

FEDERAL ENVIRONMENTAL LAW

*THE USER'S GUIDE
Third Edition*



*By
Olga L. Moya
Andrew L. Fono*

WEST®

Thomson Reuters created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson Reuters does not render legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

COPYRIGHT © 1997 WEST PUBLISHING CO.

© West, a Thomson business, 2001

© 2011 Thomson Reuters

610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-16045-4

FEDERAL
ENVIRONMENTAL LAW

THE USER'S GUIDE

Third Edition

By
OLGA L. MOYA
Professor of Law
South Texas College of Law

ANDREW L. FONO
Environmental Attorney
Haynes and Boone, L.L.P.

WEST®

A Thomson Reuters business

DEDICATIONS

To:

My husband, Richard F. Lewis, and my children, Leanessa and Taylor Byrd for all of your love and support. You each bring much joy to my life.

OLGA L. MOYA

To:

My wife Stephanie, and my three daughters, Alissa, Taylor and McKenna, and our zealously affectionate puppy Addie, for all your love, joy and support.

ANDREW L. FONO

ACKNOWLEDGMENTS

In preparing this book, we received invaluable help from various individuals and entities. We wish to thank South Texas College of Law, for its generous support of this project from inception to completion. We also wish to thank and acknowledge the law students from South Texas College of Law who conducted numerous hours of research in support of this project. Finally, we wish to thank West[®] for allowing us to continue to assist others in understanding the world of environmental law.

PREFACE

Welcome to the exciting and challenging field of environmental law. Almost anyone encountering environmental statutes and regulations will agree that this area of the law can be confusing and often intimidating. We would like you to use this publication as a tool to help you better understand some of the basics of federal environmental law. We hope this book will enhance your understanding of environmental law and enable you to comfortably discuss and apply its principles.

This Third Edition to *The User's Guide* continues our tradition of bringing you a simple yet thorough guide to federal environmental law. *The User's Guide* provides a simple, yet comprehensive text that guides you through each of five primary environmental statutes, related regulations, law reviews and journals, and case holdings. Most texts are either complex legal casebooks, or student aids that are far too limited in their scope and resources. *The User's Guide* is very different because it combines the simplicity of a guidebook with diverse resources intended to further one's understanding of its contents.

The User's Guide is designed specifically for students at the graduate and undergraduate levels who study environmental science and related technology; law students, engineers and technicians routinely faced with environmental issues; and attorneys who practice environmental law. As a quick resource, *The User's Guide* provides numerous citations to regulations, executive orders, court cases, and law reviews, journal articles and other resources. In addition, *The User's Guide* provides a list of acronyms, a glossary of terms, and a detailed index. This book should not be used as primary authority, or as an update on the current jurisprudence on environmental law. It should, however, be used to help you understand some of the basic principles of certain federal environmental statutes and regulations. *The User's Guide* contains six chapters including: Administrative Law, the National Environmental Policy Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Clean Air Act, and the Clean Water Act.

We sincerely encourage each of you to write us with ideas about how we can improve *The User's Guide*. We welcome your comments. Your ideas will help us provide you with the best environmental law guide available.

OLGA L. MOYA

ANDREW L. FONO

2010 Third Edition

FEDERAL
ENVIRONMENTAL LAW

THE USER'S GUIDE

Third Edition

FEDERAL
ENVIRONMENTAL LAW
THE USER'S GUIDE

Third Edition

TABLE OF CONTENTS

CHAPTER 1: ADMINISTRATIVE LAW	1
I. INTRODUCTION	1
II. THE RELATIONSHIP BETWEEN ADMINISTRATIVE LAW AND ENVIRONMENTAL LAW	2
A. PUBLIC POLICY	2
B. ENVIRONMENTAL STATUTES	3
C. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (EPA)	4
D. AGENCY POWERS, FUNCTIONS AND ACCOUNTABILITY	6
III. RULEMAKING.....	8
A. IN GENERAL	8
B. INFORMAL RULEMAKING	9
C. FORMAL RULEMAKING	11
D. HYBRID RULEMAKING.....	12
IV. ADJUDICATION.....	14
A. IN GENERAL	14
B. INFORMAL ADJUDICATIONS	15
C. FORMAL ADJUDICATIONS	15
V. ENFORCEMENT.....	16
A. IN GENERAL.....	16
B. ADMINISTRATIVE REMEDIES.....	18
C. CIVIL REMEDIES	21
D. CRIMINAL REMEDIES	23
E. CITIZEN SUITS	27
VI. THE ADMINISTRATIVE RECORD	30
A. POLICY	30
B. STATUTORY AUTHORITY.....	30
C. REGULATORY AUTHORITY	31
D. CONTENTS.....	32

E. JUDICIAL INTERPRETATIONS.....	33
VII. JUDICIAL REVIEW	34
A. IN GENERAL	34
B. UNREVIEWABILITY	35
C. JURISDICTION.....	36
D. STANDING	37
E. TIMING	40
F. THE PRIMARY JURISDICTION DOCTRINE.....	42
G. SCOPE AND STANDARD OF REVIEW	44
H. REMEDIES.....	49
VIII. CONCLUSION.....	50
CHAPTER 2: NATIONAL ENVIRONMENTAL POLICY ACT.....	51
I. INTRODUCTION	51
II. POLICY	52
A. STATUTORY APPROACH.....	53
B. JUDICIAL INTERPRETATION.....	54
III. PRACTICAL APPLICATION.....	58
A. THE ENVIRONMENTAL ASSESSMENT (EA).....	59
B. THE FINDING OF NO SIGNIFICANT IMPACT (FONSI)	60
C. THE ENVIRONMENTAL IMPACT STATEMENT (EIS).....	61
IV. APPLICATION OF NEPA.....	62
A. IS AN EIS REQUIRED?	62
B. JUDICIAL INTERPRETATION OF “SIGNIFICANT”	69
C. CATEGORICAL EXCLUSIONS (CATXs).....	71
V. NEPA'S PROCEDURAL STEPS.....	72
A. PREPARE AN EA	72
B. DETERMINE WHETHER TO PREPARE AN EIS OR FONSI	73
C. FOLLOW THE CEQ REGULATIONS THROUGHOUT THE NEPA PROCESS	77
D. CREATE AN ADMINISTRATIVE RECORD	89
VI. CONCLUSION.....	90
CHAPTER 3: RESOURCE CONSERVATION AND RECOVERY ACT ...	91
I. INTRODUCTION	91
A. BACKGROUND.....	93

B.	LEGISLATIVE HISTORY	94
C.	ORGANIZATION OF SWDA & RCRA.....	95
II.	SUBTITLE C: HAZARDOUS WASTE	97
A.	SOLID WASTE DETERMINATION	97
B.	HAZARDOUS WASTE	101
C.	HAZARDOUS WASTE REGULATION.....	113
III.	SUBTITLE D: SOLID WASTE MANAGEMENT	146
A.	INTRODUCTION.....	146
B.	DISPOSAL FACILITIES	148
IV.	ENFORCEMENT REMEDIES	150
A.	ADMINISTRATIVE REMEDIES.....	150
B.	CIVIL REMEDIES	152
C.	CRIMINAL ENFORCEMENT AUTHORITY	153
D.	CITIZEN SUITS	154
V.	JUDICIAL REVIEW	155
A.	PROMULGATION OF REGULATIONS.....	156
B.	PERMIT DECISIONS	156
C.	OTHER FINAL AGENCY ACTIONS.....	156
VI.	CONCLUSION.....	156
CHAPTER 4:	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT.....	158
I.	INTRODUCTION	158
A.	LOVE CANAL	159
B.	CONGRESS ENACTS CERCLA.....	160
C.	SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT (SARA).....	161
II.	POLICY	161
III.	THE SUPERFUND PROCESS	163
A.	IDENTIFYING ABANDONED SITES	163
B.	PRELIMINARY ASSESSMENT (PA)	166
C.	THE NATIONAL PRIORITIES LIST (NPL)	168
D.	INVESTIGATION	169
E.	REMEDIAL ACTIONS.....	170
IV.	SECTION 107 LIABILITY AND COST RECOVERY ACTIONS ..	171
A.	INTRODUCTION TO COST RECOVERY ACTIONS	171
B.	PROPERTY MUST BE A VESSEL OR FACILITY	173

C.	POTENTIALLY RESPONSIBLE PARTIES	176
D.	THERE MUST BE A HAZARDOUS SUBSTANCE	188
E.	THE PETROLEUM EXCLUSION	190
F.	RELEASE, OR THREAT OF A RELEASE OF A HAZARDOUS SUBSTANCE THAT CAUSES RESPONSE COSTS	192
G.	RESPONSE COSTS MUST BE NECESSARY AND CONSISTENT WITH THE NATIONAL CONTINGENCY PLAN (NCP)	201
H.	EXTENT OF LIABILITY	203
I.	DEFENSES	212
J.	SETTLEMENTS	221
V.	GOVERNMENT CLEANUP OPTIONS	227
A.	SECTION 104 CLEANUP ACTIONS	229
B.	SECTION 106 ORDERS	231
VI.	CONCLUSION.....	232
CHAPTER 5: THE CLEAN AIR ACT		233
I.	INTRODUCTION	233
A.	NEW PROGRAMS.....	234
B.	MAJOR PROGRAMS	237
II.	NEW SOURCE PERFORMANCE STANDARDS (NSPS).....	240
A.	INTRODUCTION.....	240
B.	STATUTORY SCHEME.....	240
C.	JUDICIAL INTERPRETATIONS.....	244
D.	CONCLUSION	245
III.	NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS)	245
A.	INTRODUCTION.....	245
B.	STATUTORY SCHEME.....	246
C.	CURRENT NAAQS POLLUTANTS.....	254
D.	CONCLUSION	256
IV.	NONATTAINMENT AREAS (NA) PROGRAM	256
A.	INTRODUCTION.....	256
B.	STATUTORY SCHEME.....	257
C.	JUDICIAL INTERPRETATIONS.....	263
D.	CONCLUSION	264
V.	PREVENTION OF SIGNIFICANT DETERIORATION PROGRAM (PSD).....	264

A.	INTRODUCTION.....	264
B.	STATUTORY SCHEME.....	265
C.	JUDICIAL INTERPRETATIONS.....	271
D.	CONCLUSION.....	272
VI.	NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS (NESHAPs).....	272
A.	INTRODUCTION.....	272
B.	STATUTORY SCHEME.....	273
C.	JUDICIAL INTERPRETATIONS.....	276
D.	CONCLUSION.....	277
VII.	ENFORCEMENT PROVISIONS.....	277
A.	INTRODUCTION.....	277
B.	GENERAL PERMIT REQUIREMENTS.....	280
C.	GOVERNMENT ACTIONS.....	283
D.	CITIZEN ACTIONS.....	287
E.	JUDICIAL INTERPRETATIONS.....	289
VIII.	CONCLUSION.....	290
CHAPTER 6:	THE CLEAN WATER ACT.....	291
I.	INTRODUCTION.....	291
A.	SOURCES OF POLLUTION.....	293
B.	TYPES OF POLLUTANTS.....	297
C.	STATUTORY SCHEME.....	298
II.	STATE WATER QUALITY STANDARDS.....	306
A.	DESIGNATING USES.....	307
B.	TESTING WATER QUALITY AND MIXING ZONES.....	308
C.	DOWNGRADING DESIGNATED USES.....	309
III.	FEDERAL EFFLUENT LIMITATIONS.....	310
A.	FEDERAL ROLE.....	310
B.	STATE ROLE.....	311
IV.	THE NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT PROGRAM.....	312
A.	STATE DELEGATION.....	313
B.	PERMIT CONDITIONS.....	313
C.	STANDARDS OF PERFORMANCE.....	318
D.	PRETREATMENT STANDARDS.....	326
E.	VARIANCES.....	329
F.	DEFENSES.....	332

V.	WETLANDS PROTECTION AND THE DREDGE AND FILL PERMIT PROGRAM	334
A.	DREDGE AND FILL PERMIT	335
B.	EXEMPTIONS	337
VI.	OIL SPILL PROGRAM	338
A.	NO DISCHARGE POLICY	338
B.	REGULATIONS.....	339
C.	ENFORCEMENT	339
VII.	NONPOINT SOURCE POLLUTION PROGRAM	340
A.	NONPOINT SOURCE MANAGEMENT PROGRAMS.....	341
B.	AREA WIDE WASTE TREATMENT PROGRAMS.....	341
C.	TRANSBOUNDARY POLLUTION.....	342
VIII.	ENFORCEMENT PROVISIONS	343
A.	INTRODUCTION.....	343
B.	GOVERNMENT ACTIONS.....	343
C.	CITIZEN ACTIONS	349
IX.	CONCLUSION.....	350
	TABLE OF AUTHORITIES	352
	ACRONYMS.....	367
	GLOSSARY	371
	INDEX.....	405

CHAPTER 1

ADMINISTRATIVE LAW

*"Government is nothing but the balance of the
natural elements of a country."*

Jose Marti, *Our America*

CHAPTER 1: ADMINISTRATIVE LAW

I. INTRODUCTION

Environmental law is governed primarily by administrative law. For this reason, you must understand basic concepts of administrative law before studying environmental law. Administrative law has only developed in this country during the last century. The Federal Administrative Procedure Act (APA) was enacted by Congress in 1946 to establish a process for use by federal agencies when exercising their rulemaking, adjudicatory, and enforcement powers.¹ This expanding area of law defines how governmental organizations such as agencies, boards, and commissions develop and implement the regulatory programs they are legislatively authorized to create. Some of the many federal agencies that impact environmental laws include the Environmental Protection Agency (EPA), the Council on Environmental Quality (CEQ), the National Forest Service and the Bureau of Land Management, to

¹ See Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 381 (1946), Codified at 5 U.S.C.A. §§ 551-559.

name just a few. For purposes of this book, we primarily refer to the EPA as the agency focus of our analysis.

Administrative law applies to government agencies and to parties affected by agency actions. Many federal environmental programs are administered by states under the delegation authority of federal laws. States often differ from both the federal government and each other in the way they interpret, implement, and enforce federal laws they are delegated to implement. In addition, each state has its own administrative guidelines that govern and define how their respective state agencies act. All actions of federal agencies must comply with the federal APA.² However, each state in implementing federal programs must comply with both the federal APA and its own state APA. Most state APAs are modeled after the federal APA, though some distinctions do exist.

II. THE RELATIONSHIP BETWEEN ADMINISTRATIVE LAW AND ENVIRONMENTAL LAW

A. PUBLIC POLICY

Public policy is the general principle by which our government branches³ are guided in their management of public affairs. The legislative branch declares and shapes national policy by passing legislation (enacting laws). The executive enforces the law while the judicial branch interprets the law when a dispute arises.

When Congress considers certain conduct to be against public policy and against the public good, it passes legislation in the form of acts or statutes. Congress specifically regulates, controls or prohibits activity in conflict with public policy. Through legislation, Congress regulates behavior, selects agencies to implement programs, and sets general procedural guidelines. This is where the relationship between administrative law and environmental law begins. The relationship between the two is so intertwined that one cannot exist without the other. When Congress passes environmental legislation it also declares and shapes our national environmental policy, thus fulfilling its

² See 5 U.S.C.A. § 551.

³ Government branches include, the legislative branch (Congress); the executive branch (the President); and the judicial branch (the Courts).

policymaking function. The environmental statutes discussed in this book are primary examples of policymaking legislation.

B. ENVIRONMENTAL STATUTES

The environmental statutes discussed in this book include the National Environmental Policy Act (NEPA),⁴ the Resource Conservation and Recovery Act (RCRA),⁵ the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁶ the Clean Air Act (CAA),⁷ and the Clean Water Act (CWA).⁸ These acts are broadly worded to identify existing problems that Congress believes can be corrected to protect human health, welfare, and the environment.

Protecting human health, welfare, and the environment is a key national policy Congress works to implement. For example, under NEPA, the national policy is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."⁹ Similarly, under the Clean Air Act, the policy is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."¹⁰

⁴ See National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4349.

⁵ See Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6992k.

⁶ See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675.

⁷ See Clean Air Act, 42 U.S.C.A. §§ 7401-7671(q).

⁸ See Clean Water Act, 33 U.S.C.A. §§ 1251-1387.

⁹ NEPA § 2; 42 U.S.C.A. § 4321.

¹⁰ CAA § 101; 42 U.S.C.A. § 7401.

C. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (EPA)

1. Policy

Through statutes, Congress creates agencies with expertise to develop programs that best monitor and regulate activities that adversely affects the public health, welfare and the environment. Congress also delegates regulatory authority to these agencies. Principally, agencies offer:

- 1) specialized staffs that provide unique expertise and increased efficiency to analyze voluminous data and conduct precise research;
- 2) preventative programs that regulate behavior that causes adverse impacts to public health, welfare and the environment, through permitting, licenses, and the passage and enforcement of regulations; and
- 3) focused and continued attention on the agencies' regulatory and enforcement missions.

2. History

In 1970, Congress created EPA.¹¹ The purpose was to consolidate functions previously carried out by several government agencies. These agencies included the Federal Water Quality Administration (within the Department of the Interior), the National Air Pollution Control Administration, and the Bureau of Solid Waste Management (both under the Department of Health, Education and Welfare). Consolidating these agencies into EPA has provided consistency for federal environmental planners and has eliminated the need to deal with numerous agencies.

3. EPA Today

Today, EPA is one of the largest federal administrative agencies. It has 10 regional offices spread throughout the nation and more than 17,000

¹¹ See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), reprinted in 84 Stat. 2086 (1970).