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**ENVIRONMENTAL  
PROTECTION**  
**Law and Policy**

*Seventh  
Edition*



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# ASPEN CASEBOOK SERIES

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## ENVIRONMENTAL PROTECTION

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### Law and Policy

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#### Seventh Edition

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Wolters Kluwer

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Published by Wolters Kluwer in New York.

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Wolters Kluwer  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-4935-3

#### Library of Congress Cataloging-in-Publication Data

Glicksman, Robert L., author.

Environmental protection : law and policy / Robert L. Glicksman, J.B. & Maurice C. Shapiro Professor of Environmental Law, The George Washington University Law School; David L. Markell, Steven M. Goldstein Professor and Associate Dean for Environmental Programs, Florida State University College of Law; William W. Buzbee, Professor of Law, Georgetown University Law Center; Daniel R. Mandelker, Howard A. Stamper Professor of Law, Washington University School of Law; Daniel Bodansky, Foundation Professor of Law, Center for Law and Global Affairs' Faculty Co-Director, Arizona State University Sandra Day O'Connor College of Law; Emily Hammond, Professor of Law, The George Washington University Law School.—Seventh Edition.

pages cm.—(Aspen casebook series)

ISBN 978-1-4548-4935-3

I. Environmental law—United States. I. Markell, David L., author. II. Buzbee, William W., 1960- , author. III. Mandelker, Daniel R., author. IV. Bodansky, Daniel, author. V. Hammond, Emily (Law teacher), author. VI. Title.

KF3775.G57 2015

344.7304'6—dc22

2014044813

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## ENVIRONMENTAL PROTECTION

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## PREFACE TO THE SEVENTH EDITION

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Environmental law continues to be characterized by political ferment and corresponding legal change. Although many central cases and statutory frameworks remain stable, environmental law demands attention to statutory and regulatory amendments, changes in agency policy, and the issuance of important new cases. Regular revision of environmental law casebooks is therefore indispensable to ensure that students are exposed to the current state of the law and its implementation. The seventh edition of this casebook has been thoroughly updated to reflect recent and proposed changes in environmental law.

Several key actors have made significant changes in U.S. environmental law since publication of the sixth edition, many of which relate to the intersection of environmental law and energy production and use. First, administrative agencies have embarked on bold new policy initiatives, such as the federal Environmental Protection Agency's efforts to reduce greenhouse gas emissions that contribute to climate change by adopting regulations that require greater fuel efficiency in cars and trucks and proposed regulations to limit these emissions from fossil fuel-fired power plants. Second, many states and local governments have continued to serve in their fundamental roles as laboratories in developing and implementing innovative environmental policy. California, for example, continued to implement its Global Warming Solutions Act. Third, as has been true since the advent of modern environmental law, the courts at both the federal and state levels have issued decisions that signaled expanded opportunities to promote environmental protection in some cases and narrowed such opportunities in others. The viability of common law causes of action has continued to receive attention, for example, as reflected in the Supreme Court's 2011 decision in *American Electric Power Co. v. Connecticut*. The seventh edition of this book takes account of developments in all three arenas.

We have not added any new chapters to this edition. We have made significant changes in many of the book's chapters and updated developments in all of them. For example, Chapter 2 assesses the impact of the Supreme Court's 2012 decision addressing the constitutionality of the Affordable Care Act for the application of the Constitution's federalism provisions to environmental law statutory and regulatory programs. We also have moved coverage of dormant Commerce Clause issues from Chapter 8 to Chapter 2, so that students can better understand the relationships among federalist doctrines such as preemption and the dormant Commerce Clause.

We have made significant additions to and revisions of Chapter 6, some in response to suggestions of casebook users. We have moved materials on motor vehicle pollution from the casebook's website to the text and combined that coverage with the materials on regulation of mobile source emissions in nonattainment areas. We also have moved from the website to the text our coverage of hazardous air pollutants and expanded that coverage with excerpts from recent cases involving

implementation of the 1990 Clean Air Act Amendments. We have deepened our coverage of the Clean Air Act by better integrating analysis of the relationships among the various statutory programs to control stationary sources, focusing on how these relationships affect strategies of regulators and regulated entities. We added as a new principal case the Supreme Court's 2014 decision in *EPA v. EME Homer City Generation*, dealing with the intractable problem of interstate air pollution.

In Chapter 7, we reorganized coverage of the threshold questions governing the scope of the Clean Water Act's application, including excerpts from the U.S. Army Corps of Engineers' proposed regulations defining the key term "waters of the United States." In Chapter 8, we have moved coverage of the Federal Insecticide, Fungicide, and Rodenticide Act from the casebook's website to the text and compared and contrasted that statute's regulatory strategies with those of the Toxic Substances Control Act.

Chapter 10 adds the Supreme Court's 2012 decision in *Sackett v. EPA* as a principal case. This decision addresses important issues concerning the scope of EPA enforcement authority and the availability of judicial review to check agency action. Chapter 10 also covers new innovations in EPA enforcement policy, including the agency's Next Generation Compliance initiative.

Chapter 12's coverage of the science and laws relating to climate change law has been thoroughly updated, including comprehensive coverage of EPA's efforts to address climate change under the Clean Air Act. The chapter now includes as a principal case the Supreme Court's decision in *American Electric Power Co., Inc. v. Connecticut*, discussed above, and the Court's other important 2014 Clean Air Act decision, *Utility Air Regulatory Group v. EPA*, which addresses the legality of EPA efforts to regulate greenhouse gas emissions by stationary sources. Chapter 12 also now includes coverage of the Durban Platform, adopted at the Durban Conference of the Parties, which launched negotiations to develop a new legal protocol under the UN Framework Convention on Climate Change.

As we have done in previous editions, we have made an effort to enhance student accessibility and instructor teachability by adding new principal cases and other primary documents that we regard as good teaching vehicles, revising note materials, creating new problems, and enhancing clarity through devices such as visual aids.

We will continue to track recent developments and make our analyses available to casebook users both in the annual professors' updates made available by the publisher every summer and at the casebook's companion website. We plan to provide comprehensive updates of the entire book each summer. In addition, we will provide individual chapter updates, which may appear more frequently. To access these materials, go to the website address, [http://www.aspenlawschool.com/books/glicksman\\_environ7e/default.asp](http://www.aspenlawschool.com/books/glicksman_environ7e/default.asp), and click on Professor Materials. You will be asked to type in the password, which is glicksman2015. The annual updates will appear under the heading Updates and Supplemental Materials. Individual chapter updates in two formats will appear directly below the annual updates. Finally, we may post recent cases and other Supplementary Documents on a chapter-by-chapter basis.

Given the dynamic nature of environmental law, it is crucial to bring new perspectives to bear on the subject. Beginning with the third edition, several new co-authors, each with extensive experience in the field and a host of valuable

insights, have been added to participate in the composition of the book. With this edition, we welcome our newest co-author, Emily Hammond, Professor of Law at the George Washington University Law School. Before joining the GW Law faculty in 2014, Professor Hammond taught at the University of Oklahoma College of Law and Wake Forest School of Law, and visited at the University of Texas, Florida State University, and the University of Georgia. Professor Hammond teaches and writes in the areas of environmental law, energy law, and administrative law. She has taken over responsibility for preparing Chapter 7, on water pollution, for this edition. A more complete biography is available at the casebook's website or on the faculty page of GW Law School's website.

We have many people to thank for this publication. We start by thanking Carol McGeehan, the initial editor for the casebook and now Publisher at Wolters Kluwer Law & Business. Carol has consistently supported our efforts over the more than thirty years of this book's lifespan. Similarly, we owe much to our current editor, Kathy Langone, who has efficiently and effectively shepherded the book through the publication process and provided all the help we requested, and more. Geoffrey Lokke did excellent work leading the copy editing process. We also thank the Deans at our respective law schools for providing both moral and financial support for our efforts, and our colleagues at other law schools whose interests overlap with ours and whose insights into environmental law have informed our work.

Finally, we would be remiss if we did not take this occasion to thank the casebook's original three authors. The first is Dan Mandelker, the Howard A. Stamper Professor of Law at the Washington University in St. Louis School of Law, and the nation's unparalleled expert on the National Environmental Policy Act. Dan continues to be responsible for preparation of Chapter 4 of this book, on NEPA. The second is Frederick R. Anderson, who passed away this year at far too early an age. Fred had an extraordinary career that included serving as the founding president of the Environmental Law Institute, the founding board chair of the Center for International Environmental Law and the Institute for Governance and Sustainable Development, dean of American University's Washington College of Law, and a partner at the law firms of McKenna Long & Aldridge and Cadwalader, Wickersham & Taft. The third founding author is A. Dan Tarlock, Distinguished Professor of Law and Director of the Program in Environmental and Energy Law at the Illinois Institute of Technology Chicago-Kent College of Law. A prolific author in the fields of environmental law, international environmental law, and water law, Dan served as the chair of a National Academy of Sciences/National Research Council committee to study water management in the western United States, was the principal report writer for the Western Water Policy Review Advisory Committee, and has been a member of a standing National Research Council committee to advise the U.S. Army Corps of Engineers on future challenges such as climate change to their missions. Professors Anderson, Mandelker, and Tarlock are among a very short list of legal academics who helped create the modern field of environmental law. Without their efforts, this book would never have existed and the current authors would not have had the opportunity to contribute to its development. We are all profoundly grateful for that opportunity and for all that the three original authors have taught us. Any errors that appear in the book are of course the responsibility of the current author group.



We encourage users of this casebook to forward their thoughts on and suggestions for improvements on any future editions to any of us. As indicated earlier in this preface, we have benefited from suggestions by casebook users in making changes to the book that appear in this edition. Our e-mail addresses are available at the casebook's website.

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December 2014

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## ACKNOWLEDGMENTS

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Any casebook is a collaborative effort among many people. Professor Glicksman would like to thank Interim Dean Gregory Maggs and Dean Blake Morant for facilitating work on this project. Professor Markell would like to thank Katie Miller, FSU Research Center, for very helpful research assistance, and Florida State University College of Law and Dean Don Weidner for research support for this project. Professor Hammond would like to thank Alina Buccella, Wake Forest University School of Law 2015. With gratitude, we would like once again to acknowledge Carol McGeehan, Publisher, Wolters Kluwer Law & Business, and our first editor, for her support. We also thank Kathy Langone, our Developmental Editor at The Froebe Group, and Geoffrey Lokke, our Production Editor, for helping us to navigate the publication process for the seventh edition.

The authors gratefully acknowledge the permissions granted to reproduce the following materials.

Bodansky, Daniel M., *The Art and Craft of International Environmental Law*, adapted and reprinted by permission of the publisher from the *Art and Craft of International Environmental Law* by Daniel Bodansky, pp. 99, 154-155, 186-187, 192, 206, 208, 210-212, 214-215, 223. Cambridge, Mass.: Harvard University Press, Copyright © 2010 by the President and Fellows of Harvard College.

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To Emily and Bertie

*R.L.G.*

To Mona, Rebecca, Jenny, and Rachel,  
and in honor of my parents,  
William Markell (1923-2009)  
and Elaine Markell

*D.L.M.*

To Lisa, Tian, and Seana, and to my parents,  
John and Ellen Buzbee

*W.W.B.*

To all my children and grandchildren

*D.R.M.*

To Anne, Maria, and Sarah

*D.M.B.*

To Joel, Arielle, Landon, and Scarlett

*E.H.*

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