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Charles B. Roe

WARNING: ENVIRONMENTAL LAW MAY BE HAZARDOUS TO THE ENVIRONMENT.

Charles B. Roe, Jr.*

CASES AND MATERIALS ON ENVIRONMENTAL LAW. By Oscar S. Gray. Washington, D.C.: Bureau of National Affairs, Inc., 1970. Pp. vi, 1252.

Not long ago environmental lawyers were seldom noticed in the legal profession. Recently, the widespread general enthusiasm for the protection of our environment has prompted an extraordinary increase in the number of attorneys who devote a significant portion of their time to these activities. Likewise, the case reports teem with the juristic effluent of environmental litigation, and the imprimatur of respectability is being placed on these developments as legal education has begun to respond to the enthusiasm.

The first casebook in the field of environmental law has now made its appearance. Oscar Gray, *Cases and Materials on Environmental Law* (1970). In agricultural terms it is a "dual purpose" document. Although written as a law school teaching aid, its main value may be as a source book for lawyers both in public and private practice who are specializing in environmental protection. The book itself is testimony to the high speed with which the field is developing. By the time this reviewer had received the twelve hundred and fifty page book in October, 1970, three months after its publication, a ninety-four page supplement was already appended. Now, after the passage of eight more months, it is undoubtedly in need of further revision.

The scope of environmental law is virtually without bounds. Its limits are determined only by the individual defining the term. Professor Gray has chosen a wide-ranging definition;[1] the outline of the casebook touches upon many established areas of the law school curriculum, from torts and real property to administrative law and civil procedure. Indeed, one of the most interesting and well-done sections

* Senior Assistant Attorney General, Environmental Protection Division, State of Washington. A.B. 1953 University of Puget Sound, J.D. 1960 University of Washington.

1. Professor Gray writes:
> The scope chosen for this work encompasses generally a range of concepts which have been associated in the field of federal policy making: conservation and related natural-resources management, historic preservation, recreation, various social impacts of public works, certain amenity values, and pollution abatement.

O. GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW at v (1970).

of the book—a case study of the "Miami Jetport" controversy—could more properly be included in a political science text.[2]

Because of the breadth of the subject matter included, Professor Gray has encountered a substantial organizational problem, and his arrangement of the material is open to criticism. However, the content of the book is basically sound, containing most of the foundation cases and statutes in the areas of study included. A much more serious problem is the time likely to be allocated for the course by law schools, as the temptation among curriculum designers may be to shortchange it. If the course is to be truly rewarding, something more substantial than a third year, one-term course must be allowed. The case offering Professor Gray has assembled could be considered only superficially in such time.

Those whose primary area of familiarity is with the Western states will note certain omissions or misdirection in the book. It is not surprising that a professor from Georgetown University would emphasize the fundamental role of the federal government in programs of environmental enhancement. Today, however, that role is largely secondary, providing state and local governments with vitally important research and financial assistance. The enforement role—the battleground of day-to-day action—is often at the state or even the local level. For example, no reference is made to state progress in the field of water quality control, although today these programs are the major weapons in the fight to eliminate water pollution.[3] Similarly, there is little mention of the important progress being made in air pollution control in some states, including Washington, primarily at the local or regional level.[4]

Professor Gray has also prescribed an overdose of federal statutes,

2. *See Id.* at 1001-38.

3. Section 1 of the Federal Water Pollution Control Act, as amended, 33 U.S.C.A. § 1151(b) (1970), for example, provides in part:

> In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve and protect *the primary responsibilities and rights of the states in preventing and controlling water pollution,* to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. . . . (Emphasis added.)

4. *See* WASH. REV. CODE ch. 70.94 (1970).

regulations, and policy statements—documents not known for their brevity. For example, more than sixty pages are devoted to reprinting the entire texts of the Air Quality Act of 1967 and the Federal Water Pollution Control Act.[5] Such materials should have been edited to insure student attention to their significant sections and to allow other vital material to be included.

To Westerners, the limited attention given to water rights law will be disappointing.[6] The administration of these resource allocation systems, like many other long established resource programs, has not, until recently, been viewed in an environmental law context. Yet, dealing as they do with whether a stream or lake remains both quantitatively and qualitatively "alive", they are the very bedrock of water related environmental programs. Without a basic understanding of water rights law, a student has missed an essential ingredient of environmental law.

These comments, while critical, are not intended to detract from the overall high quality of Professor Gray's work as a useful teaching tool. A testimony to his success is the urge developed after reading the book to return to law school—a reaction which has seldom occurred since my departure a decade ago.

How a course in law is presented is crucial. Without doubt the teaching of environmental law places a greater degree of responsibility on a professor than any other law school course for at least two reasons. First, the subject area deals with the ultimate issue of mankind's ability to survive. Second, many of those who take the course will play significant roles in making future decisions in this value-oriented field. It is, therefore, imperative that the law professor persuade students to use their newly acquired knowledge to the best advantage in mankind's struggle for survival.

The only real hope for preserving an environment acceptable for humans is through governmental programs which are soundly based, fully informed, well administered, and adequately financed. The possibility that needed protective programs for the environment will be

5. The Air Quality Act of 1967, 42 U.S.C. § 1857 *et. seq.* (Supp. V, 1970), is quoted in GRAY at 392-417; the Federal Water Pollution Control Act, 33 U.S.C.A. § 1151 *et. seq.* (1970) is quoted in GRAY at 435-71.

6. The only "water rights" case included is United States v. Gerlach Livestock Co., 339 U.S. 725 (1950), found in GRAY at 180-94.

developed voluntarily by those, both in the public and private sector, who make use of our natural resources is too remote to consider seriously. Likewise, independent citizen action, while helpful in isolated instances, cannot provide the comprehensive, sustained program that is required. It is, therefore, necessary that high quality governmental programs relating to our natural resources be developed and that the administrators be encouraged, guided, persuaded, pressured, even goaded to insure that their performance is productive.

Beginning in the mid-1960's, at least in the State of Washington and its sister Pacific Coastal States, marked improvements began to appear in the governmental environmental programs. This progressive trend continued for the next several years. However, within the past two years, signs have developed from which there is substantial basis for concluding that the speed of effective development in governmental programs is not being sustained.[7]

This gloomy conclusion is based on the observation that governmental programs relating to preservation of the environment are suffering, in some respects, from a case of too much attention. Three related diseases—"over-administering," "over-litigating" and "over-legislating" —have so distracted the administrators from their prime missions that their programs in the field may soon halt.

Professor Charles E. Corker of the University of Washington School of Law, a commentator with great perception, recently enunciated the theme of overlitigation to state water resource administrators when in answering the question "Litigating the Environment—are we overdoing it?" he replied:[8]

> My answer is *yes*. We are overdoing our litigation of the environment. I do not mean that there are necessarily too many lawsuits being filed on environmental issues, and that we should somehow cut back—I would not know how, in any case—the number of

7. Expressions of concern along this general theme have been stated to the author in personal conversations by such highly respected administrators of state environmental programs as E.F. Dibble, Vice Chairman, California Water Resources Control Board; Ralph W. Purdy, Executive Director, Michigan Water Resources Commission; Kenneth H. Spies, Executive Secretary, Oregon Department of Environmental Quality; and John A. Biggs, Director, and James P. Behlke, Executive Assistant Director, Washington State Department of Ecology.

8. Speech to the Thirteenth Annual Meeting of the Interstate Conference on Water Problems, Portland, Oregon, Oct. 29, 1970.

> those suits by ten percent, twenty percent, or fifty percent. I do mean that a disproportionately large share of attention, effort, and environmental concern is being focused on lawsuits. Lawsuits cannot accomplish, by themselves, solutions to the most pressing of our environmental problems. As a result, we are in some danger of leaving the most pressing environmental problems unsolved—or even made worse—because the commotion of litigation has persuaded us that something has been accomplished.

The affliction of overemphasis is transmitted to the legislative branch as well. Administrators of environmental programs often complain, and justifiably so, that long before they have a chance to develop and perfect an environmental program dealing with a problem under one statute, a new statute is layered on top of the old. The ultimate result is the implementation of a number of statutes in an inefficient and only partially effective manner. Equally bad is "over-administration" of the environment arising from the lack of coordination between the state and federal levels of government. Perhaps the worst example is in the field of pollution control, especially water pollution control, where the duplicative permit systems and "certification programs," the overemphasis on state reporting to the federal government and the divisions of responsibilities among various federal agencies and state government have inflicted a horrible toll of waste in terms of the nation's total available resource to cope with pollution.

These ills have been caused, in substantial part, by inappropriate advice given by lawyers. Because lawyers will undoubtedly play a dominant role in the cause of environmental protection, it will be necessary for law professors to make extra efforts in guiding students through "Environmental Law" to insure that the mistakes of the past will not be repeated.[9] The challenge will become even greater as the "new breed" of environmentally aroused students is processed into the

9. Professor Gray lightly grazed this issue, and raised another when he wrote in the last paragraph of the preface of his book:

> Finally the student should understand, as the practicing attorney fully recognizes, that the law covers all parties to these, as well as other, controversies. All parties have rights, and the need for legal services. It will be helpful for the student to approach the course with the intention of learning how best to advise any party to the types of disputes to be reviewed, whatever preconceptions he may have as to the client by whom he would prefer to be retained.

GRAY at vi.

legal profession.[10] In this way not only the teacher but the pupil will be reminded of the need for delicate application of the knowledge imparted and acquired. Like the gardener who overfertilizes and kills his lawn, the environmental lawyer must take great care not to apply such pressure to government that the distraction and "over-busy-work" prevents public officials from successfully implementing valuable environmental programs. Professor Gray's book is like nuclear energy. It has great potential; it is equally dangerous. His casebook, and all others like it which are sure to come in the very near future, must be used with "extreme care." Otherwise, the quality of the environment, which we must have if we are not to perish, will become even more difficult to attain.

10. Washington State Attorney General Slade Gorton has commented to the reviewer that approximately fifty percent of all recent law school graduates or third year students interviewed for positions with his office within the last year expressed a preference for assignments in the environmental law field.