

LAW DAY

ENVIRONMENTAL LAW OVERVIEW

A. Environmental Law Defined.

Environmental law can be defined as the law of planetary house-keeping. It is concerned with protecting the planet and its people from activities that upset the Earth and its life-sustaining capacities. Environmental law is not concerned solely with the natural environment, and with the physical condition of the land, air and water. It is also concerned with the human environment, with the health, social and other man-made conditions affecting a human being's place on Earth.

B. Pollution Defined.

Pollution can be defined as a resource out of place. Certain pesticides applied properly on crops are a useful product and a resource. But pesticides that are obsolete, impure, or otherwise no longer useful, are wastes. Drums of obsolete pesticides buried in a farmer's field are a resource out of place. Obviously, a resource out of place can have very detrimental consequences to the environment and to society.

The idea of pollution as a resource out of place is helpful in understanding the problem in a number of ways. Often pollution problems are postponed, relocated or aggravated by simply shifting a resource from one place to another. One concerned with water pollution could order the contaminants diverted from discharge into the water, and instead order the contamination burned or landfilled. But this merely shifts the pollution problem from the water to the air or land. Pollution control measures are not necessarily costly and unproductive, and can often be a valuable saver of resources. Correcting a source of fugitive emissions at a refinery increases the yield of gasoline and other products available for sale. Waste oil from automobile engines is a

valuable resource for the re-refining industry. People compete to use various resources, and different uses have diverse consequences upon the resource.

C. Connection With The Sciences And Other Disciplines.

Environmental law issues in particular involve various other disciplines which are essential to understanding the technological forces involved. The lawyer traditionally is the generalist who coordinates the process and brings the pieces of the case together. So, for example, in a trial involving an automobile accident, the lawyer may put on the testimony of an expert in accident reconstruction to determine the relative speeds and trajectories of the vehicles just prior to impact. This role is perhaps more pronounced in environmental law. Consider that a pesticide case may combine the expertise of the wildlife biologist, the entomologist (that Branch of Zoology dealing with insects), the toxicologist (poisons), and public health and agricultural administrators and specialists. An air pollution case may bring together the epidemiologist (investigator of the causes of epidemics), the botanist, the atmospheric chemist and the meteorologist (to advise us what happened when the pollutant leaves the stack), the economist, and the chemical engineer (to advise on equipment to be placed in the stack to minimize effects).

Environmental law is directly influenced by scientific insights and terminology. The vast and complex interrelationship between natural forces in the environment is under constant scrutiny and reevaluation. New insights and evaluation influence the direction of environmental law. For example, an understanding of the waste-carrying capacity of a waterway drives appropriate pollution permit limits for the waterway. In other words, the maximum level of pollution, that the waterway can absorb and still maintain its biological health and diversity,

generally determines the allowable level of pollution mandated under the law. As science develops its understanding of the waterway, the rules for the waterway are adapted.

Economics also plays a large role in shaping environmental law and policy. Technological externalities are costs passed on from a polluting firm to consumers. Pollution imposes costs but so does its avoidance. For example, pollution imposes health-care costs and pollution avoidance imposes the cost of pollution control equipment. Economic analysis may tell us that rights and liabilities should be allocated to minimize the total costs of pollution and avoiding the pollution, and such costs should be borne in some proportion to benefits received.

D. Environmental Law As It Relates To Other Areas Of Law.

Environmental law relates to many other areas of law. For example, it is concerned with civil liabilities and borrows heavily from tort and property law. It, of course, functions within constitutional limitations and doctrines. Some constitutional limitations are of special significance, such as when a restriction on the use of private property results in a compensable taking. Environmental law can involve the interpretation of contracts and the complexities of tax law. It also intersects with the intricacies of legislative policy and land use planning and control.

E. Environmental Law And Administrative Agencies.

1. Environmental Agencies.

Environmental law is administered by various governmental agencies. Agency permits, licenses, and approvals are central to air and water pollution control, solid and hazardous waste control, land use restrictions, and other environmental concerns and requirements. Beyond the Environmental Protection Agency ("EPA"), many other federal agencies at one time or another will undertake proceedings with important environmental aspects. Examples are the Nuclear Regulatory Commission and the Army Corps of Engineers. In Delaware, the Delaware

Department of Natural Resources and Environmental Control ("DNREC") is the agency primarily responsible for administration of laws affecting the environment.

Agencies such as EPA and DNREC engage in a multitude of functions. These agencies: 1) make permitting decisions; 2) enact regulations and announce policy; 3) engage in research and public scientific studies; 4) require, collect and monitor data from the regulated community; 5) propose legislation and lobby legislators; 6) issue press releases and engage the community at large; and 7) undertake enforcement actions.

2. The Federal and State Systems.

Very generally, the process of administrative law is similar whether it occurs in the federal or in the state systems. General procedural requirements apply in both systems regardless of the mission of the agencies involved. But there are differences between the two systems.

The statute that creates the agency is called the "enabling" statute. This statute may delegate power very broadly or very narrowly. For example, Congress may delegate to EPA the power to protect the environment and control pollution to protect the public health and welfare. Generally, Congress delegates broadly while states delegate more narrowly. State legislatures often enact far more detailed agency statutes, perhaps having less confidence in their agencies than Congress has in the federal agencies. The detailed enabling statutes tend to limit the power of the agency. EPA's enabling statute is found in the U.S. Code. DNREC's enabling statute is found in the Delaware Code.

State administrative agencies also face different circumstances and problems than do federal administrative agencies. For one thing, state administrative agencies are generally provided significantly less funding than their federal counterparts. In general, the states'

problems and responsibilities are more specific, localized and immediate than the federal government's problems and responsibilities. As a result, state laws and procedures are often creative and one-of-a-kind.

The federal EPA delegates much authority to its state counterparts such as DNREC. EPA also funds DNREC to a substantial degree to carry out this delegation.

3. The APA and FOIA.

Agency procedure is often governed by a general statute setting out the procedural requirements for all agencies in the jurisdiction. One common and very important statute is the Administrative Procedures Act ("APA"), found in the federal system and in most states. The Delaware APA is found at 29 Del. C. Chapter 101. Another important statute is the Freedom of Information Act ("FOIA"), which provides citizen access to government documents.

4. Agency Classifications and Powers.

There are two basic types of agencies, the executive agency and the independent regulatory commission. Both are in the executive branch. EPA is an executive agency, but its administrator, Christie Whitman, is not a member of President Bush's cabinet. DNREC's Secretary, Nicholas A. DiPasquale, on the other hand, is a member of Governor Minner's cabinet. A cabinet secretary serves at the pleasure the Chief Executive, and must follow the Chief Executive's policy directives. Independent agency commissioners have tenure, and are more independent. An example of an independent agency is the Federal Communications Commission ("FCC").

Although administrative agencies are in the executive branch, they are often delegated quasi-legislative and quasi-judicial powers. For example, EPA exercises legislative power when it promulgates regulations governing hazardous waste. DNREC exercises judicial power when it

convenes a hearing on an application for a hazardous waste collection permit, makes findings of fact, and determines the permit applicant's rights to and liabilities under the permit. The exercise of these powers is overseen by appellate judicial review.

5. The Departments of Justice.

The state and federal Departments of Justice play a more substantial role in the administration of executive branch agencies than any other department. They function as the law firm for executive branch agencies in court, and as the principal law-enforcement agency for the government. The issuance of an Attorney General's opinion is frequently used to settle disputes between agencies or to resolve a broad administrative question that covers a number of agencies. In the federal system, the Attorney General is under the President's direct control. In Delaware, the Attorney General is an independent and elective office under the Delaware Constitution.

6. Collecting Information and Imposing Sanctions.

Regulatory agencies must obtain information, and impose sanctions, in order to accomplish their missions. There are essentially four ways available to most agencies for attaining information: reporting requirements, subpoenas, record-keeping requirements, and physical inspections. Commonly, enabling statutes will provide that an agency may assess civil penalties for violations. Enabling statutes can also delegate power to issue "cease and desist" orders for immediate threats to health and safety, and can grant the power to order restitution. Agencies may also press charges for criminal violations: EPA and DNREC have the full range of powers to collect information and impose sanctions so they can fulfill their missions to protect the environment.

LAW DAY 2002

Quiz

1. Environmental law is concerned with:
 - a. The natural environment including the physical condition of the land, air and water;
 - b. The human environment including man-made conditions affecting people;
 - c. Both a and b;
 - d. None of the above.

2. The Delaware Department of Natural Resources and Environmental Control ("DNREC"):
 - a. Makes permit decisions;
 - b. Enacts regulations;
 - c. Undertakes enforcement actions;
 - d. All of the above.

3. Consider a hypothetical situation in which the Secore Company builds a factory to manufacture boxes for shipping various consumer goods. A byproduct of the manufacturing process is chromium. Secore applies for a permit from the State Environmental Administrative Agency to discharge chromium into the nearby Portwine river at a rate of 1.2 kilograms per day. Secore provides the agency with a scientific study showing that the discharge will be almost immediately diluted to .150 milligrams per liter (mg/l) in the river, and that this concentration will not adversely affect aquatic life or human health in the river. The Agency will probably grant the permit:
 - a. Because the maximum level of pollution that a waterway can absorb and still maintain its biological health generally determines the allowable level of pollution under the law;
 - b. Unless other scientific research and studies show that a concentration of .150 mg/l of chromium will in fact adversely affect aquatic life in the river;
 - c. a and b;
 - d. None of the above.

4. State agencies are generally different from federal agencies in the following ways:
 - a. Congress delegates powers to administrative agencies broadly while states delegate narrowly;
 - b. State agencies are provided with significantly less funding than federal agencies;
 - c. Federal agencies such as the federal Environmental Protection Agency ("EPA") may delegate powers and may fund state agencies to carry out this delegation, but the reverse is not true;
 - d. All of the above.

5. A trial in Court involving environmental issues:
 - a. Will probably include the testimony of more specialists and experts than would be expected in most other types of trials;
 - b. Will always involve expert testimony and the idea of a resource out of place;
 - c. Will always involve more than five experts in other disciplines;
 - d. All of the above.

6. Environmental law is directly influenced by:
 - a. Science;
 - b. Economics;
 - c. Both a and b;
 - d. None of the above.

7. EPA and DNREC have the power to:
 - a. Make physical inspections of manufacturing facilities;
 - b. Assess civil penalties for violations of environmental law;
 - c. Collect information from the regulated community;
 - d. All of the above.

8. Pollution control:
 - a. Never turns waste into a resource;
 - b. Is most effective when it shifts the pollution from one place to another;
 - c. Is always costly and unproductive;
 - d. None of the above.

9. EPA:
 - a. Is a state environmental agency;
 - b. Is a federal agency in the executive branch;
 - c. Is an independent regulatory commission;
 - d. All of the above.

10. The agency that functions as the law firm for administrative agencies and as the principal law enforcement agency for the government is:
 - a. The APA;
 - b. The Department of Justice;
 - c. The FCC;
 - d. All of the above.

LAW DAY 2002

Quiz Answer Key

1. C
2. D
3. C
4. D
5. A
6. C
7. D
8. D
9. B
10. B