



Nancy K. Kubasek
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ENVIRONMENTAL LAW

Eighth Edition

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ENVIRONMENTAL LAW

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PREFACE

This introduction to environmental law was written for college students at either the undergraduate or master's level, but it is also useful to anyone interested in learning about our system of environmental law and can serve as a helpful reference for anyone in business who is attempting to negotiate the morass of environmental regulations that affect businesses today. Readers of previous editions of the book range from graduate and undergraduate students to businesspersons and ordinary citizens interested in environmental law.

Environmental Law, 8th edition, is designed to introduce those without any legal or special scientific training to the system through which our nation attempts to preserve the environment. When I began teaching environmental law to undergraduates in 1982, there were very few such courses offered outside of law schools. There were even fewer resources available for teaching courses to anyone other than law students. My first semester, I taught the course using one of the two available law school texts.

The next year, I began putting together my own materials—materials that over the next few years evolved into an environmental law “text” designed especially for nonlaw students that I made available to my students through a copy service. To improve the quality of the materials before attempting to publish them, I asked my colleague Dr. Gary Silverman, the director of our university's Environmental Health Program, to write the chapters on water-quality control and management of waste and hazardous releases, areas in which he has special expertise.

NEW TO THIS EDITION

- **New Updated Tables and Figures:** Environmental conditions change frequently, and it is important to have the most up-to-date figures in the text, so we have attempted to provide that data in this revision.
- **New For Further Reading:** Instead of merely listing articles and books that are worth reading at the end of each chapter, in this edition we decided to reduce the number of recommended readings, and to provide a brief annotation about each selection to better enable readers to select which additional reading might be of interest to them.
- **New Changes in Environmental Law and Policy Under the Obama Administration:** During the three years of the Obama administration, they have made several changes to environmental law, although not as many as some had anticipated. These changes have been integrated throughout the text.
- **New Section Describing the First National Standards for Regulating Mercury from Power Plants.**
- **New Updated Section Discussing Climate Changes.**
- **New Updated and Expanded Section Discussing Wind Power.**

With each new edition, thanks to the assistance of numerous reviewers, as well as feedback from readers and instructors using this text, the book has come closer to meeting its goal of providing a readable and comprehensive introduction to environmental law that also provides a minimal scientific background so that readers may understand the need for these various laws.

To help readers understand our system of environmental law, *Environmental Law*, 8th edition:

- **Begins with Two Chapters Providing an Introduction to Law**—Before you can understand environmental law, you need to understand how the American legal system operates, so the first two chapters provide an overview of the American legal system, as well as administrative law and the special category of law into which environmental law falls.
- **Provides Readers with the Science That Justifies the Legal Response**—To understand each of the major areas of environmental law, it is useful to understand the science that underlies the need for the legal response. The book provides this background information in each of the chapters where this information is most helpful.
- **Highlights Important Case Law That Has Helped Shape the Evolution of Environmental Law**—Some of the cases are discussed in the text, whereas others are highlighted in the Cases and Controversies boxes.

OTHER POINTS OF DISTINCTION

- **Resolving Controversial Issues** essays at the end of each chapter help students develop their critical thinking skills while thinking about controversial environmental law issues.
- **For Further Reading** at the end of each chapter suggests books and articles for curious readers to extend their knowledge of environmental law.
- **Questions for Review and Discussion** at the end of each chapter provide a way for readers to check their knowledge of the key concepts in each chapter.

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Instructor's Manual—Prepared by Alex Frondorf, it is offered in Microsoft Word and available for download at <http://www.pearsonhighered.com/kubasek>.

ACKNOWLEDGMENTS

The author would like to acknowledge, with thanks, the individuals who made this book possible.

Three people deserve recognition for their contributions. The first is Attorney Alex Frondorf, who provided significant assistance in the updating of not just this edition, but also the previous two editions. The Cases and Controversies feature was his idea. Others have made special contributions to past revisions, and their contributions remain in this edition. For example, Carrie Williamson was instrumental in creating the **Resolving Controversial Environmental Issues** feature several, which is still an important feature of the text.

I would also like to thank Donald Weir for suggesting the addition of a discussion of SES in the previous edition, which has been retained in this new edition; it is always valuable when users of the book point out ways it can be improved.

Reviewers who made helpful suggestions for this edition included:

- Jim Banaski, *Drury University*
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- Ross Jones, *Dartmouth College*
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- Taylor Kirschenfeld, *University of West Florida*
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Finally, I acknowledge the contributions of those at Pearson, without whom this book could not have been revised. They include Executive Editor Bob Horan, Senior Editorial Project Manager Karen Kirincich, and Production Project Manager Clara Bartunek.

FEEDBACK

If you have questions related to this product, please contact our customer service department online at <http://247pearsoned.com/>.

In finishing the eighth edition of this book, I realize that despite the conscientious review of all stages of the book's production by many people, it is almost inevitable

that mistakes have crept in, for which I accept responsibility. I would therefore appreciate readers' corrections and comments as to how future editions may better achieve the goals this book is designed to attain. Please send your comments, criticisms, corrections, or suggestions to me at the Department of Legal Studies, Bowling Green State University, Bowling Green, Ohio 43403, or email me at *nkubase@cba.bgsu.edu*.

Nancy K. Kubasek

PART



An Introduction to the Law

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1



The American Legal System: The Source of Environmental Law

SOURCES OF LAW

Particular contexts dictate reactions to environmental threats. Therefore, before understanding the possible reactions to environmental harm, you must understand our legal system. The first step in this process is understanding the origins of our laws. Three articles of the U.S. Constitution create a federal government composed of three major branches: the legislative branch (under Article I) primarily creates laws; the executive branch (under Article II) primarily enforces laws; and the judicial branch (under Article III) primarily interprets laws. While performing their major functions as described in the relevant articles, the executive and judicial branches also create laws. Administrative agencies are a fourth source of laws. The following sections describe how each branch serves as a source of laws. Table 1-1 summarizes where you can find the laws created by these branches of the federal government, as well as laws created by state and local governments.

The Legislative Branch as a Source of Statutory Law

Article I, Section 1, of the U.S. Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” It is important to understand the process by which Congress makes a law (called a statute), because Congress creates most environmental laws. If you wish to change environmental laws, you must understand how to work through the legislative process. Groups that may be affected by a proposed law will seek to influence the proposal through lobbying at every stage of the legislative process. Some groups are highly organized forces that attempt to influence any proposed environmental legislation in Congress. Others are loosely knit, ad hoc organizations that emerge to influence only a particular proposal. Although most congressional lobbyists, especially those working on behalf of business interests, are paid professionals, a large number of lobbyists for environmental legislation are extremely committed volunteers.

TABLE 1-1 Where to Find Environmental Law

Level of Government	Legislative Laws	Executive Orders	Common Law/ Judicial Interpretations	Administrative Regulations
Federal	<i>United States Code (USC)</i> <i>United States Code Annotated (USCA)</i> <i>United States Statutes at Large</i>	<i>Title 3 of the Code of Federal Regulations</i> <i>Codification of Presidential Proclamations and Executive Orders</i>	<i>United States Reports (U.S.)</i> <i>United States Supreme Court Reporter (S.Ct.)</i> <i>Federal Reporter (F., F.2d)</i> <i>Federal Supplement (F.Supp.)</i> <i>Environmental Law Reporter (ELR)</i> Federal Agency Reports (titled by agency; e.g., <i>FCC reports</i>)	<i>Code of Federal Regulations (CFR)</i> <i>Federal Register</i>
State	<i>State Code or State Statutes (e.g., Baldwin's Ohio Revised Code)</i>		<i>Regional Reporters</i> <i>State Reporters</i>	<i>State Administrative Code or State Administrative Regulations</i>
Local	<i>Municipal Ordinances</i>		<i>Varies; Often Difficult to Find. Many Municipalities Do Not Publish Case Decisions, But Keep Them on Microfilm. Interested Parties Usually Must Contact the Clerk's Office at the Local Courthouse.</i>	<i>Municipality Administrative Regulations.</i>

The lobbying process for environmental issues is somewhat complicated. The situation is not always one of business lobbyists working against environmental lobbyists. Divergent opinions about proposed legislation are frequently seen within the environmental community. Established groups, such as the Defenders of Wildlife and the Environmental Defense Fund (EDF), tend to take more moderate positions and are more open to ideas for cutting the costs of environmental regulation. The moderate stances of such groups have prompted some former members to join organizations that take more extreme positions, such as Earth First!, which has essentially given up on the governmental process and takes its case directly to the media by staging protests.

Those in moderate groups see themselves as practical and effective, believing that, especially in recessionary climates, you will be ignored if you do not take economic arguments into account. Those in more extreme groups perceive the moderates as having sold out. Some of them also believe that the best way to get on television, and thus generate public support for one's position, is to take an extreme stance. Even when they hold divergent positions, some members of both camps view the proliferation of environmental lobbying groups, even when they hold diverse positions, as being positive because it means more voices sending the message to Congress that the public wants the environment protected.

During 2008, environmental groups spent \$11 million to lobby the federal government. This amount may seem large, but it is minimal compared to the \$225 million spent by the energy sector. During that year, the energy sector outspent environmental lobbyists by a factor of 21:1.¹ And we can expect to see these amounts and the disparity between environmental and industry spending to continue, as is perhaps best illustrated by examining Figures 1-1 and 1-2, which reveal the amounts

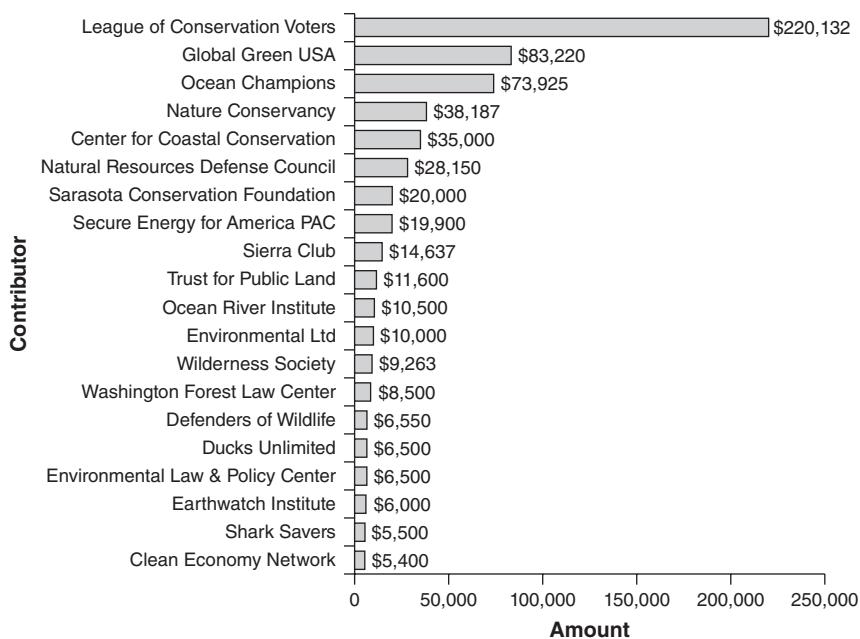


FIGURE 1-1

Source: "Environment." OpenSecrets.org. <http://www.opensecrets.org/industries/indus.php?ind=q11>

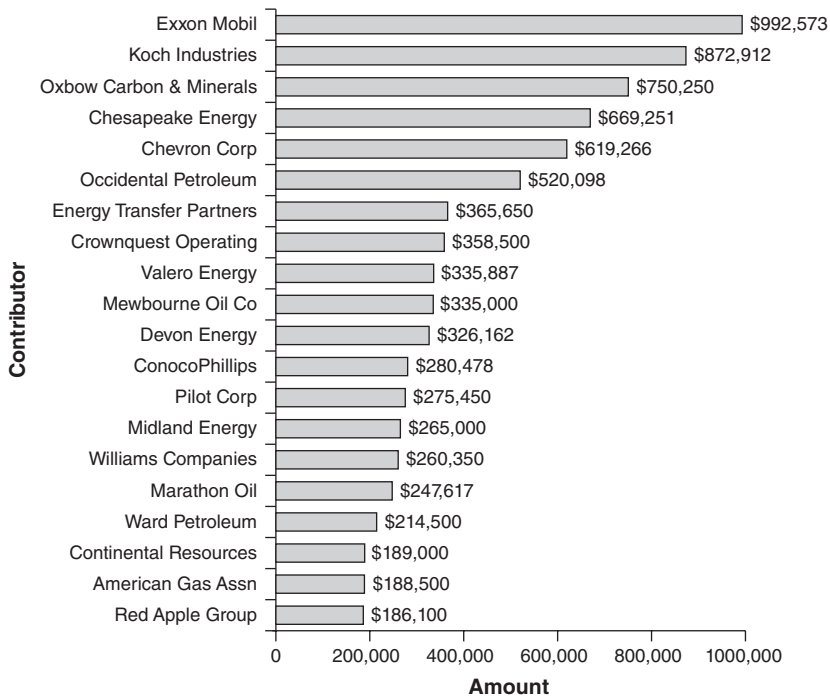


FIGURE 1-2

Source: “Gas and Oil.” OpenSecrets.org. <http://www.opensecrets.org/industries/industries.php?ind=e01> (Accessed March 15, 2012)

spent by the top 20 environmental and oil and gas industry groups in 2010–2011.² From the size of these expenditures, it is clear that lobbying is a significant aspect of the political process. Many commentators argue that the reason why hydraulic fracking, the potentially toxic method of extracting natural gas, is exempt from so many of the environmental regulations that would ordinarily apply to the process is the nearly \$750 million spent by industry lobbyists over the last decade to ensure these exemptions.³

With the increased use of the Internet, some environmental groups are trying to get ordinary citizens involved in what could be described as “grassroots email lobbying.” Groups such as Environmental Defense Fund have set up Web sites that will send messages to congressional representatives and the president on behalf of citizens who make such a request. To see how this process works, you can go to <http://www.environmentaldefense.org/actioncenter.cfm>. Once there, you can choose to email your representatives about any of various environmental issues. Once you send one message from the site, you will regularly receive email notices, telling you about new issues as they arise and inviting you to come back to the site to express your opinion on those new issues.

The focus for environmental lobbyists has traditionally been in Washington. But during the 1990s, as action at the state level became more important, we saw a shift toward more lobbying below the federal level. Many national organizations, for

How does a group decide which candidates to endorse? Let us look at the Sierra Club's endorsement process as an example.

1. Send questionnaires to all candidates to determine their position on issues they are likely to face. (However, sometimes the Sierra Club looks only at the past record of the candidates. If one candidate has a strong record in supporting the environment whereas the other has demonstrated a bias against the environment, the club will endorse based solely on past records.)
2. Examine the questionnaires and schedule interviews with the candidates.
3. Complete interviews and make recommendations to the respective political committee (chapter political committee for state and U.S. Congress races; group political committee for local or county races).
4. Vote. Two-thirds of the body must vote to endorse.

Adapted from the Sierra Club San Diego Chapter Web site, <http://sandiego.sierraclub.org/bylaws/index.asp?content=political>.

example, have local affiliates that lobby state legislatures when their interests are affected. Groups such as the Sierra Club and the National Audubon Society have local chapters that work to address issues at the state level. That shift of resources became even more dramatic during the 2006 mid-term elections, as environmental lobbying groups started donating more money to state candidates and ballot issues, reflecting the increasing role of states in environmental regulation as the federal role was shrinking. According to the Alliance for Justice, a group that assists environmental and other nonprofits in the mechanics of lobbying, in the 2012 election cycle, environmental lobbying was going to be equally important at both the state and federal levels.⁴

Unfortunately, as a result of the 2010 Supreme Court decision in the case of *Citizens United v. Federal Election Commission*,⁵ growing sums of money may play an increasing role in determining who gets elected in the future. The ruling lifted restrictions on corporate spending and allowed corporations and unions to use their general treasuries to pay for political advertisements that expressly call for the election or defeat of a candidate. According to a study done one year after the holding, 72 percent of political advertising spent in 2010 came from sources that were prohibited from spending money in 2006. And outside groups spent more money on election season political candidates than did party committees for the first time in two decades.⁶ In 2010, Common Cause launched a grassroots movement to try to promote sending legislation to Congress that would authorize spending limits and make a distinction between people and corporations in campaign finance laws.⁷

STEPS IN THE LEGISLATIVE PROCESS The federal legislative process is similar in many respects to the process followed by state legislatures, but each state constitution may require slightly different procedures. We focus on the federal process because it is the model on which state processes are based and because most environmental legislation is either federal or modeled on federal law. Our environmental laws are primarily federal because environmental problems do not recognize state borders and, therefore, require a uniform, nationwide approach.

TABLE 1-2 Organizations Engaging in Environmental Lobbying

Business Interests	Environmental Interests
Business Roundtable	Environmental Defense Fund
Chemical Manufacturing Association	National Audubon Society
National Chamber of Commerce	National Resources Defense
National Environmental Development Council (a coalition of industries)	Council Sierra Club
Utility Air Regulation Group (a coalition of utilities and trade associations)	Wilderness Society

A law arises from a legislative proposal called a bill. A bill is introduced into the House or Senate by at least one member. The bill itself may have been drafted by a lobbyist. As explained above, most environmental groups have lobbyists who attempt to persuade environmentally conscious legislators to introduce and support their bills. Various business interests also hire their own lobbyists. Table 1-2 lists some of the more active lobbying organizations that influence environmental legislation.

Once introduced, a bill is generally referred to the committee of the House or Senate that has jurisdiction over the subject matter of the bill. For example, a bill to provide subsidies to firms willing to get half their energy from solar power will be referred to the House Committee on Energy and Commerce, which will in turn refer it to an appropriate subcommittee. In most cases, a bill is simultaneously introduced into both the Senate and the House and referred to the appropriate committee and subcommittee in each. Once the bill is referred, the subcommittee holds hearings on the bill, listening to testimony from all concerned parties and establishing a hearing record. Lobbyists will be active during this time, sometimes testifying at congressional hearings.

Following these hearings, the bill is marked up (drafted in precise form) and referred to the subcommittee for a vote. When the vote is affirmative, the subcommittee forwards the bill to the full committee, which may accept the subcommittee's recommendation, put a hold on the bill, or reject it. If the House or Senate committee votes to accept the bill, the committee brings it to the full House or Senate membership for a vote. Throughout this process, the bill may be amended several times in attempts to secure its passage. Sometimes, opponents of a bill will also amend it, in an attempt to water down the bill or to cause it to be defeated. As a bill goes through this process, interested parties may follow its progress in the *Congressional Quarterly Weekly*, a publication that keeps track of what is happening to proposed legislation.

By the time the bill is passed by both the House and Senate, different versions of the proposed law will usually have been adopted by each, so the bill will need to go to a Senate–House Conference Committee, which, after compromise and reconciliation of the two versions of the bill, will produce a single bill to be reported to the full House and Senate for voting. Often you will hear discussions in the media about

differences between House and Senate versions of environmental laws that are making their way through this process. Often, one chamber's version will be supported by business interests and the other by environmental groups. The president will often throw his support publicly to one version or the other.

A final affirmative vote by both houses of Congress is required for a bill to become law. If passed, the bill is then forwarded to the president, who may either sign or veto the bill. When the president signs the bill into law, it becomes a statute. It is then written down and codified in the *United States Code* and the *United States Code Annotated*. If the president vetoes the bill, it may still become law if two-thirds of the Senate and House membership vote to override the veto. If the president takes no action within 10 days of receiving the bill from Congress, the bill becomes law without his signature; the exception to this procedure is that if Congress adjourns before the 10-day period has elapsed, the bill does not become law. The bill will have been pocket vetoed by the president; that is, the president will have “stuck the bill in a pocket”—vetoed it by doing nothing. Supporters will then have to reintroduce the bill during the next session of Congress.

Because Congress is responsible for passing environmental laws, citizens who wish to ensure that our environment is protected should keep themselves informed about their congressional representatives' voting records on environmental issues. The League of Conservation Voters has made it easy for concerned citizens to view their representatives' voting record on environmental issues by placing those records in an easily reachable database that can be found at <http://www.lcv.org/scorecard>. This Web site also contains contact information of members of Congress.

The Judicial Branch as a Source of Case Law

The federal courts and most state courts (discussed in Chapter 2) constitute the judicial branch of the government and are charged by their respective constitutions with interpreting the U.S. Constitution and statutes on a case-by-case basis. Most cases interpreting these laws are reported in large volumes called reporters, which are compilations of federal or state case laws. When two parties disagree about the meaning of a statute, they bring their case to the courts for interpretation. For example, if a bill to provide solar energy subsidies was signed by the president and became law, two parties might still disagree about its meaning and ask the federal courts to interpret it.

One disagreement that might arise with regard to such a bill is the time limit within which a firm must obtain half its energy from solar power. Although you would think that something as important as a time limit for conversion would be clearly stated in the statute, such an omission is not unusual. Congress, especially in the environmental area, often makes very broad laws and leaves it to the courts to fill in the gaps. As one senator said when Congress was about to pass the Superfund legislation, “All we know is the American people want these hazardous waste sites cleaned up . . . [L]et the courts worry about the details.”

Congress may have also made the law intentionally vague because a more specific bill could not garner sufficient support for passage. The sponsors may have specifics in mind, but knowing there will be strong opposition to those details, they