

Mastering Environmental Law

CAROLINA ACADEMIC PRESS MASTERING SERIES

RUSSELL WEAVER, SERIES EDITOR

For other titles, please go to caplaw.com.

Mastering Administrative Law, Second Edition

Linda D. Jellum

Mastering Adoption Law and Policy

Cynthia Hawkins DeBose

Mastering Alternative Dispute Resolution

Kelly M. Feeley, James A. Sheehan

Mastering American Indian Law

Angeline Wambdi EagleWoman, Stacy L. Leeds

Mastering Appellate Advocacy and Process, Revised Printing

Donna C. Looper, George W. Kuney

Mastering Art Law

Herbert Lazerow

Mastering Bankruptcy

George W. Kuney

Mastering Civil Procedure, Third Edition

David Charles Hricik

Mastering Constitutional Law, Second Edition

John C. Knechtle, Christopher J. Roederer

Mastering Contract Law

Irma S. Russell, Barbara K. Bucholtz

Mastering Corporate Tax, Second Edition

Gail Levin Richmond, Reginald Mombrun, Felicia Branch

Mastering Corporations and Other Business Entities, Second Edition

Lee Harris

Mastering Criminal Law, Second Edition

Ellen S. Podgor, Peter J. Henning, Neil P. Cohen

Mastering Criminal Procedure, Volume 1:

The Investigative Stage, Second Edition

Peter J. Henning, Andrew Taslitz, Margaret L. Paris, Cynthia E. Jones, Ellen S. Podgor

Mastering Criminal Procedure, Volume 2:

The Adjudicatory Stage, Second Edition

Peter J. Henning, Andrew Taslitz, Margaret L. Paris, Cynthia E. Jones, Ellen S. Podgor

Mastering Elder Law, Second Edition

Ralph C. Brashier

Mastering Employment Discrimination Law, Second Edition

Paul M. Secunda, Jeffrey M. Hirsch, Joseph A. Seiner

Mastering Environmental Law

Joel A. Mintz, Tracy Hester

Mastering First Amendment Law

John C. Knechtle

Mastering Income Tax

Christopher M. Pietruszkiewicz, Gail Levin Richmond

Mastering Intellectual Property

George W. Kuney, Donna C. Looper

Mastering Labor Law

Paul M. Secunda, Anne Marie Lofaso, Joseph E. Slater, Jeffrey M. Hirsch

Mastering Legal Analysis and Drafting

George W. Kuney, Donna C. Looper

**Mastering Negotiable Instruments (UCC Articles 3 and 4)
and Other Payment Systems, Second Edition**

Michael D. Floyd

Mastering Negotiation

Michael R. Fowler

Mastering Partnership Taxation

Stuart Lazar

Mastering Professional Responsibility, Second Edition

Grace M. Giesel

Mastering Property Law, Revised Printing

Darryl C. Wilson, Cynthia Hawkins DeBose

Mastering Sales

Colin P. Marks, Jeremy Kidd

Mastering Secured Transactions: UCC Article 9, Second Edition

Richard H. Nowka

Mastering Statutory Interpretation, Second Edition

Linda D. Jellum

Mastering Tort Law, Second Edition

Russell L. Weaver, Edward C. Martin, Andrew R. Klein,
Paul J. Zwier, II, John H. Bauman

Mastering Trademark and Unfair Competition Law

Lars S. Smith, Llewellyn Joseph Gibbons

Mastering Trusts and Estates

Gail Levin Richmond, Don Castleman

For other titles, please go to caplaw.com.

Mastering Environmental Law

Joel A. Mintz

PROFESSOR OF LAW EMERITUS
C. WILLIAM TROUT SENIOR FELLOW
NOVA SOUTHEASTERN UNIVERSITY
SHEPARD BROAD COLLEGE OF LAW

Tracy D. Hester

INSTRUCTIONAL PROFESSOR OF LAW
UNIVERSITY OF HOUSTON LAW CENTER



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2019
Carolina Academic Press, LLC
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Mintz, Joel A., 1949- author. | Hester, Tracy, author.
Title: Mastering environmental law / by Joel A. Mintz and Tracy Hester.
Description: Durham, North Carolina : Carolina Academic Press, LLC,
2019. | Series: Mastering series
Identifiers: LCCN 2019003156 | ISBN 9781531000905 (alk. paper)
Subjects: LCSH: Environmental law--United States.
Classification: LCC KF3775 .M584 2019 | DDC 344.7304/6--dc23
LC record available at <https://lcn.loc.gov/2019003156>

eISBN: 978-1-5310-0091-2

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

*To my wonderful mother and the memory of my father,
my first teachers and truly marvelous role models.*

—J.A.M.

*To Linda, who effortlessly combines being my wife,
my best friend, my colleague, and my inspiration.*

—T.D.H.

Contents

Table of Cases	xv
Series Editor’s Foreword	xix
Chapter 1 · Introduction	3
Chapter 2 · The Clean Air Act	5
Roadmap	5
I. Introduction and Overview	5
II. Common Law Approaches to Air Pollution Control	6
III. The Clean Air Act	7
A. National Ambient Air Quality Standards and State Implementation Plans	7
1. Setting National Ambient Air Quality Standards	7
2. What Must a State Implementation Plan Contain?	8
B. Regulation of Hazardous Air Pollutants	10
C. Requirements Applying to New Sources of Air Pollution	12
1. Limitations on New Sources in “Nonattainment Areas”	12
2. New Source Limitations in Attainment Areas	13
D. Air Pollution Controls on Motor Vehicles	14
Checkpoints	16
Chapter 3 · Climate Change Law	19
Roadmap	19
I. International Climate Change Treaties and Their Legal Effects within the United States	21
A. International Legal Commitments by the United States on Climate Change	21
1. UNFCCC	21
2. The Paris Agreement	22

3. Customary International Laws and Other Subject-Specific International Commitments	23
II. U.S. Laws That Apply to Climate Change	25
A. Clean Air Act Requirements	25
1. Authority to Regulate Greenhouse Gas Emissions as Air Pollution under the Clean Air Act	25
2. PSD Permitting for Major Greenhouse Gas Sources	26
3. NSPS/ESPS Requirements for Greenhouse Gases and the Fate of the Clean Power Plan	27
B. Other Federal Environmental Statutes That Create Climate Change Legal Obligations	28
C. State Laws and Regulations	31
D. Tort Liability	33
Checkpoints	35
Chapter 4 · Water Pollution	37
Roadmap	37
I. The National Pollutant Discharge Elimination System Permit Program	38
A. The Building Blocks of the No-Discharge Mandate	39
B. NPDES Permits	41
C. Permit Shields	42
D. Variances	43
E. Indirect Discharges	43
II. Ambient Water Quality Standards and the Total Maximum Daily Load Process	44
III. Wetlands Permitting	45
IV. Storm Water Discharges	47
V. Spill Reporting and Responses	48
VI. Delegation, Enforcement, and Citizen Suits	49
Checkpoints	51
Chapter 5 · The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)	53
Roadmap	53
I. Introduction	53
II. The Response Action Process	54
A. Remedies	55

B. Administrative Response Action Orders	56
III. CERCLA Liability	57
A. The Structure and Common Elements of Liability	57
B. Responsible Parties	58
1. Owners or Operators	58
2. Owners or Operators at the Time of Disposal	60
3. Arrangers	60
4. Transporters	61
C. What Potentially Responsible Parties May Be Responsible For	62
1. Government Response Costs	62
2. Response Costs of Nongovernmental Actors	62
3. Natural Resource Damages	63
4. Health Assessment Costs	64
D. The Liability of Multiple Responsible Parties	64
E. Contribution and Private Party Cost Recovery Actions	66
Checkpoints	69
Chapter 6 · The Resource Conservation and Recovery Act	71
Roadmap	71
I. Introduction	71
II. Regulation of Non-Hazardous Solid Wastes under RCRA Subtitle D	72
III. Regulation of Hazardous Waste under RCRA Subtitle C	73
A. Defining and Identifying Hazardous Waste	73
1. When Is a Waste a “Solid Waste”?	73
2. When Is a “Solid Waste” Also a “Hazardous Waste”?	75
a. Characteristic and Listed Hazardous Wastes	75
b. The Mixture and Derived-From Rules	76
3. Exclusions from RCRA Hazardous Waste Regulation	76
IV. Implementation of RCRA Subtitle C	77
A. Requirements for Hazardous Waste Generators	77
B. Requirements for Transporters of Hazardous Waste	78
C. Requirements Concerning Treatment, Storage, and Disposal Facilities (TSDFs)	78
1. Key Definitions and the Scope of the Regulations	78
2. TSDF Permit Requirements	79
3. Regulating the Operation of TSDFs	80
4. Land Disposal Regulations	81

5. Corrective Action Requirements	81
6. TSDF Closure and Post-Closure Requirements	82
D. The Role of the States in RCRA Implementation	82
V. The Enforcement of RCRA Requirements	83
Checkpoints	85
Chapter 7 · The Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)	87
Roadmap	87
I. TSCA—The Basic Framework	89
A. Stepping into TSCA’s Jurisdiction	90
B. The Master Chemical Inventory	91
C. New Chemicals—Notifications	92
D. Existing Chemicals—Significant New Uses	94
E. Testing and Testing Orders	95
F. Reporting Obligations	96
G. Preemption and Enforcement	98
II. Pesticides, Insecticides, Fungicides, Rodenticides, and Other Economic Poisons within the World of FIFRA	98
A. Gateway to FIFRA: What Is a Pesticide?	99
B. Registering Pesticides	99
C. Efficacy, Secrecy, and Necessity	100
D. Controlling Use of Registered Pesticides	101
E. Cancellations, Suspensions, and Recalls	102
F. A Final Word: Preemption of State Law and Tort Liability	103
Checkpoints	105
Chapter 8 · The National Environmental Policy Act	107
Roadmap	107
I. Introduction and Overview	107
II. The Nature of NEPA	108
A. Critical Statutory Provisions	108
B. The Enforceability of NEPA	109
C. Substance versus Procedure in NEPA Compliance	110
III. Triggering the Requirement to Prepare an EIS	111
A. What Is a Proposal?	112
B. What Is a Major Federal Action?	112
C. When Does a Major Federal Action Significantly Affect the Quality of the Human Environment?	114

IV. Adequacy of the Environmental Impact Statement	116
V. The Interpretation Mandate of § 102(1): NEPA's Sleeping Giant	118
VI. Remedies for NEPA Violations	118
Checkpoints	120
Chapter 9 · Endangered and Protected Species	123
Roadmap	123
I. Introduction	123
II. The Endangered Species Act	124
A. Section 4: Listing a Protected Species and Candidate Conservation Agreements	124
B. Section 7: Consultation and Incidental Take Permits	126
C. Section 9: Prohibition on Taking Protected Species and Habitat Conservation Plans	127
D. Citizen Suits and Petitions	129
III. The Marine Mammal Protection Act	129
IV. The Migratory Bird Treaty Act	130
Checkpoints	133
Chapter 10 · Environmental Enforcement	135
Roadmap	135
I. Introduction and Overview	135
II. Information Gathering	136
III. Administrative Enforcement	137
A. Notices of Violation	137
B. Administrative Compliance Orders	138
C. Administrative Penalty Orders	139
IV. Civil Judicial Enforcement	140
A. The <i>Prima Facie</i> Case	140
B. Defenses to Liability	140
V. Criminal Enforcement	141
A. Standards of Proof	142
B. Defenses to Criminal Liability	143
VI. Citizen Suit Enforcement	145
A. Notice of Intent to Sue Requirements	145
B. Citizen Suits for Wholly Past Violations	146
C. Mootness	147
D. The Diligent Prosecution Bar	147
Checkpoints	149

Chapter 11 · Environmental Litigation and Pertinent Administrative Law	151
Roadmap	151
I. Introduction and Overview	151
II. Judicial Review of Agency Actions	152
A. Lawsuits to Block Controversial Projects	152
B. Lawsuits Challenging Promulgated Regulations	154
III. Standing to Sue in Environmental Cases	156
A. Standing to Sue in Lawsuits by NGOs and Citizens	156
B. The Standing to Sue of Affected Commercial Interests	158
C. The Standing to Sue of Sovereign States	159
IV. Attorneys' Fees in Environmental Litigation	160
V. Injunctive Relief in Environmental Litigation	161
Checkpoints	163
Mastering Environmental Law Master Checklist	165
Index	183

Table of Cases

- ABB Industrial Sys., Inc. v. Prime Technology, Inc., 60
- Alabama ex. rel. Siegelman v. Environmental Protection Agency, 115
- American Chemistry Council v. EPA, 76
- American Electric Power Co., Inc. v. Connecticut, 7, 33
- American Petroleum Inst. v. EPA, 81
- Asarco LLC v. Goodwin, 58
- Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 42
- B.F. Goodrich v. Murtha, 61
- Bates v. Dow Agrosciences, LLC, 104
- Bennett v. Spear, 156, 158
- Boomer v. Atlantic Cement Co., 6
- Burlington Northern and Santa Fe Railway Co. v. United States, 61, 66
- California v. Norton, 114
- Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Commission, 110
- Carson Village Harbor v. County of Los Angeles, 63
- Center for Biological Diversity v. EPA, 29
- Center for Biological Diversity v. National Highway Transportation Administration, 30
- Chemical Manufacturers Ass'n. v. EPA, 95
- Chevron U.S.A. v. Natural Resources Defense Council, 154
- Citizens Legal Env'tl. Action Network v. Premium Std. Farms, Inc., 148
- Citizens to Preserve Overton Park v. Volpe, 153, 154
- City of Burlington v. Dague, 160
- Comer v. Murphy Oil Co., 33
- Commander Oil Corp. v. Barlo Equipment Corp., 58
- Connecticut Coastal Fisherman's Assn. v. Remington Arms Co., 74
- Conservation Law Foundation v. Exxon Mobil Corp., 29
- Cooper Industries Inc. v. Aviall Services, Inc., 67
- Donavan v. Dewey, 137
- Douglas County v. Babbitt, 115
- Dow Chemical v. United States, 137
- Ekotek Site PRP Comm. V. Self, 61
- Environmental Defense Fund v. EPA, 103

- Environmental Protection Agency v. EME Homer Generation, 10
- Friends of the Earth v. Laidlaw Environmental Services (TOC), 147, 158
- General Electric Co. v. Environmental Protection Agency, 141
- General Electric Co. v. Jackson, 57
- Georgia v. Tennessee Copper Co., 6
- Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 146
- Holland v. Missouri, 132
- Hudson v. United States, 144
- Humane Society of the U.S. v. Glickman, 132
- In re Charming Betsy, 24
- In re Mullins and Pritchard, Inc., 137
- In re Paquette Habana, 24
- Indian Brand Farms, Inc. v. Novartis Crop Protection, Inc., 104
- Lead Industries Association, Inc. v. EPA, 8
- Los Angeles Flood Control District v. Natural Resources Defense Council, 39
- Lujan v. Defenders of Wildlife, 129, 157, 158
- Luminant Generation Co., LLC v. U.S. EPA, 138
- M.A. Bruder and Sons, Inc., 139
- Marsh v. Oregon Natural Resources Council, 117
- Marshall v. Barlow's, Inc., 137
- Massachusetts v. EPA, 26, 159
- Mayaguezanos por la Salud y el Ambiente v. United States, 114
- Merrell v. Thomas, 115
- Metropolitan Edison Co. v. People Against Nuclear Energy, 116
- Michigan v. Environmental Protection Agency, 11, 155
- Montana Environmental Information Center v. U.S. Office of Surface Mining, 31
- National Coalition Against the Misuse of Pesticides v. EPA, 103
- National Mining Association v. United States Environmental Protection Agency, 11
- National Wildlife Federation v. Consumers Power Co., 39
- Native Ecosystems Council v. Marten, 129
- Native Village of Kivalina v. Exxon Mobile Corp., 33
- New York v. Burger, 137
- New York v. Shore Realty Corp., 59
- Newton County Wildlife Ass'n. v. U.S. Dept. of Agriculture, 131
- No Spray Coalition, Inc. v. City of New York, 74
- Nurad, Inc. v. William E. Hooper and Sons Co., 60
- O'Neil v. Picillo, 58, 66
- Ohio v. U.S. Department of Interior, 63
- Peterson v. BASF Corp., 104
- Portland Cement Association v. Ruckelshaus, 115
- Public Citizen v. U.S. Trade Representative, 110
- Ramsey v. Kantor, 114
- Rapanos v. United States, 40
- Robertson v. Methow Valley Citizens Council, 111

- Rocky Mountain Farmer's Union v. Corey, 33
- Ruckelshaus v. Sierra Club, 160
- Sackett v. Environmental Protection Agency, 138
- Scenic Hudson Preservation Conference v. Federal Power Commission, 153
- Seattle Audubon Society v. Evans, 131
- Seminole Tribe of Florida v. Florida, 58
- Sierra Club v. Johnson, 141
- Sierra Club v. Morton, 156
- Sierra Club v. U.S. Department of Energy, 31
- Sierra Club v. Union Oil Co., 136
- Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 132
- Southwest Williamson County Community Association, Inc. v. Slater, 113
- Spur Industries, Inc. v. Del Webb Development Co., 7
- Strykers Bay Neighborhood Council, Inc. v. Karlen, 111
- Tanglewood East Homeowners v. Charles Thomas, Inc., 60
- Tennessee Valley Authority v. Hill, 127, 161, 162
- Tippins, Inc. v. USX Corp., 61
- U.S. v. Apollo Energies, Inc., 131
- U.S. v. Biswell, 137
- U.S. v. CITGO Petroleum Corp., 131
- U.S. v. FMC Corp., 131
- U.S. v. Moon Electric Ass'n., 131
- U.S. v. Telluride Co., 141
- Union Pacific R. Co. v. Reilly Indus., Inc., 63
- United States v. Aceto Agricultural Chem. Corp., 61
- United States v. Alcan Aluminum Co., 65
- United States v. American Cyanamid Co., 62
- United States v. Atlantic Research Corp., 67
- United States v. Bell Petroleum Serus., 66
- United States v. Bestfoods, 60
- United States v. Bliss, 61
- United States v. Cannons Engineering Corp., 68
- United States v. CDMG Reality Co., 60
- United States v. Charles George Trucking, Inc., 68
- United States v. Chem Dyne Corp., 65
- United States v. City of Toledo, 144
- United States v. Cooper, 144
- United States v. Dico, Inc., 58
- United States v. Elias, 145
- United States v. Engler, 145
- United States v. Hanousek, 143
- United States v. Hercules, Inc., 66
- United States v. Hoflin, 143
- United States v. International Mineral and Chemicals Corp., 143
- United States v. Kapp, 145
- United States v. Louisville Edible Oil Products, 144
- United States v. Metropolitan District Commission, 139

- United States v. Monsanto Co., 58,
65, 66
- United States v. Northeastern
Pharm. And Chem. Co., 61
- United States v. Plaza Health
Laboratories, Inc., 40
- United States v. Price, 144
- United States v. Protex Indus, Inc.,
144
- United States v. R. W. Meyer, Inc.,
65
- United States v. Reaves, 141
- United States v. Sharon Steel Corp.,
140
- United States v. Sinskey, 143
- United States v. Tuerson, 144
- United States v. Wasserson, 142
- United States v. Weitzenhoff, 143,
145
- United States v. West Indies Transp.,
Inc., 40
- Utahns for Better Transportation v.
U.S. Department of Transporta-
tion, 117
- Utility Air Regulatory Group v. EPA,
27
- Weinberger v. Romero-Barcelo, 162
- Whitman v. American Trucking
Association, Inc., 8
- Wuebker v. Wilber Ellis Co., 104

Series Editor's Foreword

The Carolina Academic Press Mastering Series is designed to provide you with a tool that will enable you to easily and efficiently “master” the substance and content of law school courses. Throughout the series, the focus is on quality writing that makes legal concepts understandable. As a result, the series is designed to be easy to read and is not unduly cluttered with footnotes or cites to secondary sources.

In order to facilitate student mastery of topics, the Mastering Series includes a number of pedagogical features designed to improve learning and retention. At the beginning of each chapter, you will find a “Roadmap” that tells you about the chapter and provides you with a sense of the material that you will cover. A “Checkpoint” at the end of each chapter encourages you to stop and review the key concepts, reiterating what you have learned. Throughout the book, key terms are explained and emphasized. Finally, a “Master Checklist” at the end of each book reinforces what you have learned and helps you identify any areas that need review or further study.

We hope that you will enjoy studying with, and learning from, the Mastering Series.

Russell L. Weaver
Professor of Law & Distinguished University Scholar
University of Louisville, Louis D. Brandeis School of Law