

THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW

SECOND EDITION

J.B. RUHL

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FOUNDATION PRESS

CASES AND MATERIALS

THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW

SECOND EDITION

by

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To Lisa

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To Jamie and Ben

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To Steve

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PREFACE TO THE SECOND EDITION

Since the publication of the first edition of this text, a sea change in the politics of Washington, a flurry of U.S. Supreme Court decisions, and an active state and local policy landscape have kept the pace of change in environmental law at full speed. As is surely the case for all authors of environmental law survey texts, staying current has been a dizzying ride for us. But our motivation for publishing this second edition of the text was only in part to respond to the important changes in environmental law and policy of the past several years. After field testing the first edition, we concluded that some structural changes were called for to improve the integration of materials and emphasize what we believe to be the distinguishing characteristic of our approach—an emphasis on practice contexts.

The most exciting of the changes is apparent from the second edition's cover: the three authors of the first edition are delighted to have Professor Alexandra Klass of the University of Minnesota join the author team. Alex had a distinguished career in private practice before entering full time teaching, and the subjects of her academic scholarship fit well into the focal points of the text.

The significant changes one will find in the text include the following:

- The materials found in Part III of the first edition, which consisted of a series of policy topics presented in short chapters, have been integrated into other chapters of the text and Part III has been eliminated. Our original conception of Part II was that the short chapters could serve as free-standing policy discussions; however, we concluded that the separation of policy topics from their relevant legal contexts made the text somewhat unwieldy in the classroom. We made every effort to distribute the materials into other chapters of the book without sacrificing content, and we believe the result is a significantly more user-friendly text.
- The first edition chapter on regulating environmental harms was designed to cover both Clean Air Act and the Clean Water Act's effluent discharge program. We concluded this approach did not do justice to either statute, and consequently have devoted a full chapter to the Clean Air Act and a full chapter to water. The new chapter on water includes coverage of the NPDES program, the Section 404 wetlands program, and water rights.
- The first edition chapter on Public Lands has been broadened into a chapter on land management generally, covering both private and public lands. This new chapter provides a home for many of the policy topics included in Part III of the first edition.
- We have added a new chapter devoted to the topic of international and domestic climate change law and policy.

We are also delighted to report that we were able to make these changes while reducing the length of the text by over 250 pages! Most of reductions were the result of sharp editing pencils, but in some cases sections of the text that proved to be peripheral to our focus were eliminated, such as the sections on insurance litigation and on bankruptcy law. Where possible, these sections will be updated and made available intact through the casebook's website, www.practiceandpolicyofenvironmentallaw.com

We are confident that the changes reflected in the second edition will make the casebook an even stronger platform for exploring the law and policy context of environmental law and, fulfilling our primary purpose, for introducing students to the challenges inherent in the practice of environmental law. As substantial as these changes were to make, we received much help along the way. We appreciate the support we have received from our respective institutions, the Florida State University College of Law, Notre Dame Law School, Duke Law School, and the University of Minnesota Law School, as well as the encouragement of our publisher John Bloomquist and the entire team at Foundation Press. As always, we look forward to feedback from teachers and students using the book. Please feel free to contact any of us at jruhl@law.fsu.edu, nagle.8@nd.edu, salzman@law.duke.edu, or aklass@umn.edu.

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PREFACE

It has been 35 years since the wave of federal statutory initiatives of the early 1970s ushered in the modern era of environmental law. Seen then as a specialized “niche” area of practice and policy, environmental law has since matured into a broad and complex body of law which, like tax law, touches many aspects of business and social relations. Today, virtually all law firms of any substantial size have practitioners, if not departments of practitioners, devoted to their clients’ environmental law needs. Many federal, state, and regional agencies and local governments also have substantial numbers of environmental attorneys to help navigate or enforce the maze of regulations. Every law school in the nation offers at least the survey course in environmental law, and many offer numerous upper level courses in the field. In short, environmental law is no longer an unusual or fringe subject—it has become a mainstream field of legal practice and policy resting on a complex array of statutes, regulations, and cases.

We have tried in this book to make environmental law come alive, to demonstrate for the student what environmental law is about and then place that subject matter in practice settings to show the range of what environmental lawyers actually experience. In teaching the environmental survey course, all three of us felt that our students could analyze well the policy aspects of environmental law, but were more guarded about their understanding of what practicing environmental law really feels like. We believe this focus of the book—making practice settings and practice problems a prominent feature for instructors and students—significantly distinguishes it from the many other commendable casebooks available on the topic of environmental law. Indeed, we would not have bothered to prepare a new addition to the array of environmental law casebooks if we did not believe ours would offer an alternative that is different in a meaningful and useful way.

Environmental law is an exciting field, and many are drawn to the dynamic subject matter—the world around us—and its rich interdisciplinary confluence of politics, economics, science, and philosophy. The design and implementation of environmental law can make a substantial difference in the quality of life for present and future generations, and each practitioner has a realistic expectation of being able to participate in that effect. Because of its important mission, moreover, environmental law reaches across many fields of social and economic life, allowing its practitioners to interact with other professionals and to work in a variety of settings. And because the environment changes so, too, does environmental law, making its practice anything but static and monotonous. In short, practicing environmental law can be stimulating and personally rewarding.

Alas, there is another side to all of these positive qualities. As a body of law drawing from so many disciplines, environmental law can appear to have no central foundation or theme. As a body of law that so profoundly

affects the quality of life today and into the future, tremendous pressure often is placed on the institutions and practitioners of environmental law. As a body of law that touches so many different walks of life, environmental law can appear fragmented and overly detailed. And as a body of law in constant flux, environmental law can appear to have no deliberate direction. In short, practicing environmental law can, on occasion, be frustrating and even personally draining. Nonetheless, we believe it is one of the most exciting and important areas of practice in the entire legal field.

Our experience includes over 25 years of combined environmental law practice, in both government, corporate, and private firm settings, and a combined 30 years of full-time law school teaching. Reflecting our practice backgrounds, this text has been specifically designed to match the modern realities of environmental law. It is our sincere hope that this feature of the book will invigorate and enrich students' introduction to the subject and encourage them to pursue careers in the fascinating, fulfilling, and important field of environmental law.

We begin with an introductory chapter, designed to provide the student's first exposure to environmental law through the experience of environmental lawyers. Using a series of case studies, this introduction emphasizes the importance of thinking about environmental law in three dimensions: (1) the basic approaches employed by environmental law; (2) the diversity of practice settings in which environmental law arises as a driving factor; and (3) the breadth of policy issues facing the future of environmental law.

Following the introductory chapter, in Part I of the book we build a conceptual foundation in the substantive law for the student with a survey of five approaches to environmental law: (1) conservation of environmental amenities; (2) regulating environmental harms; (3) remedying environmental harms; (4) planning and information programs; and (5) public lands management. Rather than attempt to canvass every environmental law, we use one or two exemplary statutes for each theme in the typology and cover related statutes and materials in sufficient detail to further illustrate the relevant approach. Deeper instruction in other statutes and legal institutions comes in subsequent parts of the book in connection with development of the practice and policy themes rather than as discrete divisions of study.

Part II is the most innovative facet of the text, using practice settings as a way of giving life to the substantive content of environmental law. Put simply, Part II focuses on what environmental lawyers actually do. This section uses examples and problems to illustrate five key practice contexts: (1) administrative rulemaking and permitting; (2) compliance counseling; (3) enforcement; (4) private litigation; and (5) business and real estate transactions. Attention to practice settings at this breadth and level of detail is unprecedented among environmental law casebooks, and we believe it will make our text particularly useful to instructors wishing to impart some appreciation of practice challenges and to students eager to get a taste of what environmental practitioners experience.

Part III introduces the student to a series of current policy issues that are shaping the future of environmental law, including (1) ecosystem management; (2) agriculture and the environment; (3) urban development; (4) equitable environmental protection; and (5) transboundary issues. As in Part II of the book, we present these issues in real-world contexts rather than as general abstractions.

Many people and institutions provided us inspiration, support, and input along the way toward fulfilling our vision of providing an innovative environmental law text. Our respective institutions—Florida State University, the University of Notre Dame, and Duke University—and the Rocky Mountain Mineral Law Foundation provided financial and research support. Valuable comments on the approach, organization, and content of the book came from Amy Barrett, Alex Camacho, Robin Craig, Dave Markell, Joel Mintz, and Sheila Villalobos. Student research assistance was ably provided by Ali Stevens and Lucinda Lagomosina of Florida State, Stephen Leys, Carlo Rodes, and Beth Silker of Notre Dame, and Jennifer Behrens and Jonathan Hammond of Duke. A number of sections in the text were drawn from previous books we have co-authored, and we are grateful for the kind permission of Buzz Thompson, Jim Rasband, and Mark Squillace to use the material here. Steve Errick gave us early encouragement to pursue a book proposal, and John Bloomquist of Foundation Press demonstrated unyielding patience and support every step of the way. Last in our list, but by no means least in terms of our gratitude, are our respective families, each of which has invested innumerable hours in what has come to be known in our homes as “the book.”

As thankful as we are to those who helped us publish this edition, we hope to publish subsequent editions and thus will depend on and be most thankful for comments from instructors who adopt it and students who use it. Please send us any impressions you have about scope and depth of coverage, the effectiveness of the problems as teaching tools, and the approach of different chapters. We may be reached at jruhl@law.fsu.edu, nagle.8@nd.edu, and salzman@law.duke.edu.

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