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Fourth Edition

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ENVIRONMENTAL AND NATURAL RESOURCES LAW

Fourth Edition

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MATTHEW  BENDER

DEDICATION

*For my wife, Lorraine,
and for our children, Scott and Julia.*

PREFACE

Taken in its expansive sense, “environmental and natural resources law” encompasses pollution control law, energy allocation and conservation law, species and habitat protection, common law property rights, regulatory theory, and a host of other areas. In the law school setting, this obviously expansive body of legal material frequently is divided into two courses, an environmental law course focusing mainly on issues of pollution control and a natural resources law course covering the rest. As its title indicates, this textbook combines the two. The combination, I have found, works well, despite the academic challenge a broader examination can portend. For one thing, a panoptic coverage of this sort serves ideally as a platform for students whose plans include future intense study in these areas of law. It goes without saying that providing such a foundation is precisely what an introductory survey course ought to do. Beyond that, exposure to this broad reach of subject matter fosters in students a more rich understanding of generic issues and controversies that animate these areas of law. From the professor’s point of view, a major advantage inures at the course design stage. With more to choose from, instructors can supplement or reduce subject matter coverage as best suits their individual circumstances and the needs of their students.

With those considerations in mind, these materials have as a primary goal the examination of the “structure” of environmental and natural resources regulation. The book is organized to demonstrate how regulatory programs work both in the absolute and in relation to each other. In my view, this goal is more achieved more seamlessly if the book is used in conjunction with a statutory supplement.

Chapters 1 through 3 survey what might be thought of as classic “foundational” material. Chapter 1 presents a thumbnail sketch of the environmental movement that has led to the current array of legal controls, and offers a quick look into the world of administrative agencies and how they operate. Chapter 2 examines how the common law has dealt with pollution and resource allocation problems. This foray is important if only because common law mechanisms remain to this day effective tools for resolving environmental disputes. A review of the strengths and weaknesses of the common law as a method to protect the environment also sheds light on why environmental and natural resources law is now dominated by statute and regulation. Chapter 3 introduces the structure of regulation, in particular the significant interplay of the federal government, on the one hand, and the states, on the other, across this spectrum of law. As it turns out, polluters typically have two governmental masters, and in many instances, those masters disagree on what the polluter should or should not do. Chapter 3 ventures into the constitutional law of takings as well: since virtually every environmental protection and resource regulatory initiative burdens the use and value of real property, takings principles are ever relevant.

Chapters 4 through 8 present the natural resource law coverage. Chapter 4 introduces the National Environmental Policy Act, the federal government’s effort to put its own house in order. Chapter 5 examines the history of and legal regime governing federal lands and the natural resources they so abundantly contain. This coverage is important because fully one-third of land in this nation is titled in the federal government. Chapter 6 discusses the public trust doctrine, a common law principle rooted in history but continually growing in prominence. Chapter 7 shifts the focus to the Endangered Species

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Act, one of the most significant resource protection statutes in world history. Chapter 8 concludes this part of the book with an overview the domestic law of water rights. Issues of rights to water are critical to environmental quality, especially in western states, and students are well served by having some familiarity with these legal principles.

Chapters 9 through 12 present the major federal pollution control and remediation programs. Chapters 9, 10, and 11 review the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act, respectively. Chapter 12 presents the book's coverage of the significant "Superfund law," formally known as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). This statute is the federal government's pathbreaking effort at remediation of hazardous waste contamination. CERCLA has taken on infamous importance in the regulatory world because of its far-reaching liability structure.

This subject matter coverage necessarily brings into play issues of administrative law. Administrative law, briefly described, is the law of government agencies and how they operate. Administrative law is part and parcel of our course; indeed, many of the cases in this book were decided on administrative grounds. As you might expect, administrative law cannot be systematically examined in this course, due to time limitations. (For what is may be worth, administrative law *should not* be finely probed here — an academic discipline in its own right, it is better learned in a separate course devoted exclusively to the topic.) Nonetheless, for purposes of orientation, and to facilitate a better appreciation of the primary course material, this book offers, in addition to the commentary in the introductory chapter, *see supra*, four "Notes on Administrative Law" at various points in the text.

Not covered in the book, obliquely or otherwise, is environmental litigation. Courses on environmental litigation typically deal with an array of issues involving civil procedure, trial tactics, and federal court practice. This material, like administrative law, is essential groundwork for environmental lawyers, or at least those who expect to enter the courtroom, but is best left to a course devoted exclusively to those purposes.

Eric Pearson
May 2012

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