

Environmental Law Practice

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ENVIRONMENTAL LAW PRACTICE
Problems and Exercises for Skills Development
FOURTH EDITION
Jerry L. Anderson, Dennis D. Hirsch,
Noah M. Sachs, and Edmund J. Tormey

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FOURTH EDITION

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GENERAL COUNSEL, IOWA DEPARTMENT OF NATURAL RESOURCES

A Lawyering Series Coursebook

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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

To my beautiful children, Adam and Claudia.

NMS

To my wonderful family: Connie, Erin and Sean.

EJT

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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.

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 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.

About the Series

Carolina Academic Press, in cooperation with Northeastern University School of Law, is pleased to offer a new series of teaching materials, the Lawyering Series. Professor Roger Abrams, Richardson Professor of Law at Northeastern School of Law, will serve as Series Editor.

Carolina Academic Press, an independent publisher, has a strong reputation for publishing innovative print and digital teaching materials for the law school community. Northeastern University School of Law has long been known as an innovator in legal education, with a national reputation for its Cooperative Legal Education (Co-op) Program and its rich clinical, internship, and externship offerings.

Over the last decade, the American Bar Association has urged American law schools to better prepare their students for the practice of law. Most recently, the ABA has enacted new Standards that require all law students to complete six credit hours of “experiential” courses. This requirement commenced for students beginning law school in fall 2016.

It is our sincere hope that the Lawyering Series will support law schools and law professors—both full-time and adjunct—as they search for more innovative and more practical teaching materials.

We welcome your comments and suggestions. Please contact Carolina Academic Press at manuscript@caplaw.com or Series Editor Roger Abrams at r.abrams@neu.edu.

Introduction

The Goals of the Fourth Edition

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 and settle those cases. 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 this Fourth Edition 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 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. With a brand new Chapter 6 on permitting and environmental settlements, the book now covers six of the principal areas of environmental law practice: compliance counseling, administrative enforcement, environmental litigation (including citizen suits), environmental policy, permitting, and settlements. 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; comment on an EPA proposed rule; draft a settlement agreement 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.