

Environmental Law Practice

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ENVIRONMENTAL LAW PRACTICE
Problems and Exercises for Skills Development
FOURTH EDITION
Jerry L. Anderson, Dennis D. Hirsch,
Noah M. Sachs, and Edmund J. Tormey

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FOURTH EDITION

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GENERAL COUNSEL, IOWA DEPARTMENT OF NATURAL RESOURCES

A Lawyering Series Coursebook

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To my marvelous wife, Susan, and my wonderful parents.

JLA

*To my wife Suzanne, who encourages me to pursue my dreams; and to
my parents, who introduced me to writing and the law.*

DDH

To my beautiful children, Adam and Claudia.

NMS

To my wonderful family: Connie, Erin and Sean.

EJT

Contents

List of Figures	xiii
List of Exercises	xv
List of Problems	xvii
Foreword	xxi
About the Series	xxv
Introduction	xxvii
Chapter I · Environmental Compliance	3
A. Introduction: The Lawyer’s Role in Environmental Compliance	3
B. Ensuring Compliance	4
1. Complying with the Clean Air Act’s Prevention of Significant Deterioration Program	7
a. Statutes: The United States Code Annotated	9
b. Legislative History: The U.S. Code Congressional and Administrative News	15
c. Regulations: The Code of Federal Regulations	17
d. Case Law	28
<i>Alabama Power Company, et al. v. Costle</i>	28
e. Regulatory Preambles: The Federal Register	33
f. Agency Guidance Documents	43
2. Complying with the Clean Air Act’s New Source Performance Standard Program	55
<i>ASARCO Inc. v. U.S. Environmental Protection Agency</i>	57
C. Counseling Clients When the Law Is Ambiguous	63
Dana, Environmental Lawyers and the Public Service Model of Lawyering	64

American Bar Association, Model Rules of Professional Conduct (2008)	66
Futrell, Environmental Ethics, Legal Ethics, and Codes of Professional Conduct	71
Chapter II · Environmental Enforcement	75
A. Introduction: The Lawyer’s Role in Environmental Enforcement	75
B. Agency Enforcement	78
1. The Federal-State Relationship	81
<i>Harmon Industries, Inc. v. Carol M. Browner, Admin., U.S. EPA</i>	83
2. The Enforcement Process	89
a. Self-Reporting Obligations	89
b. Self-Audits and Environmental Management	91
c. Inspections	94
<i>V-1 Oil Company v. State of Wyoming, Department of Environmental Quality</i>	97
d. Types of Enforcement Actions	103
3. Administrative Practice	108
C. Sources of Law	111
1. Enforcement Response Policies	111
a. Base Penalty	112
b. Adjustment Factors	114
c. Per-Day Penalties	114
d. Environmentally Beneficial Expenditures or Supplemental Environmental Projects (SEPs)	114
e. Binding Effect of Policy	117
2. Case Law	117
a. Unpublished Opinions	117
b. Administrative Opinions	118
D. Practice Considerations	121
1. Enforcement Issues	121
a. Defenses	121
<i>Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.</i>	125
<i>John A. Rapanos, et ux., et al. v. United States</i>	129
b. Penalty Amounts	132
Chapter III · Citizen Suit Enforcement	143
A. Information Gathering	143
B. Litigation Issues	152

1. Pre-Suit Notice	152
2. Pretrial Publicity	153
3. Diligent Prosecution	155
<i>Comfort Lake Association, Inc., v. Dresel Contracting, Inc.</i>	158
4. Standing	162
5. “In Violation”/Mootness Issue	164
<i>Steel Company v. Citizens for a Better Environment</i>	166
6. Potential Recovery	175
<i>Sierra Club, Inc. v. Electronic Controls Design, Inc.</i>	177
7. Suits against the EPA or State Agency	181
Chapter IV · Environmental Litigation	183
A. Introduction: The Lawyer’s Role in Environmental Litigation	183
B. Practice Issues in Superfund Litigation	194
1. The Superfund Remediation Process	195
a. Removal Action	196
b. Site Investigation	196
c. Information Gathering	197
d. Hazard Ranking System (HRS)	197
e. National Priorities List	197
f. Remedial Investigation/Feasibility Study	198
g. Record of Decision	198
h. Remedial Design/ Remedial Action (RD/RA)	198
2. The Superfund Liability Scheme	200
The Shenandoah Superfund Site	202
3. Superfund Litigation Issues	211
a. Section 107 Liability	211
<i>United States v. Alcan Aluminum Corp.</i>	212
b. Joint and Several Liability	217
<i>Burlington Northern and Santa Fe Railway Company, et al. v. United States et al.</i>	217
c. Consistency with the NCP	225
<i>United States v. Chapman</i>	226
d. Insurance Coverage for Cleanup Costs	231
e. Choice of Remedy	232
f. 107(b) Defenses	234
g. Statute of Limitations	235
Jerry L. Anderson, The Hazardous Waste Land	236
C. Substantive Litigation Issues	242

1. Successor Liability	243
2. Municipal Solid Waste	245
3. Interim Landowner Liability	248
4. Innocent Landowner	249
5. Individual Liability	251
6. Section 106 Penalties	253
D. Superfund Cost Allocation	254
E. Settlement	256
Chapter V · Environmental Policy	261
A. Introduction: The Lawyer's Role in Environmental Policy	261
B. The Federal Rulemaking Process	262
1. Administrative Procedure Act Requirements	262
a. The Notice of Proposed Rulemaking	263
b. Public Comment on the Proposed Rule	264
c. The Final Rule	264
2. Optional Procedures Prior to the Proposal	265
a. Advance Notice of Proposed Rulemaking	265
b. Negotiated Rulemaking	266
3. Statute-Specific Procedures	267
C. The Lawyer's Involvement in the Rulemaking Process	268
1. Initiating Rulemaking	269
a. Suing the Agency to Enforce Statutory Deadlines	269
b. Petitioning the Agency for the Issuance of a Rule	269
c. Suing the Agency to Enforce Notice and Comment Rulemaking Requirements	270
<i>Tabb Lakes, Ltd. v. United States</i>	273
<i>Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers</i>	276
<i>General Electric Power Company v. Environmental Protection Agency</i>	282
<i>Cement Kiln Recycling Coalition v. Environmental Protection Agency</i>	286
<i>Waste Management, Inc. v. U.S. Environmental Protection Agency</i>	294
<i>Batterton v. Marshall</i>	298
2. Participating in the Rulemaking Process	302
3. Challenging a Final Rule in Court	305
D. Introduction to the Environmental Justice Movement	307
1. Facts about the Discriminatory Siting of Facilities	308
2. Federal Actions to Promote Environmental Justice	310
3. Environmental Justice Litigation	311

Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits	315
Chapter VI · Permitting and Settlements	331
A. Introduction: The Lawyer’s Role in Permitting	331
B. The Permitting Process	333
1. Application Preparation and Submittal	334
2. Issuance of Draft Permit and Public Comment	335
3. Issuance of Final Permit and Appeals	336
4. Permit Compliance and Enforcement	336
C. Other Permitting Issues	337
1. Individual v. General Permits	337
2. The Permit “Shield”	339
D. Permitting a Complex Real Estate Development	341
1. The Regal Hotel and Marina	341
2. Transom’s Pier and Army Corps Permitting	343
3. Environmental Impact Review of the Army Corps Permit	347
4. Judicial Review of the Army Corps Permit	352
E. Settling Environmental Disputes Involving Permits	355
Appendix · In the Matter of GEC Precision Corporation	363
Index	379

List of Figures

Figure 1.1a	U.S.C.A. General Index	10
Figure 1.1b	U.S.C.A. General Index	11
Figure 1.2	42 U.S.C.A. § 7475(a)	13
Figure 1.3	42 U.S.C.A. § 7479(1)	14
Figure 1.4	42 U.S.C.A. § 7475 Historical Note	15
Figure 1.5	Code of Federal Regulations Index	18
Figure 1.6	Code of Federal Regulations Part 52	21
Figure 1.7	40 Code of Federal Regulations §52.21	23
Figure 1.8	Preamble to proposed PSD regulations, Sept. 5, 1979	36
Figure 1.9	Preamble to final PSD regulations, August 7, 1980	39
Figure 2.1	2015 EPA Enforcement Statistics	76
Figure 2.2	Federal Environmental Enforcement Examples	77
Figure 2.3	EPA Regional Offices	80
Figure 2.4	Civil Penalty Matrix for CERCLA Section 103, EPCRA Section 304, and EPCRA Section 312	113
Figure 2.5	EPCRA Working Letter	137
Figures 3.1	NPDES Permit	145
Figures 3.2	NPDES Permit	146
Figures 3.3	Discharge Monitoring Report	147
Figure 4.1	Shenandoah CERCLA Site	202
Figure 4.2	EPA's Preferred Alternative Shenandoah Superfund Site	205
Figure 6.1	Examples of Permit Requirements in Federal Statutes	333
Figure 6.2	EA vs. EIS Requirements	349

List of Exercises

Exercise 1.1	Counseling a Client on a New Source Performance Standard Issue	61
Exercise 1.2	Counseling a Client with Respect to an Ambiguous Regulation	72
Exercise 2	Agra Enterprises—EPCRA73	133
Exercise 2.1	Fact Investigation	138
Exercise 2.2	Drafting the Administrative Complaint	139
Exercise 2.3	Settlement Negotiation	140
Exercise 3	Citizen Enforcement of the Clean Water Act: Pork Unlimited	150
Exercise 3.1	Information Request	151
Exercise 3.2	Drafting the Notice Letter	153
Exercise 3.3	Drafting the Complaint	175
Exercise 4.1	Joint Defense Agreement	208
Exercise 4.2(a)	Summary Judgment Motion—Successor Liability	245
Exercise 4.2(b)	Summary Judgment Motion—Municipal Waste	247
Exercise 4.2(c)	Summary Judgment Motion—Interim Landowner	249
Exercise 4.2(d)	Summary Judgment Motion—Innocent Landowner	251
Exercise 4.2(e)	Summary Judgment Motion—Individual Liability	253
Exercise 4.2(f)	Summary Judgment Motion—Section 106 Liability	254
Exercise 4.3	Cost Allocations	259
Exercise 5.1	Drafting Comments on EPA’s Interim Title VI Guidance	328
Exercise 5.2	Representing Your Client at a Public Hearing	329
Exercise 6.1	Drafting Settlement Terms in the CREATE v. Transom Permit Litigation	360
Exercise 6.2	Negotiating a Settlement in the CREATE v. Transom Permit Litigation	361

List of Problems

Problem 1.1	Finding Statutes	12
Problem 1.2	Applying Statutory Language	14
Problem 1.3	Applying Regulatory Language	28
Problem 1.4	Judicial Review of Regulations	33
Problem 1.5	Using Regulatory Preambles	43
Problem 1.6	Using Agency Guidance	52
Problem 1.7	Finding and Applying Statutes	55
Problem 1.8	Finding and Applying Legislative History	56
Problem 1.9	Finding and Applying Regulations	56
Problem 1.10	Applying Case Law	56
Problem 1.11	Finding and Applying Regulatory Preambles	61
Problem 1.12	Role as Counselor	65
Problem 1.13	Prevalence of Public Service Model	65
Problem 1.14	Effectiveness of Public Service Model	66
Problem 1.15	Questionable Interpretation	70
Problem 1.16	Going Over the Client's Head	70
Problem 1.17	Confidentiality	70
Problem 1.18	Moral/Ethical Considerations	71
Problem 1.19	Adequacy of Rules	72
Problem 2.1	Quality Wood Products: RCRA Overfiling	88
Problem 2.2	Self-Incrimination	90
Problem 2.3	Audit Policy	93
Problem 2.4	Inspection Authority	96
Problem 2.5	Applying Case Law and Policy	119
Problem 2.6	Administrative Hearings	120
Problem 2.7	Developing Defenses	123

Problem 3.1	FOIA	151
Problem 3.2	The Perils of Publicity	154
Problem 3.3	Diligent Prosecution	157
Problem 3.4	Wholly Past Violations and Standing	174
Problem 3.5	Settlement	176
Problem 3.6	Attorneys' Fees	180
Problem 4.1	Administrative Procedure	187
Problem 4.2	Judicial Review	189
Problem 4.3	Discovery	191
Problem 4.4	Litigation Costs	193
Problem 4.5	Hazard Ranking System/NPL Listing	206
Problem 4.6	Section 107 Elements of Liability	211
Problem 4.7	Joint and Several Liability/Arranger Liability	224
Problem 4.8	NCP Consistency	230
Problem 4.9	Insurance coverage	232
Problem 4.10	Choice of Remedy	234
Problem 4.11	Third Party Defenses	234
Problem 4.12	Statute of Limitations	235
Problem 5.1	Publication Requirement	264
Problem 5.2	Holding Hearings	264
Problem 5.3	Timing of Final Rule	265
Problem 5.4	When to Employ an ANPR	266
Problem 5.5	Why Use Negotiated Rulemaking	267
Problem 5.6	Public Hearing Requirement	267
Problem 5.7	Hearing Procedure	268
Problem 5.8	Forcing EPA to Initiate Rulemaking	269
Problem 5.9	Petitioning for Issuance of a TSCA Rule	270
Problem 5.10	Legislative/Interpretative Rule	281
Problem 5.11	General Statements of Policy Exception	293
Problem 5.12	Procedural Rule Exception	301
Problem 5.13	Challenging a Regulation	306
Problem 5.14	Parties to Complaint	328
Problem 5.15	OCR Procedures	328
Problem 5.16	Timing of Complaint	328
Problem 5.17	Investigation of Complaint	328
Problem 5.18	Mitigation	328
Problem 5.19	Justification	328
Problem 6.1	The Permit Shield	340
Problem 6.2	Is an Army Corps Permit Required?	344

LIST OF PROBLEMS

xix

Problem 6.3	Public Interest Factors	344
Problem 6.4	The Small Handle Issue at the Regal Hotel	351
Problem 6.5	Appealing the Army Corps Permit	355

Foreword

by Angus Macbeth

I began to practice environmental law as a staff attorney with the Natural Resources Defense Council in 1970, shortly after the passage of the National Environmental Policy Act. In those days the landscape had a few large visible monuments—the common law of nuisance; the Second Circuit’s decision in the first *Scenic Hudson* case—but generally the eye and the imagination could peer far and wide with little to impede the view. In the succeeding twenty-five years, during the course of which I have served as a Deputy Assistant Attorney General in the Land and Natural Resources Division at the Department of Justice and as the head of Sidley, Austin, Brown and Wood’s environmental law practice group, I have seen a massive growth of statute laws: the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, Superfund, and all their state law analogues. Beneath this forest canopy there has been a sturdy growth of both regulations and case law. EPA’s regulations at 40 CFR now extend to more than twenty-five volumes. A few years ago I looked through a leading case book on administrative law and found that more than twenty percent of the cases were drawn from environmental law. Hidden in the underbrush we find a thriving culture of guidance documents, regulations which are never made final but are followed nevertheless, and interpretive letters hidden where only the insatiable collector is likely to find them.

In short, environmental law has become a jungle. Or, if you prefer a different metaphor, an excruciating maze. Or a paper palace rivaling the tax code and regulations in complexity and counter-intuitive esoterica.

That history is the first justification for this book and it is a very powerful one. The student has to be taught the path through the jungle and how to use

a machete with speed and accuracy if he is ever to be able to give advice to his client with speed and accuracy—and most importantly, with sound judgment. This problem is there for the government lawyer, the public interest bar, and the private attorney.

I do not think it will go away. The number of Superfund cases with a hundred parties will shrink as we continue and complete the clean up of commercial hazardous waste sites; but the pervading complexity of environmental law will continue. First, the natural world is enormously complex and the regulation of human impact on the natural world will reflect that complexity. Second, the environmental laws of the last twenty-five years have been a tremendous success in reducing pollution. As a consequence, the targets for environmental regulation get smaller over time and the competing interests that must be weighed in deciding how to regulate have become more complex with the result that the law becomes more complex. Third, simplicity and accuracy are in constant tension in this field and so far simplicity has rarely prevailed (unfortunately, it does not follow that accuracy has prevailed). Finally, it is a sad fact that on the jungle floor the lush diversity of semi-legal forms of authority has rooted and spread to the point where they cannot be eradicated. Coherent compilations of basic laws such as State Implementation Plans under the Clean Air Act cannot be found. The meaning of RCRA regulations are hidden in footnotes to Federal Register preambles. It isn't the way things should be, but it certainly is the way they have been for a long time.

In short, the need for this book will persist for a long time to come.

The second real value of this volume lies in its decision to introduce students to the roles of the public interest, government *and* private attorney, instead of focusing on just one of these. In the course of my career, during which I have represented all three of these constituencies, I have come to appreciate the importance of being able to see environmental issues from more than one perspective.

This ability is valuable, first, in that it gives one insight into how the “other side” thinks. For example, a private lawyer entering a negotiation with the EPA would be well advised to have thought through how his opponent is likely to approach the issue—what the EPA attorney's goals, incentives and marching orders are likely to be. The same might be said for the EPA lawyer, who should be able to place himself in the private attorney's shoes. The exercises ask the students to play the roles of private, EPA and public interest attorney in the context of negotiating an EPCRA penalty, settling a Superfund suit and litigating a citizens suit. This should help them see how lawyers from different

sides think about an issue, thereby equipping them to deal more effectively with opposing counsel when they enter the world of practice.

Students should also draw another valuable lesson from the experience of representing different sides in environmental disputes. The layperson and the untutored lawyer often assume that environmental laws, like the lights in a crosswalk, give clear signals to the business people seeking to make their way. But the environmental lawyer soon finds out that this is not the case.

Rather, environmental statutes, regulations and policies, with their great complexity and many ambiguities, leave much room for interpretation and judgment. The earlier a lawyer recognizes this, the earlier he can start developing this judgment. By asking students to play a number of roles, and thereby to see environmental law questions from a variety of different perspectives, the book begins to develop this essential skill.

In sum, this volume provides practical training for environmental lawyers of the most useful sort. It not only leads the student through the jungle of the law, it gives him the tools to develop his judgment so that he can wrestle effectively with the tough practical problems and, in time, give his client advice that is mature and wise as well as solidly grounded in the law.

About the Series

Carolina Academic Press, in cooperation with Northeastern University School of Law, is pleased to offer a new series of teaching materials, the Lawyering Series. Professor Roger Abrams, Richardson Professor of Law at Northeastern School of Law, will serve as Series Editor.

Carolina Academic Press, an independent publisher, has a strong reputation for publishing innovative print and digital teaching materials for the law school community. Northeastern University School of Law has long been known as an innovator in legal education, with a national reputation for its Cooperative Legal Education (Co-op) Program and its rich clinical, internship, and externship offerings.

Over the last decade, the American Bar Association has urged American law schools to better prepare their students for the practice of law. Most recently, the ABA has enacted new Standards that require all law students to complete six credit hours of “experiential” courses. This requirement commenced for students beginning law school in fall 2016.

It is our sincere hope that the Lawyering Series will support law schools and law professors—both full-time and adjunct—as they search for more innovative and more practical teaching materials.

We welcome your comments and suggestions. Please contact Carolina Academic Press at manuscript@caplaw.com or Series Editor Roger Abrams at r.abrams@neu.edu.

Introduction

The Goals of the Fourth Edition

The authors of this book remember well our first days as practicing environmental lawyers. Fresh out of law school and clerkships, we set out for the library with sharpened pencils to complete our initial research assignments. We began where most law students are taught to begin, with the law reporters. But the fine interpretations of regulatory law that we needed were not to be found there. We moved on to American Jurisprudence Second, the ALRs, and the law reviews. Still nothing. Stumped, and more than a little embarrassed, we were forced to seek out more senior lawyers for guidance. Thus began our introduction to the new realm of legal materials that includes such sources as the Code of Federal Regulations, the Federal Register, the Environment Reporter, and agency guidance—the materials that environmental lawyers use most.

We also learned early on that environmental lawyers do much more than legal research (this is one of the reasons that the practice of environmental law is so much fun). They counsel clients on regulatory compliance. They bring or defend against enforcement actions. They litigate complex statutory issues and settle those cases. They initiate citizen suits. They participate in rulemaking proceedings where they argue the legal and policy merits of environmental regulations. Our practices required us to undertake many of these activities. Once again, we suffered the rude awakening that law school had hardly touched upon, much less prepared us for, these tasks.

As environmental law professors, we were determined that our students would be better prepared for environmental law practice than we had been.

We looked for a book that would introduce students to the resources that environmental lawyers use and the activities in which they routinely engage. We found that such a book did not exist.

The principal objective of this Fourth Edition of *Environmental Law Practice: Problems and Exercises for Skills Development* is to fill this gap. The materials in this book will introduce you to the main sources of environmental law. Some of these are contained in the book itself. In other instances, we teach you how to find them on your own. Those who work through this book should be able to head to the library on their first environmental law research assignment with strategies and skills for finding the information they need, not just sharpened pencils.

The book also uses exercises and role plays to introduce you to the day-to-day tasks of environmental law practice. With a brand new Chapter 6 on permitting and environmental settlements, the book now covers six of the principal areas of environmental law practice: compliance counseling, administrative enforcement, environmental litigation (including citizen suits), environmental policy, permitting, and settlements. It is comprehensive in its approach to these areas, providing lessons for the aspiring private lawyer, government lawyer, and public interest attorney. The book will teach you how to bring a federal enforcement action against a polluter; negotiate a Superfund settlement; prepare documents and strategy for a citizen's suit; counsel a corporation on environmental compliance; comment on an EPA proposed rule; draft a settlement agreement as well as develop many other relevant skills.

The problems and exercises are also good opportunities for increasing your knowledge of substantive environmental law. Environmental law consists largely of complex statutory and regulatory schemes, many of which are featured in this book. Often, the best way to learn these doctrines is to use them. More than once, we have seen it all “come together” for a student while working through an exercise in class. The book should help you to master the complexities of environmental law.

This book can serve as a stand-alone text for an upper-level course on environmental practice or as a supplement to an introductory environmental law text. Whichever way you encounter it, we hope that it provides you with a useful introduction to the practice of environmental law.