

CASES AND MATERIALS ON  
**ENVIRONMENTAL  
LAW**

Seventh Edition

Daniel A. Farber  
Jody Freeman  
Ann E. Carlson  
Roger W. Findley

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LAW**

**Seventh Edition**

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## Preface

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This edition marks the first time that our esteemed colleague, Roger Findley, has not joined us as a co-author. As one of the founding figures in modern environmental law, Roger took the lead in the initial edition of this casebook twenty-five years ago. As the senior co-author, he has helped inspire and shape every edition since then. It is hard to imagine this casebook without him. This edition is also the first to include Professor Ann Carlson from the UCLA School of Law as a co-author. We miss Roger's contribution greatly and welcome Ann to the book.

The 7th Edition, like its predecessors, is designed to give students an understanding of federal environmental law and policy that is broad and thematic as well as detailed and concrete. We have made some significant changes to this edition and updated it to reflect the fast-changing pace of environmental law. We have also reorganized and reordered much of the material to provide more coherence to the book as a whole.

We have substantially revised our introductory materials. Our opening chapter, *Perspectives on Environmental Law*, includes foundational views on the field, and the latest scholarly analyses of environmental trends, as well as up-to-the minute details about climate change policies, particularly those emanating from the states. Our second chapter, *Approaches to Environmental Protection*, covers the most dominant tools for addressing environmental harms, including risk-assessment, cost-benefit analysis and distributional approaches. Thus, when students begin to study the specific regulatory schemes in the balance of the book, they will already have a rich understanding of environmental policy and a grasp of the array of regulatory instruments.

This edition is notable for other changes as well. We have added an entirely new chapter on the Endangered Species Act that includes up-to-date case law, critiques of the Act's focus on individual species rather than ecosystems, and extensive treatment of the Spotted Owl controversy, which serves as an illustrative case study. We have reorganized and integrated the materials on RCRA and CERCLA into an all-new "soup-to-nuts" chapter that provides historical perspective, overviews of each statute, and material describing the relationship between the two statutes. We also now have a stand-alone chapter on toxics regulation under FIFRA and TSCA, as well as new material on the regulatory treatment of genetically modified materials.

In the Clean Air Act chapter, we have entirely revamped the materials on New Source Review to reflect this hot area of litigation. We have expanded our treatment of market mechanisms under the Act to cover more comprehensively the problem of interstate spillovers (including an analysis of the Ozone Transport Commission and the NOX SIP Call). We

describe a broad range of market mechanisms for addressing air pollution, and extend them to greenhouse gas regulation—for example, we discuss the market approaches contained in the new Regional Greenhouse Gas Initiative just launched by the New England states. We have included new materials and new perspectives on federalism, including a focus on the relationship between state climate change activities and federalism.

Other important additions include new materials on NAFTA and regulatory appropriations cases under Chapter 11 of the treaty; new materials on stormwater pollution and its treatment under the Clean Water Act; and updated and revamped NEPA materials that explain the statute's ongoing significance. As with our last edition, we have added a variety of charts and summaries to help organize and simplify the statutory material.

We could not have completed this new edition without the extraordinary efforts of our research assistants, Madeline Fleisher, Adam Kron, Dhananjay Manthripragada, Jessica Yarnall, our indexer, Caleb Donaldson, and our superb administrative assistants Kathy Curley, Mary Elliott, and Lauren Zachry. Peter Wyckoff and Michael Gerrard deserve special thanks for giving us the view from practice, as do our partners and families for providing support and love during the writing process. And our students, who challenge and inspire us to think about environmental issues in new and interesting ways, deserve our appreciation for spurring us to make the casebook better.

As we write this preface, an extraordinary shift is taking place in the U.S. response to perhaps the most significant environmental problem of the coming century, climate change. The federal government has remained largely inactive in efforts to reduce the greenhouse gas emissions that scientists almost uniformly believe are heating the earth's temperatures. Yet into this policy breach have stepped the states, or at least a majority of the states. We see the Northeastern states committing to a market based scheme to reduce carbon dioxide emissions from power plants; California enacting legislation to reduce greenhouse gas emissions from automobile tailpipes (and ten states agreeing to follow California's lead); some twenty states requiring their utilities to purchase renewable energy portfolios; and numerous states and municipalities establishing greenhouse gas emission target reductions. In the aftermath of Hurricane Katrina, Gulf Coast states have expressed their concern about increased vulnerability to flooding. The legal maneuvering surrounding these efforts continues to be dynamic but may not keep pace with climate developments; each new issue of *Science* and *Nature* seems to demonstrate that climate change is happening earlier and more rapidly than scientific models have predicted. All of this may prompt a federal statute sooner rather than later; at least two bills on climate change have been introduced in Congress as of the time of writing. The point, however, should be clear: the future of climate change is now, and we are at a delicate, interesting and crucial moment in addressing the problem.

Of monumental importance to the future of U.S. environmental law is the addition of two new justices to the Supreme Court: Chief Justice John Roberts and Associate Justice Samuel Alito. They replace two westerners, Chief Justice Rehnquist and Justice Sandra Day O'Connor. It is hard to predict the impact this shift will have on the field, but it won't be long before we know. The Court decided three important environmental cases in this first Term of the Roberts Court, and has taken at least one for its second Term, all of which implicate the extent of federal power to address environmental problems. As always, the future of environmental law is both interesting and uncertain. It could not be a more exciting time to be a student in the field.

DANIEL A. FARBER  
JODY FREEMAN  
ANN E. CARLSON

July, 2006

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## Table of Acronyms

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AB	Appellate Body
ACE	Army Corps of Engineers
ADR	Alternative Dispute Resolution
AEC	Atomic Energy Commission
AEI	American Enterprise Institute
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AFO	Animal Feeding Operation
AID	Agency for International Development
AISA	American Iron and Steel Institute
ALJ	Administrative Law Judge
AMC	American Mining Congress
AMI	American Meat Institute
ANILCA	Alaska National Interest Lands Conservation Act
APA	Administrative Procedure Act
APHIS	Animal Plant Health and Inspection Service
API	American Petroleum Institute
AQCR	Air Quality Control Regions
ARARs	Applicable or Relevant and Appropriate Requirements
ATA	American Trucking Association
AUM	Animal Unit Month
BACT	Best Available Control Technology
BADCT	Best Available Demonstrated Control Technology
BART	Best Available Retrofit Technology
BAT	Best Achievable Technology
BATEA	Best Available Technology Economically Achievable
BCT	Best Conventional Pollutant Control Technology
BDAT	Best Demonstrated Available Technology
BLM	Bureau of Land Management
BMP	Best Management Practices
BOD	Biochemical Oxygen Demand
BOD5	Biochemical Oxygen Demand measured over a 5-day period
BODS	Biochemical Oxygen-Demanding Substances
BPCTCA	Best Practicable Control Technology Currently Available
BPJ	Best Professional Judgment
BPCT	Best Practicable Control Technology
BRD	Biological Resources Division

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BTUs	British Thermal Units
BWCA	Boundary Waters Canoe Area
BWCAW	Boundary Waters Canoe Area Wilderness
CAA	Clean Air Act
CAFE	Corporate Average Fuel Economy
CAFO	Concentrated Animal Feeding Operation
CARE	Citizens Against the Refinery's Effects
CARE	Concerned Area Residents for the Environment
CASAC	Clean Air Scientific Advisory Committee
CBA	Cost-Benefit Analysis
CBD	Convention on Biological Diversity
CBI	Confidential Business Information
CEQ	Council on Environmental Quality
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
CMA	Chemical Manufacturers Association
CO	Carbon Monoxide
CO <sub>2</sub>	Carbon Dioxide
COCC	Columbia Organic Chemical Company
COD	Chemical Oxygen Demand
COLA	Cost of Living Adjustment
COP	Conference of the Parties
CPSC	Consumer Product Safety Commission
CRJ	Commission for Racial Justice
CSD	Commission on Sustainable Development
CSMA	Chemical Specialties Manufacturers Association
CSWG	Corporate Sunshine Working Group
CV	Contingent Valuation
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
D <sub>2</sub> O	Deuterium Oxide ("Heavy Water")
DAF	Dilution and Attenuation Factor
DBCP	Dibromochloropropane
DCO	Delayed Compliance Order
DDT	DichloroDiphenylTrichloroethane
DEP	Department of Environmental Protection
DES	Diethylstilbesterol
DF	Deterioration Factor
DHEC	Department of Health and Environmental Control
DMC	De Minimis Classification

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DMRs	Discharge Monitoring Reports
DNA	Deoxyribonucleic Acid
DOI	Department of the Interior
DOJ	Department of Justice
DOT	Department of Transportation
DUs	Designated Uses
EA	Environmental Assessment
EC	European Community
ECJ	European Court of Justice
EDF	Environmental Defense Fund
EEC	European Economic Community
EEI	Edison Electric Institute
EGU	Electric Generating Unit
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
ELI	Environmental Law Institute
EMSs	Environmental Management Systems
EP	Extraction Procedure
EP	Erythrocyte Protoporphyrin
EPA	Environmental Protection Agency
EPCRA	Emergency Planning and Community Right-to-Know Act
EQB	Environmental Quality Board
ESA	Endangered Species Act
ETP	Eastern Tropical Pacific
ETS	Environmental Transportation Systems
EU	European Union
EWG	The Environmental Working Group
FAA	Federal Aviation Administration
FACA	Federal Advisory Committee Act
FASB	Financial Accounting Standards Board
FBI	Federal Bureau of Investigation
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FDD	Final Development Document
FDF	Fundamentally Different Factor
FEISS	Final Environmental Impact Statement Supplement
FERC	Federal Energy Regulatory Commission
FFDCA	Federal Food, Drug, and Cosmetic Act

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FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FIP	Federal Implementation Plan
FLPMA	Federal Land Policy and Management Act
FMC	Federal Maritime Commission
FOE	Friends of the Earth
FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FPA	Federal Power Act
FPAs	Final Project Agreements
FWPCA	Federal Water Pollution and Control Act
FWS	Fish and Wildlife Service
FY	Fiscal Year
GAAP	Generally Accepted Accounting Principles
GAO	General Accounting Office
GAP	Gap Analysis Program
GATT	General Agreement on Tariffs and Trade
GES	Global Environmental Facility
GHG	Greenhouse Gas
GIS	Geographic Information Systems
GM	General Motors
GM	Genetically Modified
GMOs	Genetically Modified Organisms
GNP	Gross National Product
GSA	General Services Administration
GWEN	Ground Wave Emergency Network
HC	Hydrocarbons
HCP	Habitat Conservation Plan
HREC	Hampton Roads Energy Company
HSWA	Hazardous and Solid Waste Amendments
HUD	Housing and Urban Development
HWIR	Hazardous Waste Identification Rule
ICC	Interstate Commerce Commission
ICR	Ignitable, Corrosive, and Reactive
ICS	Individual Control Strategies
IEPA	Illinois Environmental Protection Agency
I & M	Inspection and Maintenance
INS	Immigration and Naturalization Service
IPC	International Paper Company
IPCC	Intergovernmental Panel on Climate Change
IPM	Integrated Pest Management

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IPM	Integrated Planning Model
ITC	Interagency Testing Committee
IWC	International Whaling Commission
JCAE	Joint Committee on Atomic Energy
JTU	Jackson Turbidity Unit
LAER	Lowest Achievable Emission Rate
LDRs	Land Disposal Restrictions
LEV	Low Emissions Vehicle
LIA	Lead Industry Association
LMFBR	Liquid Metal Fast Breeder Reactor
LULUs	Locally Undesirable Land Uses
LWK	Live Weight Killed
MACT	Maximum Achievable Control Technology
MCC	Metropolitan Correction Center
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
MGP	Manufactured Gas Plant
MMPA	Marine Mammal Protection Act
MOA	Memorandum of Agreement
MPRSA	Marine Protection, Research, and Sanctuaries Act
MSDS	Material Safety Data Sheets
MSHA	Mine Safety and Health Administration
MSW	Municipal Solid Waste
MTBE	Methyl Tertiary-Butyl Ether
NAACP	National Association for the Advancement of Colored People
NAAQS	National Ambient Air Quality Standards
NAFTA	North American Free Trade Agreement
NAS	National Academy of Sciences
NASA	National Aeronautics and Space Administration
NAZ	Nonattainment Zone
NBARs	Nonbinding Preliminary Allocations of Responsibility
NBII	National Biological Information Infrastructure
NBS	National Biological Service
NCCP	Natural Community Conservation Program
NCP	National Contingency Plan
NEPA	National Environmental Policy Act
NEPACCO	Northeastern Pharmaceutical and Chemical Company
NESHAP	National Emission Standards for Hazardous Air Pollutants
NFMA	National Forest Management Act
NGO	Nongovernmental Organization

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NGPRP	Northern Great Plains Resources Program
NIEHS	National Institute of Environmental Health Sciences
NIMBY	"Not In My Back Yard"
NIPDWS	National Interim Primary Drinking Water Standards
NLEV	National Low Emission Vehicle
NO <sub>2</sub>	Nitrogen Dioxide
NOAA	National Oceanographic and Atmospheric Agency
NODA	Notice of Data Availability
NO <sub>x</sub>	Nitrogen Oxides
NPDES	National Pollutant Discharge Elimination System
NPL	National Priorities List
NRA	Negotiated Rulemaking Act
NRC	Nuclear Regulatory Commission
NRC	National Research Council
NRDC	Natural Resources Defense Council
NSPS	New Source Performance Standards
NSR	New Source Review
NWF	National Wildlife Federation
O <sub>3</sub>	Ozone
OCPSPF	Organic Chemicals, Plastics and Synthetic Fibers
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
OSWER	Office of Solid Waste and Emergency Response
OTAG	Ozone Transport Assessment Group
PANE	People Against Nuclear Energy
Pb	Lead
PBT	Persistent, Bioaccumulative, and Toxic
PCB	Polychlorinated Biphenyl
PEL	Permissible Exposure Limit
PG&E	Pacific Gas and Electric
PIRG	Public Interest Research Group
PM	Particulate Matter
POTWs	Publicly Owned Treatment Works
PPA	Plant Pest Act
ppm	parts per million
ppq	parts per quadrillion
ppt	parts per trillion
PRP	Potentially Responsible Party
PSD	Prevention of Significant Deterioration

PSNS	Pretreatment Standards for New Sources
PUD	Public Utility District
RACM	Reasonably Available Control Measures
RACT	Reasonably Available Control Technology
RAND	Research and Development (a think tank)
RCO	Responsible Corporate Officer
RCRA	Resource Conservation and Recovery Act
RECLAIM	Regional Clean Air Incentives Market
RFF	Resources for the Future
RPA	Renewable Resources Planning Act
RTCs	RECLAIM Trading Credits
SAB	Staff Accounting Bulletins
SAB	Scientific Advisory Board
SAP	Scientific Advisory Panel
SARA	Superfund Amendment and Reauthorization Act
SCRDI	South Carolina Recycling and Disposal, Inc.
SCS	Soil Conservation Service
SDWA	Safe Drinking Water Act
SEC	Securities and Exchange Commission
SEIS	Supplemental Environmental Impact Statement
SEPs	Supplemental Environmental Projects
SEPs	Supplemental Enforcement Plans
SIC	Standard Industrial Classification
SICEA	Steel Industry Compliance Extension Act
SIP	State Implementation Plan
SIPI	Scientists' Institute for Public Information
SIR	Supplemental Information Report
SO <sub>2</sub>	Sulfur Dioxide
SPS	Sanitary and Phyto-Sanitary
SRF	State Revolving Fund
SWANCC	Solid Waste Agency of Northern Cook County
TC	Toxicity Characteristic
TCDD	2,3,7,8-Tetrachlorodibenzo-p-dioxin
TCLP	Toxicity Characteristic Leaching Procedure
TCP	2,4,5-Trichlorophenol
TCP	Transportation Control Plan
TMDLs	Total Maximum Daily Loads
TMI-1	Three Mile Island Unit 1 nuclear power plant
TMI-2	Three Mile Island Unit 2 nuclear power plant
TOC	Total Organic Carbon
TRI	Toxic Release Inventory

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TRPA	Tahoe Regional Planning Agency
TSCA	Toxic Substances Control Act
TSD	Treatment, Storage, and Disposal
TSDFs	Treatment, Storage, and Disposal Facilities
TSS	Total Suspended Solids
TTHMs	Total Trihalomethanes
TVA	Tennessee Valley Authority
$\mu\text{g}/\text{m}^3$	Micrograms per cubic meter (of air)
$\mu\text{g Pb}/\text{dl}$	Micrograms of lead per deciliter (of blood)
$\mu\text{g Pb}/\text{m}^3$	Micrograms of lead per cubic meter (of air)
U.N.	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
USDA	United States Department of Agriculture
USEPA	United States Environmental Protection Agency
USGS	United States Geological Survey
UST	Underground Storage Tank
VCP	Voluntary Cleanup Program
VOCs	Volatile Organic Compounds
WARC	Water and Air Resources Commission
WLAs	Wasteload Allocations
WQC	Water Quality Criteria
WQSs	Water Quality Standards
WQTP	Water Quality Trading Policy
WTO	World Trade Organization
WWTP	Wastewater Treatment Plant
ZEV	Zero Emission Vehicle



## Table of Cases

The principal cases are in bold type. Cases cited or discussed in the text are roman type. References are to pages. Cases cited in principal cases and within other quoted materials are not included.

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