

Kenneth A. Manaster

ENVIRONMENTAL PROTECTION AND JUSTICE

Readings and Commentary on Environmental Law and Practice

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Readings and Commentary
on Environmental Law and Practice

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CINCINNATI
ANDERSON PUBLISHING CO.

MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE

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Library of Congress Cataloging-in-Publication Data

Environmental protection and justice: readings and commentary on environmental law and practice /
Kenneth A. Manaster.

p. cm.

Includes bibliographical references.

ISBN 0-87084-253-6

1. Environmental law – United States. 2. Legal ethics – United States. 3. Environmental ethics –
United States. 4. Environmental responsibility – United States. 5. Hazardous waste sites – Location –
United States. I. Manaster, Kenneth A.

KF3775.E546 1995

344.73'046 – dc20

[347.30446]

95-7757

CIP

Acknowledgments

I wish to express my appreciation and admiration for the talented research assistance of the following Santa Clara law students who helped greatly in the preparation of this book: Brian Frank, Alexandra McClure, Ted Stevens, and Amy Treadwell. Additionally, the students in the Environmental Law Seminar at Santa Clara in 1993 and 1994 provided invaluable responses to earlier versions of this material.

My thanks go to Barbara Friedrich, Reference Librarian, and to Angeles De Leon and Dorothy Madden, Administrative Assistants, for their generous and hard work. The gracious support of Dean Gerald F. Uelmen, Dean Mack A. Player, and Santa Clara University was indispensable to the completion of this book. The interest and guidance of Dee Dunn and Glen Weissenberger for Anderson Publishing Co. also have meant a great deal to me.

My deepest gratitude is to my family: To my daughter, Jenny, for her enthusiastic interest in this project; my son, Cole, for the extra opportunities he gave me to think about this work (and even this sentence) during nighttime feedings in his first 4½ months; and most especially to my wife, Ann Brandewie, for her unfailing support and so much more for which I am thankful beyond words.

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Chapter 1

Introduction

A. The Role of the Environmental Lawyer

1. Overview

It is easy to describe the broad purposes of environmental law. Lawyers, judges, legislators, and others working on environmental matters readily speak of the need to protect the quality of the Earth's environment for the benefit of human health and welfare. Similarly, the importance of safeguarding diverse species of plants and animals, and of maintaining a safe and "livable" world for future generations, also is declared in a multitude of statutes, judicial decisions, and other legal pronouncements. The seriousness of these objectives cannot be overstated.

Impressive statutory declarations of these purposes consistently are found in the seminal environmental legislation of the late 1960's and early 1970's, as well as in more recently enacted laws. This repetition reflects more than mere oratorical custom. Instead it highlights the continuing, complex challenge faced by the United States and other nations to take much better care of the global environment.

A large corps of environmental lawyers has developed to work with these environmental protection goals and with the regulatory measures that implement them. These lawyers can be found, of course, in the national environmental law groups that were formed in the halcyon days of the environmental movement beginning in the late 1960's. There are even more environmental lawyers in government agencies and law enforcement offices at the federal, state, regional, and local levels.

Additionally, environmental lawyers are now employed in an infinite variety of regulated entities, including manufacturing corporations, electric utilities, construction companies, food processing firms, waste disposal companies, universities, and mining and other natural resource development ventures. Government agencies that engage in waste disposal, construction, resource development, or other polluting activities also have found it necessary to include environmental lawyers on their staffs. Finally, private law firms now commonly have environmental lawyers within their ranks.

In light of this increasing diversity in the clientele served by environmental lawyers, it becomes increasingly difficult to understand how the work of environmental lawyers links to the broad environmental protection goals our society has declared. In other words, how do we answer the general question often asked by non-lawyers: "What do environmental lawyers do?"

At a very superficial level of discourse, of course, the question is not troublesome: The environmental lawyer responds to environmental protection goals and requirements from the perspective of his or her specific client. This legal work usually places the environmental lawyer in the midst of a process for the resolution of disputes over the standards of conduct that are to govern certain activities that have environmental side-effects.

To describe the attorney's role in this general way is to present a bland description of the environmental lawyer as merely a "hired gun," possessing no personal, environmental values. Clearly that description would not be accepted by the environmental lawyers who represent environmental groups, whether national or local and whether concerned with a broad range of environmental issues or having a single-issue focus. Those lawyers, since the inception of this field, have worked with passion and skill for the strong environmental values they share with their clients.

Beyond this category of environmental lawyers, however, it is less evident that client representation and environmental values are in harmony. Particularly difficult to reconcile is the role of the environmental lawyer who serves a regulated entity—a polluter or developer—on the proverbial "other side of the fence." This is, of course, where most attorneys working in this field are found nowadays. Must we conclude that these modern environmental lawyers, serving these types of clients, either are devoid of concern for environmental protection, or are compelled to set aside their environmental sensibilities if they wish to provide effective representation to a regulated entity? This question is distressing, particularly when pondered by idealistic law students and young lawyers contemplating a career in environmental law.

Before the question can be answered, its implicit premise should be examined. The premise is that any regulated entity by definition is opposed to environmental protection goals and their associated requirements. The good guys—bad guys dichotomy that has characterized much environmental policy debate seems to rest on this premise. In contrast, the experience of environmental lawyers for polluters and developers, and of environmental regulators as well, tends increasingly to undercut the validity of the premise. Few, if any, regulated interests still wish to be free of all, or even most, environmental protection obligations. Whatever vestiges of such an attitude may have been encountered in the early years of environmental law now have largely disappeared,¹ but the rhetoric of our political debates does not usually recognize this.

In this modern context, it is usually both simplistic and erroneous to see the regulated entity's objectives as "anti-environmental," and thus to see its lawyer as just a hired

¹ "Recent public opinion polls have shown widespread support for strong environmental protection programs. Increasingly, we also find that the level of environmental sensitivity within the business community mirrors the rising level of public concern for environmental quality. Indeed, we can assume that at least some of the people who express support for environmental protection in opinion surveys are the same people charged with environmental protection duties in industry. . . . [W]e identify good guys and bad guys, yet we know that we distort the truth in doing so." Kenneth A. Manaster, "Ten Paradoxes of Environmental Law," 27 *Loyola of Los Angeles Law Review* 917, 932-33 (1994).

gun uncritically serving such objectives. In contrast to that view of the environmental lawyer's role, the thesis underlying these readings is quite different. The thesis is that environmental lawyers serving regulated entities, as well as environmental lawyers serving any other type of client, seek to reconcile environmental protection goals with important concepts of justice. That is the distinctive and challenging role lawyers perform in the making and implementation of environmental policy.

This role distinguishes environmental lawyers from the other active participants in environmental processes, most notably the scientific and technical experts who are of increasing importance as environmental laws and regulations become more and more complex. Most of the legal standards environmental lawyers work with nowadays are highly technical in nature. Many environmental managers and consultants are becoming extremely adept at understanding, interpreting, and applying these standards—often without the aid of lawyers. As this trend develops, it might appear that lawyers have less and less to add to environmental regulatory processes,² other than their training in the procedures of lawmaking and dispute resolution, and their customary comfort with public speaking in various settings. Surely that training, and that capability of serving as an articulate spokesperson, enable the environmental lawyer to make distinctive contributions of a sort that cannot be made by environmental engineers, chemists, biologists, toxicologists, hydrogeologists, and other such experts. But that is not all the lawyer brings. The lawyer's training and skills, coupled with the lawyer's professional responsibility to work toward a more just society, enable the environmental lawyer to make a unique contribution: To promote environmental quality while at the same time promoting claims for justice—for fair and equitable treatment—in the processes and outcomes the legal system produces. This sensitivity to fundamental values—both environmental and nonenvironmental—and this responsibility to work to reconcile them when conflicts appear, are hallmarks of the environmental lawyer's role.

Although the modern environmental lawyer works almost constantly with technical experts, the lawyer—whether representing a regulatory agency or an industrial polluter, a citizens group or a municipal landfill operator—is not just one more technical expert on the client's team. The environmental lawyer's role ultimately is much more than that: It is to protect the environment and to serve justice. These readings seek to illuminate some of the most important problem areas in which environmental lawyers are called upon to meet this difficult, dual responsibility.

Whether the reader studies all of this book, or only selected chapters, it is the author's

² A very negative view of environmental lawyers was indicated in a 1993 news report that the Administrator of the U. S. Environmental Protection Agency hoped to reduce litigation under the federal Superfund program “by suggesting, among other solutions, that corporations bypass lawyers by sending their CEOs to negotiate with senior EPA officers. ‘This is not to denigrate lawyers,’ she says, ‘but the CEO can see the company’s interest as a whole and will often move when his lawyers are paralyzed.’” “Toxic Dumps: The Lawyers’ Money Pit,” *Time*, September 13, 1993, at 64.

A more positive assessment of modern lawyers, including environmental lawyers, is suggested in Robert C. Clark, “Why So Many Lawyers? Are They Good or Bad?” 61 *Fordham Law Review* 275 (1992).

hope that the reader will gain greater understanding of this responsibility. With such understanding, it also is hoped that the reader will approach both career planning and the actual practice of environmental law with more of the clarity, commitment, and personal integrity that environmental protection and justice deserve.

The last portion of this Chapter 1 explores ethical concerns arising from possible conflicts between the lawyer's own environmental values and the lawyer's duty to the client. In Chapter 2 various concepts of justice are introduced, providing a reference point for later chapters' examination of specific types of legal disputes and their stakes. Chapter 3 addresses the great variety of factors that influence the setting of regulatory priorities in environmental policy, and that thereby allocate the benefits and burdens of environmental protection programs.

Chapters 4, 5, and 6 focus on the types of justice concerns that arise most commonly in the practice of environmental law. These chapters examine fairness issues that arise in three major facets of environmental law, *viz.*, the selection of targets for enforcement or cleanup action, the processes for administering and enforcing environmental standards, and access to decisional processes and data.

Finally, Chapter 7 addresses the extraordinarily complex mixture of environmental protection and justice interests that come into play in controversies over the siting of polluting or risk-creating activities. As will be seen, these siting disputes bring together virtually all of the major environmental concerns and concepts of justice examined in the preceding chapters.

Especially in Chapter 7, as well as in portions of the preceding chapters, the concerns often labeled nowadays as "environmental justice" will be presented, *i.e.*, the impacts of environmental law and regulation on low-income and minority communities. The readings thus address the fundamental claims for fairness and equity that the "environmental justice movement" raises. At the same time, however, and without diminishing the gravity and urgency of those claims, this book is intended to remind us that justice is an essential aspect of the environmental lawyer's responsibility for all types of cases and for all types of clients.

2. The Changing Marketplace

Although environmental law has continued to grow as a practice area, even when demand for other legal specialties has diminished, there are forces at work in the legal marketplace that increasingly will change environmental practice. These changes further compel the attorney to consider carefully his or her role, responsibilities, personal values, and professional objectives.

Ross Sandler, "Where the Jobs Are," *The Environmental Forum*, Volume 10, Number 6, Nov.-Dec. 1993, at 12.

More industrial firms will turn to in-house personnel to handle regulatory environmental affairs. It is cheaper and the work has [become] and will continue to become more

routine. Non-lawyer environmental managers can handle much of the work. Most regulatory work at environmental agencies is performed by non-lawyers. It should be of no surprise that the regulated community also will come to rely on non-lawyers to interact with their counterparts at the agencies.

Engineering firms will hold their own and perhaps even grow at the expense of the law firms. There is substantial overlap between what engineering firms and law firms do in the regulatory area. For many projects, there is no particular reason why a competent engineer cannot handle most regulatory matters, except those involving enforcement proceedings. Environmental lawyers all know horror stories about engineers or other non-lawyers who have caused major problems. But for a large percentage of clients, the risk of a mistake is not large enough to hire both a lawyer and an engineer. With obvious overlap between the professions, cost becomes a major factor, and cost favors the engineer.

Environmental law will not retreat to the world of the 1970's. Regulations and the needs of clients have expanded far too much for that to occur. But it does appear that the pendulum is swinging in favor of firms with regulatory skills rather than litigation skills, in favor of geographical advantage over national practice, in favor of firms with lower fee schedules rather than higher, and in favor of non-lawyers for many routine or regulatory matters. There will, of course, be wide variation from firm to firm and area to area. Nonetheless, these structural forces in the marketplace should have a pronounced impact on the environmental law field for the remainder of [the] 1990s.

B. Ethical Concerns: The Lawyer's Values Versus Duty to the Client

Obviously in environmental law practice, as in all other fields of law, the lawyer works for a client and seeks to further the client's immediate objectives. Thus service to the client provides the context in which the fundamental role of the environmental lawyer is performed. Some environmental lawyers appear to work in a rather different context, for they enjoy the luxury, in effect, of being able to set their client's objectives, or at least to guide them to a very great extent. This is the heady experience of lawyers in public interest, environmental law firms. The firm and the client are essentially one and the same, often with only an advisory board or board of trustees signifying a distinction. Even lawyers in government enforcement offices, such as a state attorney general's office, at times enjoy broad latitude to set the environmental agenda for the client, the people of the jurisdiction.

Ordinarily, however, there is a real client—an individual, a company, a group of citizens, a trade association, an elected or appointed government official, or a governmental board—whose needs and concerns provide the impetus for the environmental lawyer's work. The readings in this book illustrate some of the most basic problem areas in which environmental lawyers seek to serve such clients and at the same time work for environmental protection and justice.

Preliminarily, however, the lawyer-client relationship presents a more personal and