

**Environmental  
Decisionmaking  
for the 21st Century**



# Environmental Decisionmaking for the 21st Century

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*For my kids, Cooper, Tom, and Sam*



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# Foreword

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Anyone who has taught a course in environmental law understands the difficulty of conveying the breadth and complexity of the field. A typical environmental law course at an American law school today tends to focus largely on the key regulatory programs managed primarily by the Environmental Protection Agency, including most prominently the Clean Air Act and Clean Water Act, but also including a smattering of other laws such as the Resource Conservation and Recovery Act, the Comprehensive Environmental Response Compensation and Liability Act (Superfund), the Toxic Substances Control Act, and the Emergency Planning and Community Right to Know Act. And yet coverage of all of these complex laws still only begins to scratch the surface of the field of environmental law. It misses a number of other regulatory statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, the Oil Pollution Act, the Ocean Dumping Act, the Safe Drinking Water Act, and a wide range of other regulatory and non-regulatory laws that tend to focus more on natural resources and resource planning. Among the most prominent of these are the National Environmental Policy Act and the Endangered Species Act, but as with the purely regulatory statutes these laws only begin to tell the story. In addition to laws focusing on public lands management, such as the National Forest Management Act and the Federal Land Policy and Management Act, a host of other laws impact private lands, including, for example, the Coastal Zone Management Act and the Surface Mining Control and Reclamation Act. Many schools offer separate courses on public lands or natural resources law that attempt to fill the hiatus with environmental law, and some schools offer a range of other environmental and resource-related courses and seminars, including water law, climate law, and energy law. Specialty courses that focus on a particular regulatory program or type of practice are also relatively common. These might include, for example, air pollution law, environmental enforcement, or environmental litigation. I am not aware, however, of many schools that offer a dedicated course on environmental decisionmaking.

One might argue, of course, that all environmental and natural resources law courses are about environmental decisionmaking, and to some extent that is true. But the substantive complexity of environmental law makes it difficult to focus much attention on how and why agencies make decisions that impact our environment, or how interested parties might effectively engage agencies to influence those decisions. That is the focus of *Environmental Decisionmaking*. It is a book about the process and tools of agency decisionmaking, and the role of outside parties in that decisionmaking. And while it follows a somewhat conventional law school text format, it is as much about policy as environmental law and, as such, it can be adapted quite readily to a graduate, non-law school course in environmental policy or management.

*Environmental Decisionmaking* begins with a look at the foundational issues that underlie agency decisionmaking. These include ethical considerations, constitutional law principles, and the basic framework of administrative law. The book then proceeds to a more focused look at the essential tools that agencies use to make environmental decisions including cost-benefit analysis, risk assessment, and most important of all, environmental impact assessment. Much attention is paid to the National Environmental Policy Act or NEPA, which requires all federal agencies to prepare an environmental impact statement (EIS) for all major proposals for federal action that significantly affect the human environment. But in the course of studying NEPA, a range of other substantive laws come into play, enriching the student's understanding of those laws and how their substantive and procedural requirements complement NEPA and otherwise implicate agency decisionmaking.

One irony of focusing on NEPA is that issues with federal regulatory laws arise far less often in the NEPA context than do resource laws. That is largely because of early decisions by the congress and the courts to exempt the EPA from much of NEPA's reach. But there are important exceptions, most notably for permits issued under the Clean Water Act, and cases involving these regulatory laws are most valuable for understanding agency decisionmaking.

When I first designed a course on environmental decisionmaking I considered it an introduction to the field of environmental law and policy. A couple of years ago, however, one of my better students suggested that I reimagine it as a capstone course. According to this student, other courses had helped him to understand the law, but this course helped him appreciate how environmental law works. I have taken that critique to heart in editing this book and in designing my process for assessing students who take the course. Problem exercises are included throughout the book to afford students an opportunity to test their understanding of the material. More importantly, however, I want to give students a sense for what it feels like to engage decisionmakers effectively and in a meaningful way. To that end, I generally require students to draft a substantial comment on a pending agency proposal for their grade. Although I carefully monitor student choices to ensure that the issues are both appropriate and manageable, I am flexible regarding the nature of the comment exercise and I have allowed several students to draft rulemaking petitions in lieu of a more traditional public comment. Whatever vehicle they choose, however, I ask each student to engage agency officials directly either by email, phone, and if possible, at meetings or hearings. And I require each student to certify to me that they have filed their comments with the relevant agency as condition for receiving a grade.

What has struck me most about this exercise is how well it tends to evolve. Students invariably begin not truly understanding what they are supposed to do or how they can offer anything of value to the agency. First drafts are sometimes awkward, and perhaps not surprisingly, structured more like legal briefs than comments. I am rarely disappointed, however, with their final product, and the students genuinely seem to appreciate the experience of getting to know about an issue or project in detail and offering ideas as to how the final decision might be improved. As the class grows in popularity it has become harder to give each student's comments the individual attention that it deserves but I am committed to keeping the comment project as an integral part of the class.

Beyond the practical experience that students receive with the decisionmaking process, I would like to think that this course also imparts lessons about being a good citizen. I

always emphasize to my students that as future lawyers and policy experts they will have the opportunity to play an important role in future government decisionmaking. Some of them, of course, will actually be making those government decisions, but most will likely play a supporting role, trying to influence agencies to make decisions favorable to their clients. I also harbor the hope and belief, however, that once students have experienced the satisfaction of working through complex documents and developing a critique of a proposed government decision, that they will carry that experience with them and be lured into participating again, even when they are not being compensated, whenever they see an opportunity to use their expertise to improve government decisions.

In writing this book I have often reflected on the famous admonition from the Council on Environmental Quality's NEPA rules that "it is not better documents but better decisions that count." As the CEQ goes on to say, "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action." How true. Still, I cannot help but feel that excellent comments and excellent civic engagement with agency decision-makers are critical factors to fostering excellent action. It is my hope that this book might play some small role in helping students achieve that excellent level of civic engagement.

Mark Squillace  
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Wendell Berry, *Solving for Pattern*, in THE GIFT OF THE GOOD LAND (1980)

Eamonn Butler, *Public Choice—A Primer*, Institute of Economic Affairs, London (2012)

Barry Commoner, *Failure of the Environmental Effort*, 18 ENVT. L. REP. (ENVT. L. INST.) 10195 (1988).

Timothy Dyk, *The Supreme Court's Role in Shaping Administrative Law*, 17 ADMIN. L. NEWS 1 (1991).

Clayton P. Gillette and James Krier, *Risk, Courts, and Agencies*, U. PA. L. REV. 138 (1990).

Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

ALDO LEOPOLD, *The Land Ethic*, in A SAND COUNTY ALMANAC (1949, 1966).

Edward McTiernan and Michael B. Gerrard, *Expediting Environmental Review and Permitting of Infrastructure Projects—The 2015 FAST Act and NEPA*, Sabin Center for Climate Change Law (2015)

Joseph Mendelson III and Andrew Kimbrell, *The Legislative Environmental Impact Statement: An Analysis of Public Citizen v. Office of the U.S. Trade Representative*, 23 ENVT. L. REP. (ENVT. L. INST.) 10653 (1993).

Robert Reich, *The Miasma of Regulation*, in TALES OF A NEW AMERICA (1987)

DANIEL J. ROHLE, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION (1989).

J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the Courts*, 95 MINN. L. REV. 424 (2010)

Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENVT. L. 93 (1990).

Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVT. L.J. 279 (1998)

Amy Sinden, Douglas A. Kysar & David M. Driesen, *Cost-Benefit Analysis: New Foundations on Shifting Sand*, 3 REG. & GOVERNANCE 48 (2009)

Mark Squillace, *Meaningful Engagement in Public Lands Decisionmaking*, 59 ROCKY MT. MIN. L. FOUND. 21-1 (2013)

Lynn White, Jr., *The Future of Compassion*, 30 ECUMENICAL REVIEW 99 (1978).

