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# **Environmental Law and the Values of Nature**

**Richard J. Finkmoore**

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*To Erin*

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# Author's Note

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The judicial opinions, articles, and books excerpted here have been rigorously edited in order to keep the whole pertinent and manageable. All omissions from the text of the sources quoted here (with the exception of some string citations) are indicated by ellipses. Most footnotes in the originals have been omitted, and where retained have been renumbered.

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I welcome comments by users of this book and suggestions for improvement. These may be sent to [rjf@cwsl.edu](mailto:rjf@cwsl.edu).

Richard J. Finkmoore

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# Understanding Environmental Law: An Introduction

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Just now we seem to be expecting some wonderworld to be attained through an ever-greater dedication to our sciences, technologies, and commercial projects. In the process, however, we are causing immense ruin in the world around us.

We might begin to think about our present life-situation by reflecting for a moment on the wonder of Earth, how it came to be the garden planet of the universe and what might be our human role in this context. To appreciate our immediate situation we might also develop a new intimacy with the North American countries. For we need the guidance and support of this continent as we find our way into the future.

The most basic and most disturbing commitment of the original European settlers was to conquer the continent and reduce it to human use. Because the exaltation of the human and the subjugation of the natural have been so excessive, we need to understand how the human community and the living forms of Earth might now become a life-giving presence to each other. We have already shaped the critical understanding and the appropriate technologies that can assist in establishing a beneficial human presence with the other components of this continent and also with the one great Earth community. We need only see that our human technologies are coherent with the ever-renewing technologies of the planet itself.

Of the institutions that should be guiding us into a viable future, the university has a special place because it teaches all those professions that control the human endeavor. In recent centuries the universities have supported an exploitation of the Earth by their teaching in the various professions, in the sciences, in engineering, law, education, and economics. Only in literature, poetry, music art and occasionally in religion and the biological sciences, has the natural world received the care that it deserves.

Our educational institutions need to see their purpose not as training personnel for exploiting the Earth but as guiding students toward an intimate relationship with the Earth. For it is the planet itself that brings us into being, sustains us in life, and delights us with its wonders. In this context we might consider the intellectual, political, and economic orientations that will enable us to fulfill the historical assignment before us—to establish a more viable way into the future.

### *Four Challenges*

The first fact that confronts students and professors of environmental law is the subject's tremendous scope and complexity. The authors of current environmental law casebooks describe the field as "a vast system," "an immense and fiercely complex web of regulations," "highly complex," "a hodgepodge," and in general bemoan the "numbing mass and complexity of environmental law."

Second, environment law teachers must deal with the fact that the field undergoes constant change. Even without major legislative action by Congress, significant new developments continually emanate from governmental agencies and, of course, the courts. Naturally, professors must present their students with the most current law. But equally important is the fact that throughout their professional careers students will regularly need to assimilate *and understand* new and sometimes sweeping changes in the law. In planning these materials, I have asked myself how law teachers can enable our students to do this successfully after graduation.

A third difficulty in studying and teaching environmental law is that its parts often do not seem in any way connected. There are separate statutes—and separate complex regulatory schemes—for air pollution, water pollution, and soil pollution (or contamination), and still different laws, for example, governing surface water pollution by one substance (oil), pollution of groundwater, and so on. Referring to the pollution control parts of environmental law, Professor John Leschy has stated, "... I [have] found it difficult to identify, must less organize a course around, some overarching themes in the regulatory patterns. They seem to me to be quite ad hoc..."<sup>1</sup>

A fourth challenge was expressed by Professor David Getches as follows: "Lawyers in great numbers are finding jobs 'doing environmental law,' but the law, lawyers, law schools, and law students seem to have so little to do with *the environment*..."<sup>2</sup> With dismay, I must agree that many of us—and often even the law itself—are disconnected from the environment.

### *Addressing the Challenges*

Because environmental law is vast, no professor can cover all of it in one course (and no casebook can cover it in one volume). Donald Elliott has written, "Today there is no serious question that environmental law is the most complicated and detailed body of law the world has ever known.... The field has simply gotten too large and complex for anyone to master it all." E. Donald Elliot, *The Last Great Clean Air Act Book?*, 5 Environmental Lawyer 321, 322 (1998). Therefore, we must be selective. To that end, this casebook<sup>3</sup> emphasizes the "natural resources portion" of environmental law—in my opinion, the more dynamic and the more interesting part of the field.

Current students can better assimilate future changes in environmental law if they have a context in which to place new legal developments. In my view, one very useful context is the history of environmental law and policy. An understanding of the evolution of the field can provide a way to connect new laws and programs to the existing legal structure (and there always is such a connection) and to be able to place new developments in the "big picture" (which law students seek and lawyers need to remain aware of).

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1. Joseph L. Sax, *Environmental Law in the Law Schools: What We Teach and How We Feel About It*, 19 Env'tl. L. Rptr. 10251 (1989).

2. Sax, *supra* (emphasis in the original).

3. Actually, these materials contain relatively few judicial opinions when compared to other books in the field, but I have bowed to tradition (and inertia in legal education) and refer to this as a "case"book.



Other environmental law professors also have emphasized the critical importance of a historical perspective. “One cannot understand current conflicts over allocation of our nation’s natural resources . . . without some grasp of the changing values of those resources over the course of our nation’s history. Nor do the approaches taken in our pollution statutes make sense unless understood in their historical context.” JAMES SALZMAN AND BARTON H. THOMPSON, JR., *ENVIRONMENTAL LAW AND POLICY* 3 (2d ed. 2007). For environmental law, a “sense of the history of it gives you a more sophisticated understanding of the case law and public law of the past, present, and future.” ZYGMUNT J.B. PLATER, ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 42 (3rd ed. 2004).

Accordingly, the first part of this casebook traces the historical evolution of environmental law.<sup>4</sup> *Importantly, however, the law presented throughout the book is modern environmental law.* For example, the National Environmental Policy Act of 1969 is examined at the appropriate point in the chronology, but the law which is presented is *the current law* of NEPA. Even in the first chapter, developments in the nineteenth century are presented through statutes which are *still in force today* and *modern* cases applying those statutes.

A powerful catalyst for the development of environmental law was the emergence of conservation and later environmentalism as social and political movements, and the rise of organized environmentalism. Environmental groups have been the primary moving force behind legislation, litigation, and administrative proceedings to improve and protect the environment. Therefore, this casebook devotes more attention than most others to the movement and its organizations. In my view, some familiarity with these topics is part of basic literacy for environmental lawyers.

Third, approaching environmental law on a statute-by-statute or resource-by-resource basis serves to reinforce the fragmentation of the field. Accordingly, the primary organization of this casebook is not the approach of most casebooks on this subject. The chronological organization of the first part of the casebook allows students to see the disparate parts within the broader evolution of environmental policy, and thereby to connect what seems at first glance unconnected. Moreover, environmental law is becoming somewhat more integrated in areas such as water allocation, endangered species protection, and ecosystem management. That these examples of integration are found in the “natural resources portion” of modern environmental law is another reason for emphasizing topics in that area.

Thus, Part I of this book presents *modern* environmental law in context; each of its five chapters explores one era in its evolution; the five chapters in Part II examine several major current environmental challenges. Because history does not unfold in neat installments, the eras presented in Part I, and the periods set forth within Chapter 1 in particular, do overlap with one another. For example, I include the early 1970s in Chapters 3 (1965–1978) and 4 (1970–1980). Eras are merely periods of time imposed on history by humans seeking understanding and meaning. With regard to our subject, public policies reflected in one part of environmental law may continue even though another part of the law changes and its new policies signal the beginning of another era. And so on. Rest assured, however, that *every* beginning and ending year denotes an important environmental *legal* event.

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4. A word to readers who are also historians: the chronology presented in the first five chapters is intended to be descriptive, not analytical. Undoubtedly, some will find it simplified and incomplete. Those readers will wish to consult the more comprehensive histories upon which I have relied and the sources cited in those works.

### *About the Values of Nature*

Part of the casebook's title warrants explanation. The environment itself—nature, if you will—is the reason we have environmental law in the first place. Many students want to learn environmental law not because it is law but because of the environment. Of course the law is very important, but that is because it determines the quality and integrity of the real world environment. In fact, nature is central to our subject; it should not be an after-thought.

When referring to the natural in our world, “value” is used here in the sense of a desirable quality, a characteristic which is of worth, economic or otherwise. Our environment has many such qualities and, from one perspective, environmental law can be considered society's decision regarding when and to what extent certain values should be recognized and protected.

Modern environmental law is sometimes presented as an accommodation between private rights and the public interest, or the result of competition among political philosophies and special interests, or scrutinized using economic analysis. The analytical frameworks of other disciplines are legitimate and instructive.

Another—and I believe equally legitimate—perspective views environmental law as a process of incorporating the values of nature into the legal system. The values of nature tell us about the objectives of the law, its development over time, and its shortcomings. Awareness of these values helps us *understand* environmental law, which is as important as *knowing* some environmental law.

The following passage helps to clarify the role of “values” as it is frequently incorporated throughout this casebook.

... [T]he terms *value* and *values* are used in two distinct but related ways. The first of the two meanings of *value* includes the motives, preferences, and underlying belief system that a person has in undertaking an activity, investigating a matter, or protecting an object. It is most commonly raised as an academic issue in a question such as “Is science free of values?” which means “Is science truly objective, or is it influenced by the motivations, perspectives, attitudes, or goals of the scientist?” Medicine, for example, is a science that is explicitly based on values because its goals and procedures grow from the desires of patients and the patients' subjective definitions of health. So, too, is conservation biology a science based on values; its practitioners look to the values of the communities they are trying to serve and to their own values in order to determine goals and methods necessary to achieve those goals. When commentators refer to this meaning, they typically write of *values*, in the plural.

The second meaning of *value*, the one more commonly found in the literature of economics and biodiversity studies, concerns the worth of a particular object or activity. “What is the value of biodiversity?” is an often-asked question, and many have tried to answer it by presenting lists of the different types of value (or worth) that humans find in various elements of biodiversity. These types of value carry names such as *use value*, *option value*, and *existence value* in this sense generally employ the singular form rather than the plural.

*Values*, [in the first sense]..., are entirely internal to human being, although the process of their development is molded by external events and other hu-

mans. In contrast, an individual assigns or attaches *worth* [value in the second sense] to objects and activities that are external to himself or herself. *Worth* is assigned when an object satisfies or in some way matches one of the individual's *values*. Since different people have different values, it is no surprise that they find worth in different objects and activities.

Therefore, the answer to the question, "What is the value of biodiversity?" (or ... "What is the worth of biodiversity?"), is "It depends upon the values that are important to you." An object, whether a work of art or an element of biodiversity, is not attributed great worth unless we can find a person for whom it satisfies important values.

DAN L. PERLMAN & GLENN ADELSON, *BIODIVERSITY: EXPLORING VALUES AND PRIORITIES IN CONSERVATION*, 39–40 (1997).

Although the two senses of "value" are related, this casebook uses the term—whether in the singular or plural—to refer to "worth," the merit and importance humans attach to specific aspects of the environment. It is important to keep in mind that the values of nature are *not* only those deemed worthy by most environmentalists, but include values derived from using, modifying, and consuming our environment.

Much of what is presented in this casebook is traditionally described as "natural resources law." But that term is not used in the title of the book; it is used only infrequently in the text. Certainly forests, water, wildlife, and so on are "natural," *but only in one sense are they "resources" as that word is generally defined*. Resources (plural) means the "available means (as of a country or business) : computable wealth (as in money, property, products) : immediate and possible sources of revenue < rich natural ~s >." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1934 (1981). As this casebook demonstrates, economic value is but one value of nature.

The environmental law that exists at a given point in time reflects those environmental values recognized as sufficiently important at that time—and those not so recognized. The path of environmental law has been to expand the values recognized and protected. For example, the values of solitude and landscapes unspoiled by man are now preserved by statute in many places. The services provided by ecosystems, such as water purification and flood control are now seen as providing economic value. Even intrinsic values, arguably, are protected by the Endangered Species Act and other statutes. An appreciation of nature's values can tell us what environmental law should become.

Finally, being reminded of the values of nature—and even discovering some for the first time—may reconnect us at least a little to the environment itself. It also may help to solve the very real problem noted by Professor Getches: that "the law, lawyers, [and] law schools ... have so little to do with *the environment*."

I close with a piece of advice for my readers, both law students and others: Go outdoors, be in nature. In my view, this is essential to knowing why environmental law is so important—and also to our sanity in this challenging modern world. Similar counsel was given by the writer Edward Abbey speaking to a group of environmental activists in the late 1970s:

One final paragraph of advice: do not burn yourself out. Be as I am—... a part-time crusader, a half-hearted fanatic. Save the other half of yourselves and your lives for pleasure and adventure. It is not enough to fight for the land; it is even more important to enjoy it. While you can. While it is still there. So get out there and hunt and fish and mess around with your friends, ramble out yon-

der and explore the forest, encounter the grizz, climb the mountains, bag the peaks, run the rivers, breathe deep of that yet sweet and lucid air, sit quietly for a while and contemplate the precious stillness, the lovely, mysterious and awesome space.

STEVE VAN MATRE AND BILL WEILER, EDS., *THE EARTH SPEAKS* 57 (1983) (quoting Edward Abbey).

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