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BOOK REVIEW

JODY L. FINKLEA*

ENVIRONMENTAL LAW PRACTICE: PROBLEMS AND EXERCISES FOR SKILLS DEVELOPMENT. By Jerry L. Anderson and Dennis D. Hirsch. Carolina Academic Press: 1999.

An exasperated law professor once cried out during a particularly contentious classroom question and answer session: "No, no . . . we're getting way too practical now!"¹ If practicality is a flaw, then *Environmental Law Practice: Problems and Exercises for Skills Development* by Jerry L. Anderson and Dennis D. Hirsch will never be able to overcome its death knell of unapologetic practicality.² However, if practicality is sought as a tool for developing a student's ability to deal effectively with real world problems in environmental law, this volume should be one's guide.

In the jungle of environmental law,³ this book serves to fill a gap previously unfilled. To introduce "students to the resources that environmental lawyers use and the activities in which they routinely engage."⁴ Such an ambition is grand for a single volume, but this single volume does explain the rudimentary elements of environmental law practice clearly and concisely and in enough detail to permit the student to understand where to begin in attacking an environmental law issue. Several features are unique about this book. First, it explains environmental law from the views of public interest, government, and private practice attorneys. Second, the book challenges students to not only passively learn the law, but to act on that learning through thoughtful problems and exercises aimed at forcing students to put into practice what they have learned from all viewpoints. Finally, this book centers its lessons around the

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1. To protect the innocent, the "exasperated professor" shall retain his anonymity.

2. See JERRY L. ANDERSON & DENNIS D. HIRSCH, ENVIRONMENTAL LAW PRACTICE: PROBLEMS AND EXERCISES FOR SKILLS DEVELOPMENT (Carolina Academic Press 1999).

3. Angus Macbeth, *Forward to* JERRY L. ANDERSON & DENNIS D. HIRSCH, ENVIRONMENTAL LAW PRACTICE: PROBLEMS AND EXERCISES FOR SKILLS DEVELOPMENT at xiii (Carolina Academic Press 1999) ("[E]nvironmental law has become a jungle. Or, if you prefer a different metaphor, an excruciating maze. Or a paper palace . . .").

4. JERRY L. ANDERSON & DENNIS D. HIRSCH, ENVIRONMENTAL LAW PRACTICE at xix (1999).

four most common settings in which an environmental lawyer can find one's self: environmental compliance; environmental enforcement; environmental litigation; and environmental policy.

CHAPTER ONE: ENVIRONMENTAL COMPLIANCE

Chapter One introduces students to the basic research tools environmental lawyers must utilize to advocate on behalf of their clients and ensure their clients remain in compliance with the complex maze of statutory law and agency regulations. Specifically, Chapter One goes through a quick summary of "notice and comment" rulemaking and provides an in-depth introduction to the form and content of the Code of Federal Regulations. The centerpiece of Chapter One is a problem scenario that leads the student through the process of complying with the Clean Air Act's Prevention of Significant Deterioration Program.

In the context of this problem scenario, the authors explain federal statutes in the United States Code Annotated as the starting point for research on compliance with environmental laws and regulations. Next, the role of legislative history and an introduction to the U.S. Code Congressional and Administrative News is discussed to place the statute in the context of the process that it arose out of. Then the authors explain what a regulation is and provide examples of applicable regulations in the Code of Federal Regulations. Case law does get some treatment and it is at this point that the authors include *Alabama Power Co. v. Costle*⁵ to show how the courts handle the interplay of statutes, legislative history, and agency regulations. Next the authors explain the value and give an example of a preamble statement in the Federal Register that accompanies a proposed rule. Finally agency guidance documents are identified and explained as a probable source of valuable information. Through the problem scenario of ensuring compliance with the Clean Air Act's Prevention of Significant Deterioration Program, the authors effectively sketch out all the commonly useful sources of information available to environmental lawyers working on such an issue.

Chapter One concludes with a broad discussion of an environmental lawyer's duties when counseling a client on an ambiguous legal issue. This discussion begins with an excerpt from a law

5. 636 F.2d 323, 394-98 (D.C. Cir. 1979).

review article on exactly this topic.⁶ Next there is a brief recitation of some applicable ABA Model Rules of Professional Conduct. Chapter One closes with another excerpt from a law review article on the interplay of legal ethics, environmental law, and rules of professional conduct.⁷ This final section of Chapter One does not lay out the law in a black letter manner, but introduces the student to applicable rules and thoughtful commentary on how those rules fit into an environmental law context. This approach challenges the student to actively participate in the discussion by completing the attending exercises and problems, without being dogmatic in approach.

CHAPTER TWO: ENVIRONMENTAL ENFORCEMENT

Chapter Two introduces the student to the process of enforcing environmental laws, from the perspective of the agency, the perspective of a private attorney who represents some entity against whom an enforcement action is being brought, and the perspective of a private attorney working in the public interest by bringing a private citizens' enforcement action. Though these three perspectives normally diverge, Chapter Two introduces students to the process of enforcement from each perspective and draws out the similarities and differences inherent in those divergent positions. Chapter Two provides enough of a brief, but thorough overview to allow the student to know where to begin when faced with an enforcement action, no matter which perspective the student, as a lawyer, may be advocating.

Chapter Two begins with a description of the agency enforcement process including: self-reporting obligations, inspections, different types of enforcement actions, and administrative practice considerations. Next, there is a discussion of the different sources of the law that will be useful to an environmental practitioner when dealing with an enforcement action. This includes a discussion of the EPA's different types of enforcement response policies and a brief discussion of how unpublished case opinions and administrative law opinions also play an important role in the research universe the student should be aware of regarding environmental enforcement. The first major division of Chapter Two ends with a discussion of the different issues that can arise in environmental enforcement include-

6. See David Dana, *Environmental Lawyers and the Public Service Model of Lawyering*, 74 OR. L. REV. 57, 58-62 (1995).

7. See J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, LOY. L.A. L. REV. 825, 834-35 (1994).

ing: defenses, penalty amounts, and other issues like public relations and the degree of agency discretion available. These issues are discussed in a common-sense manner, with the emphasis on putting this knowledge to work in practice.

Chapter Two also includes an extensive discussion on citizen suit enforcement of environmental laws. While the first major division of Chapter Two applied mostly to agency lawyers and private practice lawyers, this division of the chapter relating to citizens suits speaks directly to public interest lawyers. First the authors describe the process of information gathering for a large citizen suit enforcement action. Finally the discussion delves into the various issues that are common to citizen suits, including: pre-suit notice, requirements of diligent prosecution, standing issues, whether the defendant is "in violation," potential recovery, and issues particular to suits against the EPA or state agencies.

The subject matter of Chapter Two, environmental enforcement, could encompass many volumes in its own right, but the authors give environmental enforcement just enough coverage to make students aware of the basic process of enforcement from all three positions commonly found in an enforcement action. While not exhaustive in its coverage, Chapter Two does provide enough of an introduction to environmental enforcement to allow the student, as a lawyer, to understand how to begin the process of advocacy, no matter the position being advocated.

CHAPTER THREE: ENVIRONMENTAL LITIGATION

In many ways environmental litigation is no different from any other litigation, but there are usually some specific types of litigation issues that arise in environmental litigation. To introduce students to those issues Chapter Three is divided into two principle parts. The first introduces students to issues that normally arise in Superfund litigation, one of the most common types of contemporary environmental litigation. The second part of Chapter Three introduces students to more common issues that can occur in environmental litigation. Again the litigation issues that are highlighted in Chapter Three can apply equally to public interest, government, and private practice attorneys. All potential student perspectives derive a benefit from the discussion.

The Superfund litigation discussion begins with a basic explanation of the Superfund remediation process. Next is a more detailed explanation of the Superfund liability scheme, including a detailed fact scenario that can be used by the student to critically think about

and act on the basic explanation provided in the text. It is this detailed fact scenario that sets this book apart from others that strive to reach the same audience. The Shenandoah Superfund Site scenario is set out in great detail and every other facet of the chapter somehow brings the student back to examine the lessons of the text, in connection with that fact scenario. This active learning paradigm is what sets this book apart from others. The Superfund litigation issues highlighted are: section 107 liability, joint and several liability, consistency with the National Contingency Plan, choice of remedies, section 107(b) defenses, and statutes of limitations. The Superfund litigation discussion ends with an excerpt from a law review article that concisely explains Superfund litigation issues in a way that perfectly sums up the authors' discussion.⁸

The remainder of Chapter Three is devoted to introducing the student to other important issues that frequently arise in environmental litigation. First, the authors use another law review excerpt⁹ to explain the particular issue of successor liability in environmental litigation generally and in Superfund litigation in particular. Next, there is a brief explanation of issues involving municipal solid waste, followed by brief explanations of interim landowner liability and innocent landowner liability. Individual liability and section 106 penalties are also all discussed in the context of environmental litigation generally and in the context of Superfund litigation particularly. Chapter Three comes to a close with a brief explanation of Superfund cost allocation, including the Gore factors,¹⁰ and settlement. The second part of Chapter Three explains issues that arise in environmental litigation, but still focuses that explanation on the context of Superfund litigation. However, the tenor of the explanation is not so geared toward Superfund litigation that the student could not apply that explanation to other types of environmental litigation. Chapter Three provides a brief, but thorough explanation of the issues that arise in Superfund litigation particularly and other types of environmental litigation generally.

8. See Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1 (1993).

9. *Id.*

10. See, e.g., *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508-09 (7th Cir. 1992) (explaining the "Gore factors" provide a non-exhaustive, but valuable roster of equitable apportionment considerations).

CHAPTER FOUR: ENVIRONMENTAL POLICY

Chapter Four introduces the student to environmental policy and policymaking in the context of administrative rulemaking. The central focus of Chapter Four is to introduce the rulemaking process to the student in a way that provides an explanation of the public interest, government, and private practice attorney's roles in that rulemaking process. While a quick overview of "notice and comment" rulemaking was included in Chapter One, Chapter Four provides a detailed explanation of the "notice and comment" rulemaking process. This explanation of rulemaking is followed by an explanation of the various ways that a lawyer can enter the rulemaking process. Finally, Chapter Four, and the book as a whole, ends with a brief explanation of the evolving environmental justice movement.

Rulemaking is the central mechanism that a lawyer can use to effectuate a client's wishes in shaping environmental policy.¹¹ Chapter Four provides a detailed explanation of the federal informal, or "notice and comment," rulemaking process. This explanation begins with discussion of the requirements for the EPA to publish a notice of proposed rulemaking. Next there is an explanation of the public comment process, followed by an explanation of the requirements for the final agency rule. Beyond this basic outline of "notice and comment" rulemaking, the authors also provide the student with a brief explanation of how environmental lawyers can use an advanced notice of proposed rulemaking to their advantage and how the process of negotiated rulemaking works. The rulemaking process discussion ends with an explanation of how some environmental statutes provide for additional rulemaking procedures. Rulemaking is the elemental tool for the environmental lawyer involved in environmental policy making. The knowledgeable environmental lawyer, however, needs to know how to involve one's self in the rulemaking process.

Chapter Four next explains how the environmental lawyer can become involved in the rulemaking process. To begin, the authors provide three ways that a private practice or public interest lawyer can initiate rulemaking in the EPA. A private practice or public interest lawyer can sue the agency to enforce environmental statutory deadlines. Or, a private practice or public interest lawyer can petition the EPA to issue a rule to fill a perceived need. Or, a private

11. JERRY L. ANDERSON & DENNIS D. HIRSCH, ENVIRONMENTAL LAW PRACTICE at 193-94 (1999).

practice or public interest lawyer can sue the EPA to enforce "notice and comment" rulemaking requirements. For this last option, the authors explain four exceptions to "notice and comment" rulemaking procedures: (1) the exception for "interpretive rules," (2) the exception for "general statements of policy," (3) the exception for rules of "agency organization, procedure, or practice," and (4) the "good cause" exception.¹² The authors' explanation of involvement in the rulemaking process ends with a admonishment to private practice or public interest lawyers to advocate clients' interests at the earliest stage of the rulemaking process, because once the rulemaking process gets going the EPA becomes too entrenched in its own position to be seriously swayed by any amount of lawyering. However, the authors also explain the final agency rule can be challenged in court after its final promulgation by the agency and briefly sketch out that process.

Chapter Four and the book is brought to a conclusion with an introduction to the environmental justice movement. This brief overview of environmental justice quickly touches on the facts of environmental discrimination, federal actions that promote environmental justice, and environmental justice litigation. This introductory explanation of the environmental justice movement barely lasts four pages. The remainder of Chapter Four is devoted to the EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits,¹³ followed by a set of problems meant to get the student to think critically about environmental discrimination and the environmental justice movement.

CRITIQUES AND CONCLUSIONS

As a whole the book achieves the goals of the authors, to introduce students to the resources environmental lawyers use and the activities they routinely engage in. However, the book does suffer from several weaknesses. The most obvious weakness is the lack of detailed discussion on various issues brought to the fore. The explanations and discussions the book does engage in are thorough, given

12. It is in this explanation of the exceptions to "notice and comment" rulemaking procedures that the authors rely most heavily on case law. See, e.g., *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd* 885 F.2d 866 (4th Cir. 1989); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 998 F. Supp. 946 (N.D. Ill. 1998); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986); *Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984); *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980).

13. See 40 CFR § 7.10 *et seq.* (1997).

their brevity, but the student is left with only a thumbnail sketch of issues. For a book that only strives to introduce these issues to students, a thumbnail sketch may be sufficient. However, the nature of the problems and exercises the authors use in the book often require more knowledge or information than is available in the text. The problems and exercises are frequently more involved than the text adequately provides for.

If this book is used in an advanced environmental law class, where students already have an underlying knowledge of the basic resources of environmental law, then it will be a valuable resource. For knowledgeable students the problems and exercises will be an interesting and realistic way to put into practice what they already know and what the text has added to that knowledge. However, if this book were used in an introductory environmental law class, then the problems and exercises may overwhelm students because of their detail and complexity. Again, the explanations of various issues in the book are brief, but thorough. For the advanced environmental law student, these explanations will suffice. For beginning students, however, the explanations may not provide enough black letter law to make the practice tips, problems, and exercises truly instructional.

The problems and exercises in the book are what the authors use to tie the legal explanations together with real-world practicality. The practicality of this book is its hallmark. In the contemporary field of legal education where there is a concern for being too practical, this book is welcome convergence of concise explanations of environmental legal issues and practicality.