

ASPEN PUBLISHERS

essentials

Environmental
Law and Policy

Jonathan R. Nash



Wolters Kluwer

Law & Business

ASPEN PUBLISHERS

essentials

Environmental
Law and
Policy

常州大学图书馆
藏书章

Jonathan R. Nash
*Professor of Law
Emory University*



Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

© 2010 Aspen Publishers. All Rights Reserved.
<http://lawschool.aspenpublishers.com>

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers
Attn: Permissions Department
76 Ninth Avenue, 7th Floor
New York, NY 10011-5201

To contact Customer Care, e-mail customer.care@aspenpublishers.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

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 978-0-7355-7966-8

Library of Congress Cataloging-in-Publication Data

Nash, Jonathan Remy.

Environmental law and policy : the essentials/Jonathan R. Nash.
p. cm.

Includes index.

ISBN-13: 978-0-7355-7966-8

ISBN-10: 0-7355-7966-0

1. Environmental law—United States. 2. Environmental policy—United States.
I. Title.

KF3775.N37 2010
344.7304'6—dc22

2010008574

essentials

Environmental
Law and
Policy

Editorial Advisors

Vicki Been

*Elihu Root Professor of Law
New York University School of Law*

Erwin Chemerinsky

*Dean and Distinguished Professor of Law
University of California, Irvine, School of Law*

Richard A. Epstein

*James Parker Hall Distinguished Service Professor of Law
University of Chicago Law School
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Stanford University*

Ronald J. Gilson

*Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School*

James E. Krier

*Earl Warren DeLano Professor of Law
The University of Michigan Law School*

Richard K. Neumann Jr.

*Professor of Law
Hofstra University School of Law*

Robert H. Sitkoff

*John L. Gray Professor of Law
Harvard Law School*

David Alan Sklansky

*Professor of Law
University of California at Berkeley School of Law*

Kent D. Syverud

*Dean and Ethan A.H. Shepley University Professor
Washington University School of Law*

Elizabeth Warren

*Leo Gottlieb Professor of Law
Harvard Law School*

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International, and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional, and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and health care reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals, and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas including securities law, intellectual property, mergers and acquisitions, and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date, and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel, and business executives around the world rely on the Kluwer Law International journals, looseleaves, books, and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms, and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

To my parents, Ellen and Stanley,
who taught me the essentials, and
so much more.

Preface

What interests you about environmental law? It may be the location of environmental law at the confluence of many different interesting areas of study: politics, economics, law, science, and sociology. Few areas of law can boast such interesting policy questions and such a strong interaction between law and science.

It may be the interesting nature of the practice of environmental law. Environmental law rests on complex statutes setting out policy goals and rules, intricate regulations that elucidate and expand on the statutes, and case law interpreting the statutes and rules. It is a challenging, enjoyable area of law.

It may be that the practice of environmental law enables you to serve society and fulfill important societal goals. If detailed study of regulations makes environmental law sound somewhat dry (and it need not), then consider the important societal role you play when you use the law to protect human health and the environment. Indeed, even if you represent interests that are sometimes thought to be antithetical to environmental interests—think of representing corporations that conduct businesses that generate pollution as a byproduct—realize that you may be able to help the corporation “do the right thing” through your representation.

This book is organized to accompany you during your study of environmental law. It is primarily designed to augment a

course that focuses on the pollution-control aspects of environmental law, as do (to my experience) most introductory survey courses in environmental law. These are statutory regimes, enacted by Congress and generally enforced by the Environmental Protection Agency (EPA), that are designed to regulate the generation of pollution in different media.

The book begins by discussing important fundamentals to the study and practice of environmental law. Chapter 1 discusses various justifications for environmental protection and raises important policy issues that go to the heart of the design of environmental laws. Chapter 2 provides an overview of two areas of law that are critical to understanding environmental law: constitutional law and administrative law.

Chapters 3 through 5 cover the major pollution control statutes: Chapter 3 discusses the Clean Air Act; Chapter 4 the Clean Water Act; and Chapter 5 the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act (which address the generation, treatment, and disposal of hazardous wastes on and in land).

Introductory environmental law courses often also include some coverage of statutes that seek to conserve natural resources. This book offers support in these areas. Chapter 6 discusses the protection of endangered and threatened species under the Endangered Species Act, and Chapter 7 addresses the important National Environmental Policy Act, which requires government decision makers to consider the environmental impact of government action.

The book concludes with overviews of two important areas of environmental law. Chapter 8 discusses the enforcement of the environmental laws, both by EPA and by private citizens. Chapter 9 discusses international environmental law, with a focus on its interplay and application in the domestic laws of the United States.

Although the book is designed to be used by students in an environmental law survey class, those studying natural resources will also benefit from much of the book's coverage. Chapters 1, 2, 6, 7, and 8 will all be relevant.

Finally, the book should be of use to students in areas other than those studying environmental law and environmental policy. In keeping with Aspen's Essentials Series, I have tried to write for an audience that has little or no background in law. Chapters 1 and 2 should be especially useful as an introduction to environmental law for non-law students.

I thank my wife Lori for her help and my son Theo for his support in preparing this book. I am also extremely grateful to the various editors from whose wisdom, suggestions, and care I benefited: Carol McGeehan, Taylor Kearns, Barbara Roth, and from Sylvia Rebert, project manager. The comments and suggestions of six anonymous reviewers were invaluable. Finally, I thank the students whom I taught at Tulane Law School, Hofstra Law School, the University of Chicago Law School, and Emory University School of Law; their comments and questions were immensely helpful as I thought about structuring and writing this book.

*Atlanta, Georgia
March 2010*

essentials

Environmental
Law and
Policy

Contents

Preface xv

CHAPTER 1

Environmental Policy and the Contours of Environmental Law 1

| | |
|--|----|
| Economics and Environmental Regulation | 4 |
| The Common Law and Environmental Problems | 9 |
| The Development of Modern Federal Environmental Law | 13 |
| The Tools of Modern Environmental Law | 13 |
| Environmental Law and Federalism | 20 |
| Environmental Law and the Administrative State | 25 |
| Enforcement in Environmental Regulation | 26 |
| Environmental Justice | 29 |
| Chapter Recap | 32 |

CHAPTER 2

Environmental Regulation, Constitutional Law, and Administrative Law 35

| | |
|-------------------------|----|
| Constitutional Law | 35 |
| Commerce Clause | 36 |
| Dormant Commerce Clause | 37 |

| | |
|---|----|
| Supremacy Clause | 39 |
| Eminent Domain and the Takings Clause | 41 |
| Administrative Law | 45 |
| Promulgating Regulations | 46 |
| Other Agency Responsibilities: Administrative Adjudication and Enforcement | 49 |
| Interpreting Statutes and Regulations | 50 |
| Chapter Recap | 51 |

CHAPTER 3

The Regulation of Air Pollution: The Clean Air Act 53

| | |
|---|----|
| Categories of Sources | 55 |
| NAAQS | 55 |
| State Implementation Plans | 57 |
| SIP Calls | 58 |
| Sanctions for Inadequate SIPs | 58 |
| Specific Federal Programs | 58 |
| Requirements Based on the Area's Ambient Air Quality | 59 |
| Nonattainment | 59 |
| Prevention of Significant Deterioration | 60 |
| New Source Review | 61 |
| Hazardous Air Pollutants | 63 |
| Sulfur Dioxide Emissions Trading | 64 |
| Regulation of Interstate Pollution Transport | 66 |
| State Freedom to Regulate Beyond the Clean Air Act | 68 |
| Title V Permitting | 68 |
| Mobile Sources | 69 |
| The Clean Air Act and International Law | 71 |
| Chapter Recap | 72 |

CHAPTER 4

The Regulation of Water Pollution: The Clean Water Act 75

| | |
|-----------------|----|
| Clean Water Act | 76 |
| Goals | 76 |

| | |
|--|----|
| The Federalism of the Clean Water Act: “Waters of the United States” | 76 |
| Point Sources versus Nonpoint Sources | 78 |
| Point Source Regulation and NPDES | |
| Permits | 80 |
| Effluent Limitations Under Section 402 Permits | 81 |
| Nonpoint Sources | 84 |
| State Freedom to Regulate Beyond the Clean Water Act | 85 |
| Water Quality Standards | 85 |
| TMDLs | 87 |
| Water Quality Standards and Interstate Considerations | 88 |
| The Clean Water Act and Foreign Disputes | 89 |
| Section 401 Certification | 89 |
| Section 404 Permitting | 90 |
| Safe Drinking Water Act | 92 |
| Chapter Recap | 93 |

CHAPTER 5

| | |
|--|-----------|
| The Regulation of Hazardous Wastes: RCRA and CERCLA | 97 |
| Solid Waste | 98 |
| Hazardous Waste | 99 |
| RCRA—Substantive Requirements | 101 |
| Generators | 101 |
| Transporters | 101 |
| TSDFs | 101 |
| Landfill Regulation | 102 |
| CERCLA | 102 |
| Hazardous Substances | 103 |
| Responses to Releases and Substantial Threats of Releases | 103 |
| CERCLA Liability | 104 |
| Overview | 104 |
| Scope | 105 |
| Who Is Liable? | 106 |
| The Nature of Liability | 108 |

| | |
|--|-----|
| Defenses | 109 |
| Severability and Contributors of Small Amounts | 110 |
| CERCLA Exceptions: Lenders | 111 |
| CERCLA Exceptions: Innocent Landowners | 112 |
| The Future of CERCLA Sites and the Problem of Brownfields | 113 |
| Other Federal Regulation of Hazardous Substances | 113 |
| Chapter Recap | 114 |

CHAPTER 6

The Protection of Endangered and Threatened Species: The Endangered Species Act 117

| | |
|--|-----|
| Administration of the ESA | 117 |
| Listing Species | 118 |
| Controversy over Listing | 120 |
| Downlistings and Delistings | 120 |
| Designation of Critical Habitat | 121 |
| ESA Restrictions | 121 |
| Restrictions on Federal Government Action: Consultation | 121 |
| Irrelevance of Cost and the Availability of Injunctive Relief | 123 |
| Exemptions from ESA Coverage | 124 |
| Restrictions on Public and Private Actions | 124 |
| Protection of Endangered Plants | 125 |
| Protection of Threatened Species | 126 |
| Incidental Take Permits | 126 |
| Chapter Recap | 126 |

CHAPTER 7

Introducing Environmental Concerns to Government Decision Making: NEPA 129

| | |
|----------------------------|-----|
| NEPA—Introduction | 129 |
| Overview of NEPA Procedure | 131 |

| | |
|--|-----|
| When Must an EIS Be Prepared? | 132 |
| What Is a Major Federal Action? | 133 |
| When Does a Major Federal Action Significantly Affect the Human Environment? — Substance | 134 |
| When Does a Major Federal Action Significantly Affect the Human Environment? — Procedure | 136 |
| Timing of the EIS | 137 |
| EIS Adequacy | 138 |
| Other Federal Information-Based Regulatory Provisions | 140 |
| Chapter Recap | 141 |

CHAPTER 8

Methods of Enforcement 143

| | |
|---|-----|
| Government Enforcement of the Environmental Laws Against Alleged Violators | 144 |
| Administrative Enforcement | 144 |
| Civil Enforcement | 145 |
| Calculating Penalties | 145 |
| Criminal Enforcement | 145 |
| Citizen Suits — Introduction | 146 |
| Citizen Suits Against EPA | 147 |
| Citizen Suits Against Violators | 148 |
| Standing | 150 |
| Executive and Legislative Control over EPA | 153 |
| Executive Branch Control over EPA | 153 |
| Legislative Branch Control over EPA | 153 |
| Chapter Recap | 154 |

CHAPTER 9

Regulation of the Environment at the International Level 157

| | |
|--|-----|
| The Genesis of International Environmental Law | 157 |
| International Environmental Treaty Regimes | 159 |
| Ozone Depletion, the Vienna Convention, and the Montreal Protocol | 159 |

Contents

| | |
|--|-----|
| Global Warming, the Framework Convention for Climate Change, and the Kyoto Protocol | 160 |
| The Relevance of Domestic Law | 162 |
| Chapter Recap | 164 |
| | |
| <i>Glossary</i> | 167 |
| <i>Index</i> | 179 |