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**ENVIRONMENTAL LAW
AND POLICY**
Nature, Law, and Society

*Fourth
Edition*



Wolters Kluwer
Law & Business

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ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY

Fourth Edition



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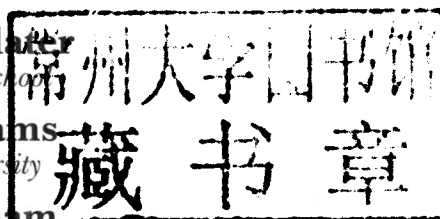
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*To our families and to all
who act to protect this fragile planet.*

There is hardly a political question in the United States which does not sooner or later turn into a judicial one.

— Alexis de Tocqueville, *Democracy in America*, 1848

All thinking worthy of the name must now be ecological.

— Lewis Mumford, *The Pentagon of Power*, 1970

Environmentalists are like misers. They are hard to live with, but make great ancestors.

— The India Times

Introduction to the Book

We travel together, passengers on a little space ship, dependent on its vulnerable resources of air and soil, all committed for our safety to its security and peace, preserved from annihilation only by the care, the work, and, I will say, the love we bestow on our fragile craft.

—Adlai Stevenson, at the United Nations, 1965

“When we try to pick out anything by itself, we find it hitched to everything else in the universe,” the wilderness prophet and Sierra Club founder John Muir once said.¹ Indeed, “Everything is connected to everything else” is the First Law of Ecology. That might pose a daunting caution for anyone setting out to learn the art of environmental law, or write a book about it. But there are logical structures and systems within the field that can help us trace a coherent path through the complexity.

Every act of technology or human behavior is likely to have a wide range of interacting effects, direct and indirect, some beneficial, some quite drastic, unpredictable, and long-term or irreversible in their impacts. Environmentalists and their attorneys tend to scrutinize human actions with an eye to accounting the full range of consequences to the public and Nature, not just the upbeat realm of short-term entrepreneurial payoffs. Environmentalism reminds us that everything goes somewhere and remains within the grand system in which we must continue to live, so we need to think broadly and plan thoughtfully for future sustainability.

Environmental law attempts to build foresight into the human decisional system, along with an awareness of costs and values that are typically invisible because, though real, they exist outside the formal market economy. Often environmental law works after the fact, attempting to force accountings for depredations that have already occurred, in hopes of deterring future repetitions. Environmental law has also developed elaborate doctrines attempting to anticipate and prevent environmental disruptions. The goal is to incorporate a process of fair, overall, comprehensive accounting of real societal costs, benefits, and alternatives into major public and private decisionmaking.

Over the past 40 years there has been a dramatic change in the stature of the field. It is no longer dismissable as the fad of a disgruntled minority. It is now the stuff of presidential campaigns and national public opinion poll majorities. There are more environmental lawyers in the U.S. than there are labor lawyers. Given the reality of environmental problems and potentials, the field of environmental protection law will inevitably continue to grow ever more intricate, challenging, and important.

The Book’s Perspective

This book is designed to track through environmental law according to the structure of the legal process. It uses some of the classic cases and materials of environmental law as well as some of the most recent.

1. J. Muir, *My First Summer in the Sierra* 211 (1911).

There are some necessary acknowledgments—our bias, for example. Every book has its bias, usually unacknowledged. If it isn't already, we wish to make this book's clear. From the start much of environmental protection law has been initiated and shaped by individuals and groups in the active environmental "movement." We believe that in most if not all cases, those who raise environmental protection legal issues are correct in identifying problems that need to be resolved. Most environmental problems arise from a fundamental human tension between short-term marketplace interests and the larger civic-societal public interest. In the dynamic logic that has built the greatest economy the world has ever known, individual human actors behave rationally to maximize their own short-term best interests, without sufficient knowledge, consideration, or accounting of the real natural and societal consequences of their actions. The ecological and civic-societal values affected by such human actions will be most efficiently addressed if they can be brought into the marketplace economy, but the altruism of market players cannot be relied upon to do that. Environmental protection law, in spite of the natural and powerful resistance of market forces, therefore seeks to force facts and public values into the markets of daily life, making human, ecological, and economic systems work successfully and sustainably.

In large part we believe the business marketplace has come to accept and internalize many public environmental values, not just as a result of civic instincts but also because of the credible prospect today of environmental enforcement by agencies and an active citizenry. This book therefore approaches many, though not all, environmental cases from the perspective of those who enforce environmental protection laws—citizens, public interest groups, and agencies. Our approach often is "how can this problem be appropriately managed within the legal system?" presuming in most cases that the targeted problems need to be addressed. Through changing cycles of environmental law—with government sometimes more protective, sometimes less—one societal constant is the necessity for nongovernmental citizen environmentalists' continuing oversight and active participation. This book thus makes particular effort to include consideration of the role of citizens, in addition to corporations and governmental officials, in the environmental legal process.

This approach seems realistic and useful as well as defensible. So to get deeper into the swamps of environmental law, in practical terms one must follow the environmental enforcement trail, which often means citizen enforcement actions. Whether readers ultimately view the field from the point of view of plaintiffs or defendants, an understanding of the environmental protection perspective is indispensable to a recognition of what's going on, and how it could be done better.

Structure

The structure of this coursebook should be clear from the table of contents. It surveys environmental law issues throughout the vast range of the U.S. legal process (with additional consideration of international environmental law principles, which have developed a great deal, often on the U.S. model).

Many books on environmental law have fallen into an organization by physical categories—air, water, toxics, wildlife, energy, land development, groundwater, timber and mining, etc.—not by legal categories. Physical subject categories often

produce duplicative and overlapping legal analyses. This book, on the other hand, contains material from many physical subject areas but takes its organization from the elements of the legal system itself, building upon a base of common law and constitutional law, and continuing on to statutory and administrative law. The way the legal system works, not the intricacy of some media-specific physical science area, is our primary concern. The aim is not to teach hyper-technical details of current law, like the specific regulatory parts-per-million hydrocarbon standards for automobile tailpipe emissions, and so on, but to show legal structures and functions. Using this legal process design, the book probes every nook and cranny of the legal system, exploring ways in which environmental attorneys in and out of government must attempt to understand the fascinating complexities of environmental problems in the real world—both human and ecological—using law imaginatively and competently to address them.

Most of the coursebook's explanation and analysis of environmental law is contained within each chapter's introduction, and, more substantially, in the "Commentary & Questions" (we call them "C&Qs") that follow all of the chapters' textual and case excerpts. Although there may be as many as a dozen subtitled entries in a C&Q section, readers should look at all of them in order to get a full sense of the issue being examined in that section, treating the C&Qs as basic explanatory text. (We've also been told that many C&Qs provide good term paper topics.)

Going Beyond the Book

An environmental law course is broad in scope. The text and commentary in this book often incorporate analysis of source material, cases, and issues extending far beyond the excerpted textual material. In many chapters you will find bulleted notes (•) indicating that extended material on point is available on the coursebook website. The website also has a catalog of links available chapter-by-chapter for further background and analysis of the issues raised in the text. To provide more depth and familiarity with detail, students and professors have often added other components to the coursework. Some students take a concurrent nonlaw course, for example, in field biology, toxicology, or environmental policy. The 2008 book by Nicholas Ashford & Charles Caldart—*Environmental Law, Policy, and Economics: Reclaiming the Environmental Agenda*—is an excellent field guide in this inquiry. G. Adelson et al., *Environment: An Interdisciplinary Anthology* (2007), presents perspectives from science, literature, and philosophy to economics, law, and politics. To give law students a taste of reality, some classes take on projects or internships with active groups outside academe. Some have carried one chosen problem area through the course of the term or kept track of an ongoing local controversy—a particular toxic disposal case, wildlife or park management issue, or mining, dredging, or dam project. Others have assigned short individual research papers, class presentations, field visits, and so on, and each of these has been valuable in providing reinforcing feedback to the analyses and techniques of environmental law set out broadly in the book. Some courses integrate one or more regulatory simulations into the course, giving students an experience of the art and skills of regulatory practice, which characterizes so much of modern law. For many

this may be the only chance they'll have in law school to pick up this critical knowledge. Several good sources of hands-on exercises are available. We have used Anderson & Hirsch's excellent *Environmental Law Practice: Problems and Exercises for Skills Development* to good effect.

Some very fine online services provide information updates on a regular basis. GREENWIRE is an excellent online source of constant updating on important governmental issues, as are the BNA Daily Environmental Report and BNA International Environment Reporter, the Endangered Species & Wetland Report, and many more. Industry organizations publish newsletters and are pleased to provide extensive materials in support of their positions. A number of excellent law reviews specialize in environmental law, and Lexis, Westlaw, and the Index to Legal Periodicals offer effective access to their contents.

The best environmental law hornbook we know is Professor William Rodgers's *Handbook on Environmental Law*. Professor Rodgers has also published a very helpful multivolume treatise. Several publishers produce useful annual statutory compilations, and Joseph Sax's *Defending the Environment* (1971) continues to be a vivid introduction and guide to the use of law in resolving the pervasive social, economic, and ecological governance problems we call "environmental."

And don't be daunted by the "numbing complexity and detail" of environmental issues and environmental law: Because everything is connected to everything else, if one just picks up a trail and follows it, it will lead to all there is to know.

Note on Editing Conventions Used in This Book

In editing materials for this coursebook we have tried to make the text as smooth as possible to the reader's eye, and to keep the amount of text as short as possible while covering this dauntingly broad and expansive field. This agenda has required quite a bit of editorial surgery on text and excerpted materials.

Within excerpts, many internal citations (especially string citations) are simply excised, with no indication by ellipsis, or are dropped to footnotes. (In some cases in the text itself, when discussing general scientific or other nonlegal data, only limited citations are supplied.) Footnotes in excerpted materials, when they remain, do not have their original numbers unless a footnote holds special importance to subsequent commentators. Judicial opinions are often drastically cut and edited, indicated only by simple ellipsis, and in a few cases portions of text are reordered to make the presentation flow more smoothly. As with most coursebooks, if the reader wishes to delve into a particular case or text, the excerpts here should serve to get the inquiry started, but there's no substitute for going back to the original full text.

Various departures from literary convention and Bluebook style have been incorporated throughout the book to improve scansion (as in eliminating brackets on [i]nitial capitalization changes, or our simplified *infra* and *supra* references). Case opinion excerpts, however, usually retain the originating court's stylistic idiosyncrasies.

Gender-sensitivity was a virtually unknown editing concept when many classic texts and decisions were written. They and some modern texts as well often address all significant parties as male. In this book the pronouns "he" and "she" when used generically should be understood to refer inclusively to all persons regardless of

gender (although in retrospect it seems most polluters still appear here as male).

Help! Acronyms!

Swarms of acronyms have invaded environmental law—EISs, FONSIIs, TRIIs, NIMBYs, PSD, CERCLA, ToSCA, TMDLs, ad infinitum. To give the student a sobering welcome to the field, and to save trees, we use acronyms throughout the book after their first appearance in these pages. To facilitate the reader's coping with those acronyms, the back reference pages (which contain all reference sections except the Tables of Contents) also include a GLOSSARY OF ACRONYMS & ABBREVIATIONS with initial page notations. You may want to tab that page for easy reference.

Acknowledgments

This book sometimes seems to have evolved with as much biodiversity of input as any marsh or rainforest. Dozens of people have helped shape and reshape it over the years. For all who know the work of Professor Joseph Sax, now emeritus professor at Berkeley, the mark of his thinking and advice on our efforts will be discernible throughout these pages. This coursebook has always been deeply shaped and guided by his environmental law teachings and vision, and we gratefully acknowledge his impact on our work. In its earliest form the book derives from materials prepared by a committee of law students at the University of Michigan in the early 1970s, including two of the present authors, for a course called Nature, Law, and Society offered to graduate and undergraduate students. In that original group Peter Schroth served not only as a major contributor but also as administrator of the course, a thankless and demanding task. The Nature, Law, and Society project was supported and advised by Joe Sax and the late Professor William Stapp of the School of Natural Resources. They served graciously and well as mentors and midwives. Prior to its first publication in 1992, the book went through repeated reincarnations at a succession of schools at which we taught—the University of Michigan Law School, Boston College Law School, Harvard Law School, Rutgers, the University of Tennessee College of Law, and Wayne State Law School. Before the first edition and since then, we have greatly benefited from suggestions and comments gratefully received from students and colleagues around the country. The book improved with the addition of Bob Graham, Lisa Heinzerling, and David Wirth. With this fourth edition we bid farewell to our marvelous charter member Bill Goldfarb and welcome our new colleague, Noah Hall. Our colleague Professor Lisa Heinzerling is currently on leave in the nation's service and will be returning in the future for the fifth edition. Very helpful contributions have come from our colleagues Glenn Adelson, Harry Bader, Michael Blumm, John Dernbach, Ira Feldman, Linda Green, Jeffrey Haynes, Oliver Houck, Casey Jarman, Barbara Koocher, John Kostyack, Patrick Parenteau, Beth Perkins, Anna Schulz, and Jon Witten, and we owe a continuing debt to Michael Kitchen of the Pixelantics Electronic Design Studio in Ann Arbor for his design genius on past editions and his gentle tutoring in the publishing process.

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of the Class of 2011, and the members of the Boston College Law School Environmental Law Society who compiled the tables of cases and authorities under deadline pressures.² The Boston College Law School Library staff repeatedly has provided indispensable detective work and support, receiving fiendish eleventh-hour requests and calmly coming through for us: Mark Sullivan, Joan Shear, Patrick Rey, Tuananth Truong, Karen Breda, and Mary Ann Neary. As for the many authors, photographers, and publishers who graciously granted us permission to reprint portions of their works, a complete listing follows immediately after the text, with our gratitude. We also wish to acknowledge the remarkable group associated with Aspen Publishing who have welcomed and coddled the third and fourth editions of the coursebook—especially Carol McGeehan, Melody Davies, Barbara Roth, Peter Skagestad, and copy-editor extraordinaire Lisa Wehrle.

Ultimately, our greatest warm thanks and appreciation must be reserved for all our families, who naïvely expressed pleasure when they first heard of this project.

Z.J.B.P.
R.H.A.
R.L.G.
D.A.W.
N.D.H.

July 2010

2. The excellent Boston College Environmental Law Society volunteers who worked rushed hours on indexing and creating the tables of cases and authorities were John Ahearn, Brendan Boyle, Nicholas Buttino, Brian Confrey, Matt Donohue, Blair Edwards, Lum Fobi, Hannah Rogers-Ganter, Anne Gordon, Noah Hampton, Lindsay Jansen, Matt Lynch, Jubilee Menzies, Greg O'Brien, Kara Plunkett, Liza Rosenhof, Jeanne Semivan, Andrew Silver, Alisa Sokol, and Patrick Wu, with editorial help, very much appreciated, from Heather Coe-Smith, Barbara Koocher, and Paul Marzagalli.

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CLASSIFIEDS. Temperate but
endangered planet. Enjoys
weather, northern lights,
continental drift. Seeks caring
relationship with intelligent
life form.

F.O.E.