
PREFACE TO THE NINTH EDITION

We prepared the 9th edition of the casebook with a revised cast of coauthors. Dan Bodansky, who prepared the international law materials in several previous editions, chose not to participate in this edition. David Markell, who has been a key contributor to previous editions, sadly passed away much too soon. The remaining authors welcome to this edition Alejandro Camacho, Chancellor's Professor of Law and Faculty Director, Center for Land, Environment, and Natural Resources at the University of California, Irvine School of Law. Alex is a leading scholar on natural resources and public lands law, whose work has addressed issues such as the role of public participation and scientific expertise in regulation, the allocation of authority and relationships between regulatory institutions, and how the design and goals of legal institutions must and can be reshaped to more effectively account for emerging technologies and the dynamic character of natural and human systems. Alex has taken over preparation of Chapter 5 for this edition, with the expectation that his role will expand in future editions.

Much of what we said in introducing the 8th edition remains true today. U.S. politics and policymaking remain contentious. Sharp, seemingly irreconcilable disagreements exist about approaches to governance and the content of policy, in the environmental arena and elsewhere. It is almost as if every time there is a change of the party holding the presidency, teachers must adjust major portions of the course. But due to partisan gridlock in Congress, most of the major statutes have seen little or no change since 1990's major overhaul of the Clean Air Act. As this book was being submitted for publication, however, Congress addressed climate change more extensively than it ever had before through the adoption of the Inflation Reduction Act (IRA). Despite minor amendments to the Clean Air Act, the IRA relied almost exclusively on subsidies (e.g., through the creation of tax credits and deductions) rather than regulation in doing so. As a result, policy shifts have mainly played out before agencies, in federal courts, or at the state level.

The challenge in preparing, and teaching from, a book such as this one is to present the history of environmental law in such a way as to identify both well entrenched and persistent aspects of the subject and issues that have triggered policy and doctrinal ferment. We again in this new edition seek to strike a balance between covering the enduring, introducing areas of ferment, and providing materials, problems, and questions designed to build students' skills so they will be equipped to work with further environmental law shifts they will surely encounter and perhaps shape. Climate change law probably changes most rapidly due to the contesting policy visions of the nation's two major political parties, which has led to multiple, iterative policy transformations depending on which party controls the White House, and then inevitable judicial contests. Furthermore, the ever-growing body of scientific knowledge about the causes and consequences of climate change continues to shape what is needed, sought, and fought over in Congress, before agencies, and in the courts.

In the latter regard, we have continued to provide unusually deep treatment of the science which provides the factual (and policymaking) context for environmental law. That coverage is especially evident in our chapters on air pollution, water pollution, toxic substance regulation, and climate change. Because environmental law is highly interdisciplinary, we think it is

necessary to expose students to the kinds of scientific materials and issues that underpin and shape most environmental law disputes.

This edition of the casebook loses one chapter from previous editions but introduces a new online supplement to the teaching materials. Because our experience and feedback from users has convinced us that few instructors taught the international environmental law chapter, we have deleted it from this edition. Our understanding is that most instructors who teach international environmental law do so in a free-standing course. But we have retained coverage, albeit shortened, of the international aspects of climate change law and policy. Those materials continue to appear at the end of Chapter 11.

The new supplement covers environmental justice and will be available online. As the distributional inequities of environmental injuries and the policies meant to prevent and redress them have become clearer, environmental justice issues have moved to the forefront of the field. In previous editions, we covered environmental justice issues in scattered fashion throughout the book. We decided that this approach was inadequate. The new supplement provides much more extensive and integrated treatment of environmental justice issues.

As in past editions, we have included problems to test student understanding of the material in fact-specific contexts. We also tried to streamline note material again, and to cordon off some textual treatment in identified Notes, so that instructors can pick and choose the materials most likely to engage them and their students.

The most significant changes or additions in the 9th edition include the following:

- Chapter 1 materials continue to focus on the foundations of environmental law, including coverage of common law claims. Both as a preface to the online environmental justice materials but also to demonstrate the ongoing vitality and importance of state environmental law, the new edition adds materials about the Flint, Michigan battles over shifts in the municipal water system, lead contamination, and efforts to address resulting harms. We provide an excerpt of the state's *Mays* Supreme Court decision.
- Chapter 2's environmental federalism materials retain their 8th edition form, but integrate references to recent years' shifts, especially with regulatory and judicial skirmishes resulting from major policy differences among the Obama, Trump, and Biden administrations.
- Administrative law, including in the environmental context, continues to be the locus of enormous ferment and controversy. Chapter 3 covers changes, driven by the Supreme Court, to areas such as standard of judicial review and potential changes to entrenched law in areas such as the nondelegation doctrine. The chapter includes a new Note on the Supreme Court's 2021 decision in *TransUnion LLC v. Ramirez*, which threatens to significantly constrain the ability of regulatory beneficiaries to satisfy constitutional standing requirements. The revised Note on judicial review of statutory interpretation focuses on the Supreme Court's 2022 decision in *West Virginia v. EPA* (which we include as a principal case in Chapter 11 in connection with its resolution of substantive Clean Air Act issues). That case solidified the "major questions" doctrine as a strong clear statement rule, with profound implications for the scope of agency regulatory authority under environmental and other regulatory statutes. The section on congressional control of environmental decisionmaking by agencies focuses on continued use of the Congressional Review Act, while the section on executive control of agencies has been thoroughly updated to cover important executive orders by Presidents Trump and Biden, which approach environmental protection regulatory policy issues from antagonistic and sympathetic perspectives, respectively.
- Chapter 4 covers the Council on Environmental Quality's overhaul of its 1978 NEPA regulations under the Trump administration and the Biden CEQ's phased revision of those regulations. It also covers significant new NEPA case law. The chapter also includes a new

principal case, *Food and Water Watch v. FERC*, on the recurring issue of the extent to which NEPA analyses of the impacts on climate change of actions to extract or transport fossil fuels must include consideration of the indirect, downstream effects stemming from consumption activities. The chapter also replaces *Grand Canyon Trust v. FAA* with a newer case on cumulative impacts, *Sierra Club v. EPA*. The chapter now includes a new Note on the environmental justice implications of NEPA implementation.

- Chapter 5 adds discussion of the most recent research and scholarship on biodiversity loss. It also discusses the Trump administration's various regulatory attempts to restrict the scope of the Endangered Species Act—including those related to endangered and threatened species listing, critical habitat designation, and federal agency consultation—and the Biden administration's attempts to reverse or revise these regulatory changes. The chapter also summarizes recent case law and scholarship on listing, critical habitat, federal agency consultation, takings prohibitions, and incidental takings.
- Chapter 6 includes fully updated references to new scientific studies about the adverse effects of air pollution, the current state of air quality, and the distributional consequences of air pollution in the United States. The section on new source performance standards under the Clean Air Act includes new discussion of the impact of the Supreme Court's 2022 decision in *West Virginia v. EPA* (which we include as a principal case in Chapter 11) on the array of regulatory choices available to EPA. We have reorganized the chapter's coverage of new source review under the PSD program so that we cover questions concerning the scope of the NSR program before we cover its substantive aspects. The materials on mobile source pollution include discussion of EPA's shifting approaches under the Trump and Biden administrations to the availability to California of waivers from the statute's preemption of more stringent state regulation of tailpipe emissions (which we cover in more detail in Chapter 11). Similarly, we cover the opposing approaches of different presidencies to regulation of hazardous air pollutants such as mercury from electric power plants.
- Chapter 7 includes updates on the ongoing litigation involving the "waters of the United States" definition in the Clean Water Act. As this edition was going to press, the Supreme Court was scheduled to hear oral argument on the next installment of *Sackett v. EPA*. Although the text anticipates possible outcomes in light of emerging Supreme Court jurisprudence, it is intentionally crafted to provide flexibility to instructors. It also provides a brief discussion of *County of Maui v. Hawaii Wildlife Fund* and invites students to think critically about discharges "from" a point source.
- Chapter 8 covers EPA's early efforts to implement the 2016 amendments to the Toxic Substances Control Act. It describes a recent flurry of cases concerning the pesticide registration process under the Federal Insecticide, Fungicide, and Rodenticide Act, driven perhaps by developing scientific information about the effects of pesticide exposure. The chapter replaces the principal case on the Federal Food, Drug, and Cosmetic Act's regulation of pesticide residues on food, which was vacated, with the Ninth Circuit's 2021 decision in *League of United Latin American Citizens v. Regan*. We have omitted the *South Camden Citizens in Action* case on facility siting, which we included as a principal case in previous editions, because we now have extended coverage in the new supplemental materials of environmental justice issues such as implications on facility siting.
- Chapter 9 includes the latest case law under the Comprehensive Environmental Response, Compensation, and Liability Act, including cases on arranger liability and corporate veil piercing. The chapter now includes discussion of the approach to joint and several liability in the Restatement (Third) Torts and how it might affect allocation of responsibility for CERCLA response costs. The chapter also covers recent case law on §113(f) contribution actions.

- We have streamlined Chapter 10's coverage of the environmental enforcement process. The chapter's structure remains the same, but we have removed outdated discussion of executive policy approaches while calling attention to new developments, mostly in the courts.
- Chapter 11 includes updated coverage of climate change law, policy, and science. The section on responding to climate change has been thoroughly updated to reflect the diametrically opposed regulatory responses to climate change by the Trump and Biden administrations. The section includes as a new principal case the Supreme Court's 2022 decision in *West Virginia v. EPA*, in which the Court narrowly construed §111(d) of the Clean Air Act to prohibit EPA's use of the "generation-shifting" building blocks of the Obama administration's Clean Power Plan. We have also included expanded material on both domestic and international judicial responses to climate change, including litigation battles addressing the issue of whether common law actions against municipalities to compensate for climate-related harms based on a multitude of state common law theories belong in federal or state court. We have significantly shortened the section on international climate law, replacing the lengthy excerpts from international climate agreements with a law review excerpt that summarizes the history of those agreements. We supplement that excerpt with new note materials.

As we have done for several editions, we will continue to maintain a website for the book that alerts readers to developments that occur after the new edition's publication. Readers can access those materials, including the environmental justice supplement, at <https://www.aspen-publishing.com/Glicksman-Environmental9>. We will revise the updates at least once each year during the summer, but also may do so before each semester, or when the courts issue decisions in important new cases or Congress enacts new environmental legislation.

We were assisted during the publication process by Kathy Langone of the Froebe Group, Linda Mehta, our Production Editor, and Jordan Jepsen, our Editor. We extend our heartfelt thanks to both of them. We take sole blame for any errors that remain notwithstanding this assistance.

As always, we encourage professors who adopt the book to contact us with questions, thoughts, suggestions, and criticisms. We appreciate your decision to select our book as a teaching tool, given the array of environmental texts from which to choose. We are committed to making the experience of both teachers and students using the book as valuable, interesting, and perhaps even fun as possible.

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January 2023