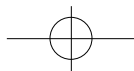
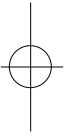
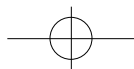
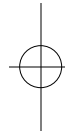
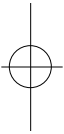


ENVIRONMENTAL LAW PRACTICE





ENVIRONMENTAL LAW PRACTICE

*Problems and Exercises
for Skills Development*

SECOND EDITION

Jerry L. Anderson

DRAKE UNIVERSITY LAW SCHOOL

Dennis D. Hirsch

CAPITAL UNIVERSITY LAW SCHOOL

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 1999, 2003 Jerry L. Anderson and Dennis D. Hirsch
All Rights Reserved.

ISBN 0-89089-276-8
LCCN 2003109203

Carolina Academic Press
700 Kent St.
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

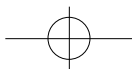
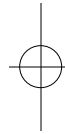
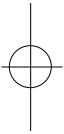
Printed in the United States of America

To my marvelous wife, Susan, and my wonderful parents.

JLA

*To my wife Suzanne, who encourages me to pursue my dreams;
and to my parents, who introduced me to writing and the law.*

DDH



CONTENTS

Foreword by Angus Macbeth	xv
Acknowledgments	xix
Introduction	xxi
Chapter I Environmental Compliance	3
A. Introduction: The Lawyer's Role in Environmental Compliance	3
B. Ensuring Compliance	4
1. Complying with the Clean Air Act's Prevention of Significant Deterioration Program	6
a) Statutes: The United States Code Annotated	8
Practice Tip: Researching Statutory Law	8
Problem 1.1: Finding Statutes	11
Practice Tip: Use the Definitions Section	11
Problem 1.2: Applying Statutory Language	12
b) Legislative History: The U.S. Code Congressional and Administrative News	13
Practice Tip: Use Congressional Committee Reports	14
c) Regulations: The Code of Federal Regulations	15
Problem 1.3: Applying Regulatory Language	24
d) Case Law	24
<i>Alabama Power Company, et al. v. Costle</i>	24
Problem 1.4: Judicial Review of Regulations	29
e) Regulatory Preambles: The Federal Register	29
Practice Tip: Locating the Proposed Rule	31
Problem 1.5: Using Regulatory Preambles	39
f) Agency Guidance Documents	39
Problem 1.6: Using Agency Guidance	42
Practice Tip: Using EPA Hotlines	43
g) On-Line Research Guide	43

viii CONTENTS

2. Complying with the Clean Air Act's New Source Performance Standard Program	52
Problem 1.7: Finding and Applying Statutes	52
Problem 1.8: Finding and Applying Legislative History	53
Problem 1.9: Finding and Applying Regulations	53
Problem 1.10: Applying Case Law	53
<i>ASARCO Inc. v. U.S. Environmental Protection Agency</i>	54
Problem 1.11: Finding and Applying Regulatory Preambles	58
Exercise 1.1: Counseling a Client on a New Source Performance Standard Issue	58
C. Counseling Clients When the Law Is Ambiguous	61
Dana, <i>Environmental Lawyers and the Public Service Model of Lawyering</i>	61
Problem 1.12: Role as Counselor	62
Problem 1.13: Prevalence of Public Service Model	63
Problem 1.14: Effectiveness of Public Service Model	63
American Bar Association, <i>Model Rules of Professional Conduct</i> (2003)	63
Problem 1.15: Questionable Interpretation	67
Problem 1.16: Going Over the Client's Head	67
Problem 1.17: Confidentiality	67
Problem 1.18: Moral/Ethical Considerations	68
Futrell, <i>Environmental Ethics, Legal Ethics, and Codes of Professional Conduct</i>	68
Problem 1.19: Adequacy of Rules	69
Exercise 1.2: Counseling a Client with Respect to an Ambiguous Regulation	69
Chapter II Environmental Enforcement	71
A. Introduction: The Lawyer's Role in Environmental Enforcement	71
B. Agency Enforcement	73
1. The Federal-State Relationship	77
<i>HARMON INDUSTRIES, INC., v. CAROL M. BROWNER, Admin., U.S. EPA</i>	78
Problem 2.1 Quality Wood Products: RCRA	83
2. The Enforcement Process	84
a. Self-Reporting Obligations	84
Problem 2.2: Self-Incrimination	85
b. Self-Audits and Environmental Management	85
Problem 2.3: Audit Policy	87

CONTENTS ix

Practice Tip: Environmental Management Systems	88
c. Inspections	88
Problem 2.4: Inspection Authority	90
<i>V-1 Oil Company v. State of Wyoming,</i> <i>Department of Environmental Quality</i>	90
Practice Tip: Inspections	95
d. Types of Enforcement Actions	96
i) Informal Action.	96
ii) Notice of Violation (NOV).	96
iii) Administrative Order (AO).	97
Practice Tip: Model Administrative Orders	97
iv) Administrative Penalty.	97
v) Civil Suit.	98
Practice Tip: Administrative vs. Civil Actions	98
vi) Criminal Penalties.	99
3. Administrative Practice	99
Practice Tip: Environmental Appeals Board Procedures	101
C. Sources of Law	101
1. Enforcement Response Policies	101
a) Base Penalty	102
b) Adjustment Factors	103
c) Per-Day Penalties	104
d) Environmentally Beneficial Expenditures or Supplemental Environmental Projects (SEPs)	104
Supplemental Environmental Projects: Criteria	106
2. Case Law	107
a) Unpublished Opinions	107
b) Administrative Opinions	107
Practice Tip: Finding Opinions	108
Problem 2.5: Applying Case Law and Policy	108
D. Practice Considerations	110
1. Enforcement Issues	110
a) Defenses	110
Problem 2.6: Developing Defenses	112
<i>SOLID WASTE AGENCY OF NORTHERN</i> <i>COOK COUNTY v. UNITED STATES ARMY</i> <i>CORPS OF ENGINEERS, et al.</i>	113
b) Penalty Amounts	120
c) Other Issues	121

x CONTENTS

Exercise 2.1: Agra Enterprises—EPCRA	121
Exercise 2.1(a): Fact Investigation	125
Practice Tip: Legal Interviewing	125
Exercise 2.1(b): Drafting the Administrative Complaint	126
Exercise 2.1(c): Settlement Negotiation	126
E. Citizen Suit Enforcement	142
1. Information Gathering	142
Practice Tip: Protecting Confidential Information	146
Exercise 2.2: Citizen Enforcement of the Clean Water Act: Pork Unlimited	148
Exercise 2.2(a): Information Request	148
2. Litigation Issues	149
a) Pre-Suit Notice	149
Exercise 2.2(b): Drafting the Notice Letter	149
b) Diligent Prosecution	150
Problem 2.7: Diligent Prosecution	151
<i>Comfort Lake Association, Inc., v.</i> <i>Dresel Contracting, Inc.</i>	151
c) Standing	156
d) “In Violation” Issue	158
<i>Steel Company v. Citizens for a Better Environment</i>	158
Problem 2.8: Standing	167
e) Potential Recovery	167
Problem 2.9: Settlement	167
<i>Sierra Club, Inc. v. Electronic Controls Design, Inc.</i>	168
f) Suits Against the EPA or State Agency	171
Practice Tip: Political Pressure	172
Exercise 2.2(c): Drafting the Complaint	173
Chapter III Environmental Litigation	175
A. Introduction: The Lawyer’s Role in Environmental Litigation	175
B. Practice Issues in Superfund Litigation	178
1. The Superfund Remediation Process	178
a) Removal Action	179
b) Site Investigation	180
c) Information Gathering	180
d) Hazard Ranking System (“HRS”)	180
e) National Priorities List	180
f) Remedial Investigation/Feasibility Study	181
g) Record of Decision	181

CONTENTS xi

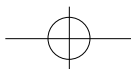
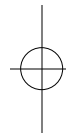
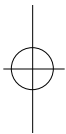
2. The Superfund Liability Scheme	181
The Shenandoah Superfund Site	183
Problem 3.1: Hazard Ranking System/NPL Listing	188
Practice Tip: Hiring Consultants	189
Exercise 3.1: Joint Defense Agreement	190
3. Superfund Litigation Issues	192
a) Section 107 Liability	193
Problem 3.2: Section 107 Elements of Liability	193
<i>United States v. Alcan Aluminum Corp.</i>	194
b) Joint and Several Liability	199
Problem 3.3: Joint and Several Liability	199
c) Consistency with the NCP	200
<i>United States v. Chapman</i>	200
Problem 3.4: NCP Consistency	204
d) Choice of Remedy	205
Problem 3.5: Choice of Remedy	206
e) 107(b) Defenses	206
Problem 3.6: Third Party Defenses	207
f) Statute of Limitations	207
Problem 3.7: Statute of Limitations	208
Jerry L. Anderson, <i>The Hazardous Waste Land</i>	208
C. Substantive Litigation Issues	218
1. Successor Liability	218
Exercise 3.2(a): Summary Judgment Motion—	
Successor Liability	220
2. Municipal Solid Waste	220
Exercise 3.2(b): Summary Judgment Motion—	
Municipal Waste	222
3. Interim Landowner Liability	222
Exercise 3.2(c): Summary Judgment Motion—	
Interim Landowner	223
4. Innocent Landowner	223
Exercise 3.2(d): Summary Judgment Motion—	
Innocent Landowner	225
5. Individual Liability	225
Exercise 3.2(e): Summary Judgment Motion—	
Individual Liability	226
6. Section 106 Penalties	227
Exercise 3.2(f): Summary Judgment Motion—	
Section 106 Liability	228

xii CONTENTS

D. Superfund Cost Allocation	228
E. Settlement	230
Exercise 3.3: Cost Allocations	232
Chapter IV Environmental Policy	235
A. Introduction: The Lawyer's Role in Environmental Policy	235
B. The Federal Rulemaking Process	236
1. Administrative Procedure Act Requirements	236
(a) The Notice of Proposed Rulemaking	237
Problem 4.1: Publication Requirement	237
(b) Public Comment on the Proposed Rule	238
Problem 4.2: Holding Hearings	238
(c) The Final Rule	238
Problem 4.3: Timing of Final Rule	239
2. Optional Procedures Prior to the Proposal	239
(a) Advance Notice of Proposed Rulemaking	239
Problem 4.4: When to Employ an ANPR	240
(b) Negotiated Rulemaking	240
Problem 4.5: Why Use Negotiated Rulemaking	241
3. Statute-Specific Procedures	241
Problem 4.6: Public Hearing Requirement	241
Problem 4.7: Hearing Procedure	242
C. The Lawyer's Involvement in the Rulemaking Process	242
1. Initiating Rulemaking	243
(a) Suing the Agency to Enforce Statutory Deadlines	243
Problem 4.8: Forcing EPA to Initiate Rulemaking	243
(b) Petitioning the Agency for the Issuance of a Rule	243
Problem 4.9: Petitioning for Issuance of a TSCA Rule	244
(c) Suing the Agency to Enforce Notice and Comment Rulemaking Requirements	244
(i) The Exception for Interpretative Rules	246
<i>Tabb Lakes, Ltd. v. United States</i>	247
<i>Solid Waste Agency of Northern Cook Country v. United States Army Corps of Engineers</i>	250
Problem 4.10: Legislative/Interpretive Rule	255
(ii) The Exception for "General Statements of Policy"	255
<i>General Electric Power Company v. Environmental Protection Agency</i>	256

CONTENTS xiii

<i>Brock v. Cathedral Bluffs Shale Oil Co.</i>	260
Problem 4.11: General Statements of Policy Exception	265
(iii) The Exception for Rules of “Agency Organization, Procedure or Practice”	265
<i>Waste Management, Inc. v. United States Environmental Protection Agency</i>	266
<i>Batterton v. Marshall</i>	270
Problem 4.12: Procedural Rule Exception	273
(iv) The “Good Cause” Exception	274
2. Participating in the Rulemaking Process	274
Practice Tip: Making Contact with the EPA	275
Practice Tip: Work Closely with Technical Staff	276
3. Challenging a Final Rule in Court	277
Problem 4.13: Challenging a Regulation	278
D. Introduction to the Environmental Justice Movement	279
1. Facts About the Discriminatory Siting of Facilities	280
2. Federal Actions to Promote Environmental Justice	282
3. Environmental Justice Litigation	283
Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits	287
Problem 4.14: Parties to Complaint	299
Problem 4.15: OCR Procedures	299
Problem 4.16: Timing of Complaint	299
Problem 4.17: Investigation of Complaint	299
Problem 4.18: Mitigation	300
Problem 4.19: Justification	300
Exercise 4.1: Drafting Comments on the EPA’s Interim Title VI Guidance	300
Exercise 4.2: Representing Your Client at a Public Hearing	301
Appendix In the Matter of GEC Precision Corporation	303
Index	319



FOREWORD

BY **ANGUS MACBETH**

I began to practice environmental law as a staff attorney with the Natural Resources Defense Council in 1970, shortly after the passage of the National Environmental Policy Act. In those days the landscape had a few large visible monuments—the common law of nuisance; the Second Circuit’s decision in the first Scenic Hudson case—but generally the eye and the imagination could peer far and wide with little to impede the view. In the succeeding twenty-five years, during the course of which I have served as a Deputy Assistant Attorney General in the Land and Natural Resources Division at the Department of Justice and as the head of Sidley, Austin, Brown and Wood’s environmental law practice group, I have seen a massive growth of statute laws: the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, Superfund, and all their state law analogues. Beneath this forest canopy there has been a sturdy growth of both regulations and case law. EPA’s regulations at 40 CFR now extend to more than twenty-five volumes. A few years ago I looked through a leading case book on administrative law and found that more than twenty percent of the cases were drawn from environmental law. Hidden in the underbrush we find a thriving culture of guidance documents, regulations which are never made final but are followed nevertheless, and interpretive letters hidden where only the insatiable collector is likely to find them.

In short, environmental law has become a jungle. Or, if you prefer a different metaphor, an excruciating maze. Or a paper palace rivaling the tax code and regulations in complexity and counter-intuitive esoterica.

That history is the first justification for this book and it is a very powerful one. The student has to be taught the path through the jungle and how to use a machete with speed and accuracy if he is ever to be able to give advice to his client with speed and accuracy—and most importantly, with sound judgment. This problem is there for the government lawyer, the public interest bar, and the private attorney.

xvi FOREWORD

I do not think it will go away. The number of Superfund cases with a hundred parties will shrink as we continue and complete the clean up of commercial hazardous waste sites; but the pervading complexity of environmental law will continue. First, the natural world is enormously complex and the regulation of human impact on the natural world will reflect that complexity. Second, the environmental laws of the last twenty-five years have been a tremendous success in reducing pollution. As a consequence, the targets for environmental regulation get smaller over time and the competing interests that must be weighed in deciding how to regulate have become more complex with the result that the law becomes more complex. Third, simplicity and accuracy are in constant tension in this field and so far simplicity has rarely prevailed (unfortunately, it does not follow that accuracy has prevailed). Finally, it is a sad fact that on the jungle floor the lush diversity of semi-legal forms of authority has rooted and spread to the point where they cannot be eradicated. Coherent compilations of basic laws such as State Implementation Plans under the Clean Air Act cannot be found. The meaning of RCRA regulations are hidden in footnotes to Federal Register preambles. It isn't the way things should be, but it certainly is the way they have been for a long time.

In short, the need for this book will persist for a long time to come.

The second real value of this volume lies in its decision to introduce students to the roles of the public interest, government *and* private attorney, instead of focusing on just one of these. In the course of my career, during which I have represented all three of these constituencies, I have come to appreciate the importance of being able to see environmental issues from more than one perspective.

This ability is valuable, first, in that it gives one insight into how the "other side" thinks. For example, a private lawyer entering a negotiation with the EPA would be well advised to have thought through how his opponent is likely to approach the issue - what the EPA attorney's goals, incentives and marching orders are likely to be. The same might be said for the EPA lawyer, who should be able to place himself in the private attorney's shoes. The exercises ask the students to play the roles of private, EPA and public interest attorney in the context of negotiating an EPCRA penalty, settling a Superfund suit and litigating a citizens suit. This should help them see how lawyers from different sides think about an issue, thereby equipping them to deal more effectively with opposing counsel when they enter the world of practice.

Students should also draw another valuable lesson from the experience of representing different sides in environmental disputes. The layperson and the untutored lawyer often assume that environmental laws, like the lights in a

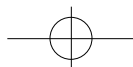
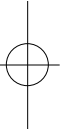


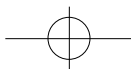
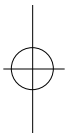
FOREWORD xvii

crosswalk, give clear signals to the business people seeking to make their way. But the environmental lawyer soon finds out that this is not the case.

Rather, environmental statutes, regulations and policies, with their great complexity and many ambiguities, leave much room for interpretation and judgment. The earlier a lawyer recognizes this, the earlier he can start developing this judgment. By asking students to play a number of roles, and thereby to see environmental law questions from a variety of different perspectives, the book begins to develop this essential skill.

In sum, this volume provides practical training for environmental lawyers of the most useful sort. It not only leads the student through the jungle of the law, it gives him the tools to develop his judgment so that he can wrestle effectively with the tough practical problems and, in time, give his client advice that is mature and wise as well as solidly grounded in the law.





ACKNOWLEDGMENTS

Many people assisted us in bringing this project to fruition. We want to thank the following:

Drake law students Michael Angell, Shraddha Upadhyaya, Letticia Rodriguez, Paul Johnson, Patricia Ashton, Liz Williams, Hayley Hanson, Ronald Bailey, Angela Doss, and Erin Sass, and Capital law students Sonja Rawn and Summer Koladin provided able research assistance. The Rocky Mountain Mineral Law Foundation generously provided a grant to support the research for the book. Aimee Bentlage, Administrative Assistant to the Dean at Drake Law School, did a wonderful job proofing and editing the text. Drake Law Librarian Sandy Placzek went beyond the call of duty solving computer glitches and finding sources. Capital Law School librarians Jacqueline Orlando and Jane Underwood and Boston College Law School librarian Joan Shear provided insights on legal research. Britney Brigner of LexisNexis and Anthony Buscemi of Westlaw gave useful advice on how best to conduct on-line research. Susan Anderson provided her excellent editing acumen as well as her moral support.

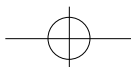
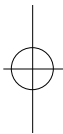
We were also assisted by many of our colleagues in practice. From EPA's Region VII, Martha Steincamp, Regional Counsel, and Becky Dolph, Deputy Regional Counsel, provided valuable "real world" input and problem examples. Scott Fulton, Justina Fugh, Michael Goo, Geoffrey Wilcox, and Padmini Singh of the EPA's Office of General Counsel (OGC), and Suzanne Childress, Christina McCulloch, Carol Holmes and Joe Theis of the EPA's Office of Enforcement and Compliance Assurance (OECA) talked with us about the skills that are required for legal practice at the EPA. Angus Macbeth, David Buente, Sam Gutter, Jim Cahan, Larry Gutierrez, Tom Echikson, Margaret Spring and Alan Au of Sidley, Austin, Brown & Wood's environmental group provided input about the skills that are needed for environmental law practice at a private firm and provided us with useful source materials. The authors also thank Bill Beck, Terry Satterlee, and Alok Ahuja at Lathrop and Gage for environmental law practice advice.



xx ACKNOWLEDGMENTS

Finally, we would like to thank several of our academic colleagues. Professors Jonathan Wiener at Duke, Richard Lazarus at Georgetown and Sandra Zellmer at Toledo provided valuable feedback on the concept for this book. Professors Zyg Plater at Boston College, Clifford Rechtschaffen at Golden Gate and Eileen Gauna at Southwestern provided valuable comments on the book, as did Michael Gerrard of the Arnold & Porter law firm.

In addition, we acknowledge the generosity of Capital University Law School and the Drake University Law School Endowment Trust which provided summer research grants to support the writing of the first and second editions of this book.





INTRODUCTION

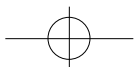
THE GOALS OF THIS BOOK

The authors of this book remember well our first days as practicing environmental lawyers. Fresh out of law school and clerkships, we set out for the library with sharpened pencils to complete our initial research assignments. We began where most law students are taught to begin, with the law reporters. But the fine interpretations of regulatory law that we needed were not to be found there. We moved on to American Jurisprudence Second, the ALRs, and the law reviews. Still nothing. Stumped, and more than a little embarrassed, we were forced to seek out more senior lawyers for guidance. Thus began our introduction to the new realm of legal materials that includes such sources as the Code of Federal Regulations, the Federal Register, the Environment Reporter, and agency guidance — the materials that environmental lawyers use most.

We also learned early on that environmental lawyers do much more than legal research (this is one of the reasons that the practice of environmental law is so much fun). They counsel clients on regulatory compliance. They bring or defend against enforcement actions. They litigate complex statutory issues. They initiate citizen suits. They participate in rulemaking proceedings where they argue the legal and policy merits of environmental regulations. Our practices required us to undertake many of these activities. Once again, we suffered the rude awakening that law school had hardly touched upon, much less prepared us for, these tasks.

As environmental law professors, we were determined that our students would be better prepared for environmental law practice than we had been. We looked for a book that would introduce students to the resources that environmental lawyers use and the activities in which they routinely engage. We found that such a book did not exist.

The principal objective of *Environmental Law Practice: Problems and Exercises for Skills Development* is to fill this gap. The materials in this book will introduce you to the main sources of environmental law. Some of these are contained in the book itself. In other instances, we teach you how to find them





xxii INTRODUCTION: THE GOALS OF THIS BOOK

on your own. Those who work through this book should be able to head to the library on their first environmental law research assignment with strategies and skills for finding the information they need, not just sharpened pencils.

The book also uses exercises and role plays to introduce you to the day-to-day tasks of environmental law practice. It covers four of the principal areas of environmental law practice: compliance counseling, administrative enforcement, environmental litigation (including citizen suits), and environmental policy. It is comprehensive in its approach to these areas, providing lessons for the aspiring private lawyer, government lawyer, and public interest attorney. The book will teach you how to bring a federal enforcement action against a polluter; negotiate a Superfund settlement; prepare documents and strategy for a citizen's suit; counsel a corporation on environmental compliance; and comment on an EPA proposed rule, as well as develop many other relevant skills.

The problems and exercises are also good opportunities for increasing your knowledge of substantive environmental law. Environmental law consists largely of complex statutory and regulatory schemes, many of which are featured in this book. Often, the best way to learn these doctrines is to use them. More than once, we have seen it all "come together" for a student while working through an exercise in class. The book should help you to master the complexities of environmental law.

This book can serve as a stand-alone text for an upper-level course on environmental practice or as a supplement to an introductory environmental law text. Whichever way you encounter it, we hope that it provides you with a useful introduction to the practice of environmental law.

