Water Law
Law 146-001
(CRN 20419)

Prof. Claeys
Spring 2013

UPDATED March 14, 2013, and before then January 10, 2013. Deletions are in strike-through and additions are underlined.

Classroom: Founders 477
Meeting Times: Wednesday 2:00 – 3:50 p.m.
Exam: Wed., May 8, noon

Office hours and whereabouts

My office is on the fourth floor, in the faculty suite, Room 420. My phone number is (703) 993-8247. My email address is eclaey@gmu.edu. The course also has a TWEN site, and I am reachable on the discussion board of that site.

This semester, I will hold office hours Monday and Wednesday mornings, 9 – 10 a.m. These are “walk-by” hours, meaning that I do not have any other appointments during them and you are free to come in to my office without appointment. (If I need to cancel office hours, I will let you know in advance by email and post a note on the course TWEN calendar.) However, I am happy to schedule appointments if you have a conflict during office hours or if you prefer for other reasons.

Cancellations and make-up classes

At this time, I do not anticipate canceling any classes. If I need to cancel class suddenly due to illness or some emergency, I will have my secretary post notices in the atrium and on the door of Founders 477, and I will send an email to the class.

Class reading

Reading will vary anywhere from 5 pages per hour (10 pages per 2-hour class block) to 25 pages per hour (50 pages per class block). (I try to assign shorter lengths of readings when the book excerpts lots of cases and longer lengths when the book excerpts law review articles or supplies long overviews to selected topics.) When I assign readings at the low end of this range, you should assume I’ll parse the assigned readings very closely in class discussion and question students actively; when I assign readings at the high end of this range, you should assume I’ll discuss the materials generally and lecture.

To help you read ahead, the assignments below forecast the reading I anticipate covering for the entirety of the course. However, this forecast is not a promise but a projection. I reserve the right to change the projected reading schedule depending on how fast or slow we are going. If
you read more than a class ahead, you assume the risk of reading material I decide to leave on the cutting room floor.

Class expectations

I expect you to be prepared for class. For any case excerpted at any length longer than a page, I expect you to understand the facts, the lawsuit, the theories of the case adopted in the majority and any separate opinions.

When I or the casebook presents a “squib” case—that is, a case consolidated into a paragraph or so, I expect you to know the facts, the holding, the rationale, and the contribution to the general line of doctrine covered in class.

When the casebook or excerpted cases refer to statutes, I expect you to read them closely enough to answer questions about them.

I expect you to attend class on a regular basis, and the ABA makes it a general condition of accreditation that students not miss more than 2 weeks of class. I keep attendance by having you sign in each day.

If you miss more than 4 class hours (the equivalent of 2 classes), I will not seat you for the examination and to give you a “forced withdraw” grade for the course.

With two exceptions, this is a “strict liability” policy: I do not waive this requirement because you are sick, have a job interview, personal emergency, &c. Except as specified below, you do not need to let me know in advance that you will be absent (and I prefer not to be notified), but by the same token I will not excuse absences in general.

   Exception 1: I do not enforce the attendance policy when I need to reschedule class because I am canceling class due to non-GMU commitments.

   Exception 2: I also do not enforce the attendance policy if the GMU Provost’s office designates the day a day of observance for a religion and you certify to me that you are a member of that religion. The [GMU Provost’s Guidelines](http://www.gmu.edu/Provost/GP/sabbatical_guidelines.html) require students to provide faculty with reasonable notice of the dates of major religious holidays on which they will be absent. To implement that guideline, I require students, within the first two weeks of the semester, to notify me of the dates for which they are requesting an excused absence for participation in any university-sponsored activity scheduled prior to the start of the semester. If you want me to grant permission for you to record a class for such an absence, you must ask me to do so when you notify me of your absence.

   Otherwise, I expect you to self-regulate interviews, personal emergencies, illnesses, and other occurrences that may cause you not to attend class, so that you do not miss more than 2 classes or 4 class hours’ worth of time.
I expect you to prepare for class. I call on students during class, to discuss material that a lawyer should have been able to digest from the reading without much assistance. If I call on you and you are unprepared, that counts as an absence for 1 hour (i.e., ½ of one of your 2 class absences, or 1/4 of the total time you may be absent without going over the limit). If you are unprepared and wish to avoid getting called on, please notify me before the beginning of class and I will mark you for a 30-minute absence (i.e., 1/8 of the total time you may be absent without going over the limit).

During class, I expect you to be generally respectful to me and your classmates. Imagine the standards of comportment you would use if you were a lawyer, sitting in front of a judge, watching as the judge engages another lawyer in the proceeding. Please treat me and any of your colleagues with whom I am conversing with the same professional courtesy.

**Recording classes**

I reserve all property rights in my class lectures, presentations, and discussions. As a general rule, I prefer that classes not be recorded. However, I will grant permission in specific cases when a student can demonstrate a special need. For example, as noted above, if you are missing class to observe a religious holiday I will allow you to make arrangements to have a classmate record class. Relevant disabilities may trigger such needs as well. If you think you have such a need, please ask and we can discuss. If you prefer to ask anonymously, please contact Annamaria Niields, Associate Dean of Students, and she can ask me on your behalf.

**Grading**

The grade for this class will be based solely primarily on a 2 hour examination. The examination will be closed-open-book. I may adjust grades from the examination up or down one-third grade based on my evaluation of your participation in class. You have the right to appeal my grading of the examination; there will be no appeal from my evaluation of class participation.

**Course materials**

For this course, please acquire a copy of


Please enroll in the TWEN site for this course.

I will also make available a supplement, for reading on January 9, no later than Thursday January 6. I will post supplement readings on the course TWEN site and make hard copies available as well. Reserving the right to change my mind, I anticipate that all other readings after Jan. 9 will come from the book by Tarlock et al.
Course reading

All references are to pages in the book by Tarlock, Corbridge, Getches, and Benson, unless otherwise specified.

Please note that the readings below are forecasts (that is, for every class after our first class on January 9). I reserve the right to add to, subtract from, restructure or otherwise modify reading depending on how class proceeds.


Historical Foundations of Water Law


Water Law’s Context-Dependence (I)

Tarlock et al. 67-71. Irwin.
Tarlock et al. 84-94. Herminghaus.

2. January 16.

Water Law’s Context-Dependence (II)


Riparian rights: Riparian rights: Overview, acquisition, and enjoyment.


Tarlock 126-54. Harris, Restatement (Second) of Torts ss 850-50A, ss 850-50A, Pyle, Pabst.

Tarlock 71-84. Coffin v. Left Hand Ditch. (I’ll lecture about this case, and class discussion and questions will focus more on the other assigned reading.)


5. February 6. Prior appropriation: more enjoyment


6. February 13. Prior appropriation: transfer and loss


Tarlock et al. 266-308.

8. February 27. Statutory administration: Threshold issues, and protections for instream flows.

Tarlock et al. 308-19. Discussion of threshold issues.


Tarlock et al. 319-26. Begin discussion of public interest and Little Blue Natural Resources Dist.

Leftover discussion of Little Blue Natural Resources Dist. (if any)


CLASS CANCELLED TO DUE SNOW THAT NEVER CAME

[no class March 13; spring break]


Tarlock et al. 319-26. Public interest and Little Blue Natural Resources Dist.


44. 10. March 27. Statutory administration: Transfers and changed uses.


42. 11. April 3. Public Use of Waters: The Public Trust


Tarlock et al. 449-60. Beacham, Thompson.

Tarlock et al. 460-79. McIlroy, Emmert.


13. April 17. Overview of Federal Environmental Regulation of Water (I)


14. Tuesday, April 23. Overview of Federal Environmental Regulation of Water (II)


Tarlock et al. 747-60. The interplay between federal environmental regulation and state water law. Getches excerpt, Bay-Delta case study.

Tarlock et al. 728-37. State certification and federal actions. PUD No. 1.

[I deleted some reading for this class based on how class discussion has been going.]