

ASPEN CASEBOOK SERIES

GLICKSMAN  
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ENVIRONMENTAL  
PROTECTION  
Law and Policy

*Sixth  
Edition*



Wolters Kluwer

Law & Business

# ASPEN CASEBOOK SERIES

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## ENVIRONMENTAL PROTECTION

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### Law and Policy

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#### Sixth Edition

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**Wolters Kluwer**

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

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www.AspenLaw.com

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Attn: Permissions Department  
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New York, NY 10011-5201

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Aspen Publishers  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-9430-2

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

Environmental protection : law and policy / Robert L. Glicksman . . . [et al.].—6th ed.  
p. cm.—(Aspen casebook series)

ISBN 978-0-7355-9430-2 (casebound : alk. paper)

1. Environmental law—United States—Cases. I. Glicksman, Robert L.

KF3775.E547 2010  
344.7304'6—dc22

2010049412

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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, and to my parents,  
David and Beverly Bodansky

*D.M.B.*

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## PREFACE TO THE SIXTH 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 sixth edition of this casebook has been thoroughly updated to reflect recent and proposed changes in environmental law.

Environmental law often develops in response to dramatic events, but it is also shaped by longer-range phenomena. During the four years since publication of the fifth edition, environmental law and policy have been most affected by a stunning event—the April 2010 explosion in the Macondo well at the Deepwater Horizon mobile offshore drilling unit owned by Transocean Ltd. and leased to a BP affiliate, which led to the spill of millions of barrels of oil into the Gulf of Mexico—and a longer-range phenomenon, global climate change. We have analyzed throughout this edition the manner in which the Deepwater Horizon oil spill and climate change have affected environmental law and policy and are likely to do so in the future.

The Deepwater Horizon oil spill raised issues relating to virtually every corner of environmental law, including common law liability, judicial review and aspects of administrative law, environmental assessment, endangered species protection, water pollution, and remediation and liability for oil spills. We treat these issues at appropriate places throughout the book. In addition, we have reconceived our treatment of environmental remediation by adding a new section to Chapter 9 that compares the tools for responding to spills of chemicals and oil under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); the Resource Conservation and Recovery Act (RCRA); and the Oil Pollution Act of 1990. This section of Chapter 9 includes for the first time coverage of both the remediation and liability schemes under the Oil Pollution Act.

Global climate change has dominated both the media coverage and the policymaking arena of environmental law during the last four years. Climate change issues are addressed by the media virtually every day. The debate over whether and how to address climate change in Congress and the states has been furious and contentious. Like the Deepwater Horizon spill, climate change issues affect virtually every aspect of environmental law; consequently, references to climate change appear in most of the book's chapters. In previous editions, we covered climate change most extensively in a section of the chapter on air pollution. We decided that the importance of global climate change warranted coverage in its own chapter, so the sixth edition includes a new chapter (12) on climate change that



comprehensively addresses the legal and policy ferment surrounding the environmental challenges it presents. The House of Representatives enacted a bill in 2009 that would have taken steps to mitigate greenhouse gas emissions and, to a much more limited degree, to assist in adaptation to climate change. The Senate failed to enact its own bill, likely dooming efforts to pass a comprehensive climate change bill for the foreseeable future. Since congressional debate in 2009 and 2010 framed the issues and regulatory design choices that policymakers will continue to face, including whether it makes sense to address climate change at all, we provide summaries and questions regarding the leading bills' choices and sources of controversy. Chapter 12 also provides new materials regarding climate change science and the anticipated environmental and social effects of a changing climate. We also provide readings concerning the political and economic obstacles that hinder legal responses to climate change, and the menu of policy options available to address climate change. In addition, we provide new materials on enacted climate laws and regulatory initiatives, including state climate initiatives, federalism debates over the state climate role, and climate-related actions under existing statutory and regulatory programs, including, most prominently, Environmental Protection Agency regulatory actions that have started the nation on the path to regulation of greenhouse gas emissions under the Clean Air Act. This new chapter closes by providing discussion and cases utilizing common law causes of action to combat climate change as well as a comprehensive but succinct survey of international law responses to the threats posed by climate change.

We have changed (and, we hope, enhanced) the book in other ways. The sixth edition includes more expansive and in-depth coverage in Chapter 11 of international environmental law questions. This expanded coverage reflects the growing importance of that field as well as the addition of a new co-author, described below, who is one of the leading experts on both international environmental law and climate change. We also have enriched our coverage of federalism issues in Chapter 2 by adding readings and materials on regulatory, judicial, and legislative actions that affect the allocation of policymaking authority between the federal government and the states. This additional coverage allows instructors interested in focusing more heavily on federalism questions to do so. As indicated above, the material on climate change in Chapter 12 also include a section on federalism. Both federalism and international environmental law issues continue to crop up throughout the text.

We have, of course, updated the materials throughout the book, adding new principal cases and other primary documents, revising note materials, creating new problems, and making an effort to enhance clarity through devices such as visual aids. The materials on climate change, in particular, include many new diagrams to assist understanding of climate change challenges and legal responses. The new principal cases include important Supreme Court decisions issued since the publication of the last edition under the Endangered Species Act (*National Association of Home Builders*), the Clean Air Act (*Duke Energy* and *Massachusetts v. EPA*), the Clean Water Act (*Coeur Alaska*), CERCLA (*Burlington Northern & Santa Fe Ry.* and *Atlantic Research*), and the dormant Commerce Clause (*United Haulers*). Important circuit court decisions also appear as new principal cases in the chapters on air pollution and environmental contamination remediation, among others. We have made a special effort to tighten the textual and note materials to enhance student accessibility and instructor teachability. Among other things, we have broken

off some of those materials into self-contained “Notes on” segments that instructors can choose to cover or omit, depending on the emphasis they wish to provide. 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 website, <http://docs.law.gwu.edu/facweb/rglicks/index.htm>, which is periodically updated.

Given the dynamic nature of environmental law, it is crucial to bring new perspectives to bear on the subject. Beginning with the third edition, a series of 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. Given the increasing importance of international environmental law and the emphasis on climate change law and policy since the publication of the fifth edition, we decided it was time to add a co-author with expertise in these areas to help with the sixth edition. We therefore welcome as the newest co-author Professor Daniel Bodansky of the Arizona State University Sandra Day O’Connor College of Law. Professor Bodansky is a prominent authority on global climate change whose teaching and research has focused on international environmental law, public international law, and sustainability. He has served as the climate change coordinator and attorney-advisor at the U.S. Department of State, and has consulted for the United Nations in the areas of climate change and tobacco control. Since 2001 Professor Bodansky has been a consultant and senior advisor for the Pew Center on Global Climate Change. Professor Bodansky has reconceived and expanded the book’s chapter on international law and written the new materials in Chapter 12 on the international law aspects of global climate change.

We encourage users of this casebook to forward their thoughts on and suggestions for improvements on any future editions to any of us. Our e-mail addresses are available at the casebook’s website.

*Robert L. Glicksman*  
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November 2010

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## ACKNOWLEDGMENTS

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Any casebook is a collaborative effort among many people. Professor Glicksman would like to thank Dean Fred Lawrence for facilitating work on this project and GW Law LLM and JD students Jessica Werber and Melissa Dolan for valuable research assistance. Professor Markell would like to thank Christian Cutillo, FSU College of Law '11, for very helpful research assistance, and Florida State University College of Law and Dean Don Weidner for research support for this project. Professor Buzbee would like to thank Emory Law School students and research assistants Gina Von Sternberg and Franklin Chu for their help with revisions to Chapters 1 and 2, Chapter 9 materials on oil spills, and portions of Chapter 12's new coverage of climate change law. With gratitude, we would like once again to acknowledge Carol McGeehan, our first editor, of Aspen Publishers for her support in bringing this edition to print. We also thank Kathy Langone, our Developmental Editor at Aspen Publishers, and Lisa Connery, Project Manager at Publication Services, Inc., for helping us to navigate the publication process for the sixth 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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