

# THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW

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## NOTES ON HOW TO USE THE TEXT

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There were many fine environmental law survey texts available when we began considering authoring another, so we decided the only point in doing so would be to provide something different. We concluded that the one facet of environmental law missing from all other survey texts is significant coverage of the *practice* of environmental law. Also, we found little coverage of *policy* topics as discrete, focused discussions. Thus, without sacrificing coverage of the conventional topics of environmental law statutes and structure, we built our text around the practice and policy themes. The text breaks down into three parts for this purpose:

**Part I: Approaches to Environmental Law** – This part of the text supplies the conventional coverage of statutes. In order to open up space for the practice and policy chapters, we made decisions about which statutes to make our focal points, using a typology of environmental laws to orient the students. Each chapter thus uses one statute as its major focus and then supplies some level of coverage of other major statutes. One consequence is that some statutes, such as FIFRA and TSCA, are not covered at all, but we believe the trade-off is well worth it given the opportunity the text affords to cover practice and policy topics in more detail.

**Part II: The Practice of Environmental Law** – We consider this part of the text the innovative feature of the book and what gives it certain pedagogical advantages. Unlike all other environmental law texts, this part provides the student a feel for practice settings. In particular, the usual “stiff” structural topics of administrative law, the common law, and enforcement are covered here with a practice focus. Other topics such as compliance counseling, business transactions, obtaining (or fighting) permits, and insurance recovery litigation are simply not covered at all in most survey texts, yet this is what students often yearn to be exposed to early in their forays into environmental law.

**Part III: Formulating Environmental Policy** – This part of the text also is different from most survey texts in that, rather than blending policy discussions along the way, it groups major policy themes as discrete chapters and allows a more focused examination. This is not to say that policy is not discussed in Parts I and II of the text, but that this part allows an opportunity to treat policy topics after a firm foundation has been set in environmental statutes, structure, and practice.

This approach allows a great deal of versatility, not only in the survey course but also to allow the book to extend its use into advanced courses. Some recommended formats follow:

### **Conventional “Statutes and Structure” Focus**

The conventional 3-hour environmental law survey course, focusing on the major statutes and the underlying structure of environmental law, can be built by using Part I of the text as the statutory coverage and then any or all of the following chapters to cover structure, place either before or after the statutory coverage (we recommend after):

- Chapter 7: Administrative Rulemaking and Permitting
- Chapter 9: Enforcement
- Chapter 10: Private Litigation (skip Part B on insurance recovery litigation)

Time permitting, ending with one or more policy chapters from Part III can enrich the course.

### **Practice and Policy “Modules” Approach**

An alternative survey course method, one we favor, is to group “modules” of chapters exposing the student to linked statutory, structural, practice, and policy themes. These modules each begin with a chapter in Part I of the text and then link to one or more possible chapters in Parts II and III. As the course works forward, each chapter from Part I is covered with one or more of its associated chapters, thus providing a building sense of the statutes, structure, practice, and policy. For example:

<b>Part I Chapter</b>	<b>Part II Chapter(s)</b>	<b>Part III Chapter(s)</b>
2 – Conservation	7 – Administrative Rulemaking and Permitting	12 – Ecosystem Management 13 – Agriculture
3 – Regulating Harms	8 – Compliance Counseling 10 – Private Litigation	15 – Equitable Protection
4 – Remediating Harms	9 – Enforcement 10 – Private Litigation 11 – Business Transactions	15 – Equitable Protection 16 – Transboundary Effects
5 – Planning and Information		14 – Urban Development 15 – Equitable Protection 16 – Transboundary Effects
6 – Public Lands		12 – Ecosystem Management

This approach allows the course to cover as many of the statutes as the instructor desired and to blend structure, practice, and policy coverage as and when desired.

### **Advanced Environmental Law Practice Focus**

One of the advantages of the text is that it can be used for an advanced class on environmental law practice as a self-contained text. Part II of the text supplies the

foundation for examining practice settings, and Parts I and III of the text can be used to provide subject matter for hypothetical's and for refreshing the student's understanding of the substantive law. J.B. Ruhl is offering a course like this in Fall 2008 using a "business transactions" theme. The advantage of using that theme is that the environmental attorney advising a client in the purchase or sale of assets or stocks must have a comprehensive knowledge of the law and potential concerns, so it allows a wide scope for the course. Ruhl's course follows this track:

- Chapter 11, Section I: This section orients the students to the business transactions "due diligence" setting and provides a great "what not to do" example in the *Keywell* case.
- Chapter 8: With the basic setting in place, the course shifts to reviewing the key substantive contexts the "due diligence" lawyer must consider. Chapter 8 focuses broadly on compliance and how to achieve it, a question the lawyer must confront in assessing any transaction (e.g., do the facilities comply; can the intended uses comply; and what if they do not?).
- Chapter 7, Section III: A key question that often arises in transactions relates to permitting—i.e., does the particular facility have the necessary permits, or can the intended use of the land obtain them?
- Chapter 9, Sections I-II: If noncompliance is detected in the course of due diligence, the parties are likely to ask what the enforcement consequences are likely to be.
- Chapter 10: And the potential for private claims against the facilities, insurance recovery, and recovery under CERCLA must also be evaluated.
- Chapter 11, Sections II-III: With the purposes of due diligence and the "problemshd" defined, the course then returns the student to the skills associated with the transactional setting—drafting contracts and advising about corporate form.

There are other ways to configure a course like this. The key is to use Chapter 11 as the core skill-set chapter and blend in other materials from Part II of the text. Also, although Part II is intended to be a free-standing part of the text, substantive materials in Parts I and III can be used directly to supply legal background in hypothetical's and to reinforce the student's substantive background. For example, in the wind energy hypothetical that forms the core of Section II of Chapter 8, alert the students to the ESA materials in Chapter 2 or assign some of them as readings to support the questions on pages 742, 745, and 751.

We hope you and your students enjoy the book, and we welcome recommendations for improvement.

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