

JERRY L. ANDERSON & DENNIS D. HIRSCH

ENVIRONMENTAL LAW PRACTICE

PROBLEMS AND EXERCISES FOR SKILLS DEVELOPMENT

THIRD EDITION

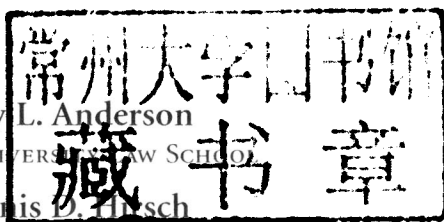


ENVIRONMENTAL LAW PRACTICE

*Problems and Exercises for
Skills Development*

THIRD EDITION

Jerry L. Anderson
DRAKE UNIVERSITY LAW SCHOOL
Dennis P. Hirsch
CAPITAL UNIVERSITY LAW SCHOOL



CAROLINA ACADEMIC PRESS
Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Anderson, Jerry L. (Jerry Linn), 1959-
Environmental law practice : problems and exercises for skills development /
Jerry L. Anderson, Dennis D. Hirsch. -- 3rd ed.
p. cm.
Includes index.
ISBN 978-1-59460-813-1 (alk. paper)
1. Environmental law--United States--Problems, exercises, etc. I. Hirsch,
Dennis D. (Dennis Daniel), 1962- II. Title.

KF3775.Z9A53 2010
344.73'046076--dc22

2010002269

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

ENVIRONMENTAL LAW PRACTICE

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

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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.

ACKNOWLEDGMENTS

Several people have made important contributions to this third edition. In addition to our spouses, to whom this book is dedicated and who provided much support during the latest revision of the book, we want to acknowledge the contributions of, and to thank, Drake law student Katie Kowalczyk, Stetson law student Samantha Hagio, and Capital law student Daniel Lenert, who provided highly capable, insightful and thorough research assistance. We would also like to thank the Capital University Law School and the Drake University Law School Endowment Trust which provided summer research grants to support the writing of this third edition.

Acknowledgments for the First and Second Editions:

Many people assisted us in bringing this project to fruition. We want to thank the following:

Drake law students Michael Angell, Shraddha Upadhyaya, Letticia Rodriguez, Paul Johnson, Patricia Ashton, Liz Williams, Hayley Hanson, Ronald Bailey, Angela Doss, and Erin Sass, and Capital law students Sonja Rawn and Summer Koladin provided able research assistance. The Rocky Mountain Mineral Law Foundation generously provided a grant to support the research for the book. Aimee Bentlage, Administrative Assistant to the Dean at Drake Law School, did a wonderful job proofing and editing the text. Drake Law Librarian Sandy Placzek went beyond the call of duty solving computer glitches and finding sources. Capital Law School librarians Jacqueline Orlando and Jane Underwood and Boston College Law School librarian Joan Shear provided insights on legal research. Britney Brigner of LexisNexis and Anthony Buscemi of Westlaw gave useful advice on how best to conduct on-line research. Susan Anderson provided her excellent editing acumen as well as her moral support.

We were also assisted by many of our colleagues in practice. From EPA's Region VII, Martha Steincamp, Regional Counsel, and Becky Dolph, Deputy Regional Counsel, provided valuable "real world" input and problem exam-

ples. Scott Fulton, Justina Fugh, Michael Goo, Geoffrey Wilcox, and Padmini Singh of the EPA's Office of General Counsel (OGC), and Suzanne Childress, Christina McCulloch, Carol Holmes and Joe Theis of the EPA's Office of Enforcement and Compliance Assurance (OECA) talked with us about the skills that are required for legal practice at the EPA. Angus Macbeth, David Buente, Sam Gutter, Jim Cahan, Larry Gutierrez, Tom Echikson, Margaret Spring and Alan Au of Sidley, Austin, Brown & Wood's environmental group provided input about the skills that are needed for environmental law practice at a private firm and provided us with useful source materials. The authors also thank Bill Beck, Terry Satterlee, and Alok Ahuja at Lathrop and Gage for environmental law practice advice.

Finally, we would like to thank several of our academic colleagues. Professors Jonathan Wiener at Duke, Richard Lazarus at Georgetown and Sandra Zellmer at Toledo provided valuable feedback on the concept for this book. Professors Zyg Plater at Boston College, Clifford Rechtschaffen at Golden Gate and Eileen Gauna at Southwestern provided valuable comments on the book, as did Michael Gerrard of the Arnold & Porter law firm.

In addition, we acknowledge the generosity of Capital University Law School and the Drake University Law School Endowment Trust which provided summer research grants to support the writing of the first and second editions of this book.

INTRODUCTION

The Goals of This Book

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. 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 *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 or computer terminal on their first environmental law research assignment with strategies and skills for finding the information they need.

The book also uses exercises and role plays to introduce you to the day-to-day tasks of environmental law practice. It covers four of the principal areas of environmental law practice: compliance counseling, administrative enforcement, environmental litigation (including citizen suits), and environmental policy. 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; and comment on an EPA proposed rule, 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.

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