dean. Failure to do so is a violation of the Code of Academic Conduct."

As a pedagogical and career matter, you have a strong interest in ensuring that the school maintains its ABA accreditation to increase the value in the marketplace of your degree from this school. During an ABA site inspection, the inspector expressed great distress at the number of students surfing the net, playing games, downloading music, and engaging

in extended e-mail conversations with friends during class. This behavior puts this institution and your career opportunities at risk. Please don't do it in our class.

BIOGRAPHICAL INFORMATION:

I think you should know your audience. If you want to learn more about me, please see my resume on TWEN.

OFFICE HOURS:

I will hold official office hours on **Tuesday and Thursday, 1:30 p.m. to 5 p.m.** Other times by appointment. My door is usually open, so please feel free to talk with me if I am in my office at other times. I am also available by e-mail.

WEBSITES YOU MAY FIND USEFUL:

Quite a few web sites are devoted to ADR. Some examples include:

EDR-Related Websites:

<http://www.ecr.gov/> (U.S. Institute for Environmental Conflict Resolution)

<http://roster.ecr.gov/login.aspx> (national roster of EDR practitioners)

<http://www.ecr.gov/Training/Training.aspx> (EDR training programs)

<http://www.ecr.gov/Resources/NativeAmericanTribalConsultationServices.aspx> (Native American collaboration and conflict resolution program)

<http://www.law.utah.edu/stegner/> (The Wallace Stegner Center at the University of Utah)

<http://www.epa.gov/adr/> (EPA Conflict Resolution and Prevention Center)

<http://www.dec.ny.gov/regulations/2580.html> (NY Dept. of Environmental Conservation, Environmental Dispute Resolution Program)

<http://theconsensusbuildingapproach.blogspot.com/2012/05/fifteen-things-we-know-about.html> (Larry Susskind's blog)

<http://www.hewlett.org/programs/environment-program> (Hewlett Foundation's environmental conflict resolution program)

<https://www.keystone.org/> (The Keystone Center)

<http://www.mediate.org/practice-areas/> (CDR Associates NR practice area)

National & International Organizations:

<http://www.acresolution.org> (Association for Conflict Resolution (ACR))

<http://www.abanet.org/dispute/home.html> (ABA Dispute Resolution Section)

<http://www.nafcm.org/> (National Association for Community Mediation (NAFCM))

<http://www.iamed.org/index1.cfm> (International Academy of Mediators)

<http://www.iccwbo.org/> (International Chamber of Commerce)

<http://www.attorney-mediators.org/> (Association of Attorney-Mediators)

Other ADR Resources:

<http://www.cardozo.yu.edu/kukin/ADRResources.asp> (ADR resource list, including graduate ADR programs)
<http://www.apecemaker.net> (National Conference on Peacemaking and Conflict Resolution)
<http://www.igc.apc.org> (Conflict Resolution Center International)
<http://www.mediate.com> (gathering spot for mediators with articles of interest)
<http://www.Colorado.EDU/conflict/> (collecting ADR resources)
<http://www.cpradr.org/> (Center for Public Resources)
<http://www.caadrs.org/index.htm> (source of research about ADR)
<http://www.emu.edu/ctp/contact.html> (Eastern Mennonite peace building program)
<http://www.hamline.edu/law/adr/index.html> (Hamline webpage with links to ethics video clips and mediation case law project)
<http://www.ictj.org/en/index.html> (International Center for Transitional Justice)
<http://www.josseybass.com/WileyCDA/Section/id-131471.html> (publisher's list of ADR books)
<http://www.nccusl.org/Update/> (site for drafts and final version of Uniform Mediation Act; legislative adoption information)
<http://www.ncsconline.org/WC/Publications/ADR/SearchState.asp> (National Center for State Courts database on state court ADR programs – data may not be current)
<http://www.pon.harvard.edu/> (Program on Negotiation – Harvard Law School; has training videos (mostly dated) and role-plays)
<http://www.law.missouri.edu/llm/> (LL.M. program at University of Missouri)

Third-Party Providers:

<http://www.jamsadr.com> (a dispute resolution organization)
<http://www.adr.org/> (American Arbitration Association)
<http://www.dr.bbb.org/> (Better Business Bureau dispute resolution program)
<http://www.mccammongroup.com/> (The McCammon Group – Virginia)

LAWYER AS PROBLEM SOLVER CURRICULAR PROGRAM:

ASL offers a certificate program called the Lawyer as Problem Solver Certificate. This program has a broader reach than programs at some other schools that focus only on alternative dispute resolution. The Lawyer as Problem Solver program focuses on the role of the modern attorney in facilitating problem solving for clients both inside and outside of the courtroom. The program seeks to provide students with the skills they need to effectively serve their clients, including skills in oral and written communication, interviewing and counseling, negotiation, dispute resolution, coalition-building, decision-making, teamwork, and leadership.

The requirements for the certificate appear on the TWEN site. If the faculty makes any changes in them, I will let you know.

About 20 percent of the students in each graduating class have earned the LAPS certificate from its inception.

Environmental Dispute Resolution
Professor Paula Young
Spring 2014
Class Key
Version 1.0

Tuesday and Thursday, 10:30 a.m. to 12:10 p.m.

All classes meet in Room 227 unless otherwise announced.

Module 1: *Litigation and Administrative Rule-Making*

Class 1: *Jan. 14, 2014: Introduction, Context, and Consensus Building about Course*

No Class on Thursday, January 16, 2014.

Class 2: *Jan. 21, 2014: Role of Litigation*

Class 3: *Jan. 23, 2014: Traditional Rule-making, Background Information and Discussion*

Class 4: *Jan. 28, 2014: Negotiated Rule-making, Background Information and Discussion*
• ***Due: Simulation Pre-Planning Document for your assigned role***

Class 5: *Jan. 30, 2014: Negotiated Rule-making*
• ***IckyStuff Simulation***

Class 6: *Feb. 4, 2014: Negotiated Rule-making*
• ***De-brief IckyStuff Simulation***

Module 2: *Distributive Bargaining Theory and Skills*

Class 7: *Feb. 6, 2014: Distributive Bargaining: The Tension between Creating and Claiming Value; Trust in Negotiations*

Class 8: *<>, 2014: Distributive Bargaining: Claiming Value; Concession Strategies*

Class 9: *<>, 2014: Distributive Bargaining: Opening Offers and Demands*

Class 10: *<>, 2014: Distributive Bargaining: Hard Bargaining Tactics*

Class 11: *<>, 2014: Distributive Bargaining:*
• ***Video of Distributive Bargaining in Mediation Dispute – Mumbai v. Med Pro***

Module 3: Arbitration in Environmental Disputes

Class 12: <>, 2014: *Claims Facility Approach*

- *Gulf Coast Claims Facility*
- *Simulation: To Hell with Your Angel's Share*

Module 4: Group Leverage in Environmental/Natural Resources Negotiations

Class 13: Feb. 20, 2014: *Guest appearance by ASL alumnus, Cory Vicars*

- *Senior Land Representative, Land Surface Operations, Shell Exploration & Production, Pennsylvania.*

Module 5: Consensus Building Theory and Practice

Class 14: Feb. 25, 2014: *Introduction to Consensus Building Processes and Tools*

- *Video: Journey to Consensus, available at <http://www.municipalaffairs.alberta.ca/1494.cfm> (requires Real Player) (copies on Reserve).*

Class 15: Feb. 27, 2014: *Introduction to Red Wolf Simulation*

- *Background Materials*
- *Role Assignments*

Spring Break: March 2-8, 2014

Class 16: March 11, 2014: *Red Wolf Simulation (Day 1) (Board Room).*

- ***Due: Simulation Pre-Planning Document for your assigned role***

March 13, 2014: No class.

Class 17: March 18, 2014: *Red Wolf Simulation (Day 2) (Board Room).*

Class 18: March 20, 2014: *Red Wolf Simulation (Day 3) (Board Room).*

Class 19: March 25, 2014: *Introduce Appalachian Wind Farm Simulation*

- *Guest appearance by jointly-retained expert on Wind Farm Law and Policy (tentative).*

Class 20: March 27, 2014: *Appalachian Wind Farm Simulation (text pp. 71-91)¹*

- ***Due: Simulation Pre-Planning Document for your assigned role***
- *Analyze the Conflict*
- *Preliminary Review*
- *Collecting Information*
 - *Guest appearance by jointly-retained expert on Federal Aviation Commission requirements*
 - *Guest appearance by representative of the National Agriculture Aviation Association (crop dusters)*

¹ SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS' GROUPS* (Jossey-Bass 2001).

- *Assessing the Information*

Class 21: *April 1, 2014: Appalachian Wind Farm Simulation (text pp. 92-124; 186-196)*

- *Designing a Strategy*
- *Role of the Neutral Fact-Finder*
 - *Guest appearance by jointly-retained expert on Federal Communications Commission requirements*
 - *Guest appearance by jointly-retained expert on local archeological, historical, and Native American sites*
- *Role of Group Facilitators*
- *Adopting Procedures*
- *Developing Ground Rules*

Class 22: *April 3, 2014: Appalachian Wind Farm Simulation (text pp. 224-257; 267-277)*

- *Collecting Additional Information*
 - *Guest appearance by jointly-retained expert on US Fish and Wildlife Service Land-Based Wind Energy Guidelines*
 - *Guest appearance by jointly-retained expert on local bat ecology*
- *Handling the Human Side of the Process*
- *Bringing People to the Table*
- *Coping with Differences in Negotiating Skills*
- *Keeping People at the Table*
- *Handling Intense Emotions*
- *Getting Even*
- *Handling Personal Risk*

Class 23: *April 8, 2014: Appalachian Wind Farm Simulation (text pp. 124-136; 258-267)*

- *Collecting Additional Information*
 - *Guest appearance by jointly-retained expert on the economic impact of proposed wind farm on Tazewell County*
 - *Guest appearance by jointly-retained expert on effect of proposed wind farm on employment and labor in Tazewell County*
- *Educating the Parties*
- *Identify Issues*
- *Discussing Interests*
- *Agreeing on Data*
- *Developing Options*
- *Organizing to Produce Options*
- *Removing Data-Based Roadblocks*

Class 24: *April 10, 2014: Appalachian Wind Farm Simulation (text pp. 155-186)*

- *Collecting Additional Information*
 - *Guest appearance by jointly-retained expert on the economic impact of proposed wind farm on the local coal industry*
 - *Guest appearance by jointly-retained expert on the effect of the proposed wind farm on adjacent landowners*
- *Holding Productive Meetings*
- *Build Effective Constituencies*
- *Working with the News Media*

Class 25: April 15, 2014: Appalachian Wind Farm Simulation (text pp. 197-223)

- *Values, Trust, Power*

Class 26: April 17, 2014: Appalachian Wind Farm Simulation Text (pp. 137-148)

- *Reaching Agreement*
- *Breaking Deadlocks*

Class 27: April 22, 2014: Appalachian Wind Farm Simulation (pp. 148-154)

- *Carrying Out Agreements*
- *Define Implementation Procedures*
- *Conduct Any Required Renegotiation*
- *Developing Monitoring Systems*
- *Handling Violations*

Class 28: April 24, 2014: Appalachian Wind Farm Simulation

- *De-brief simulation experience*
- *Reflections on course.*