
PREFACE TO THE EIGHTH EDITION

These are contentious times in U.S. (and global) politics. Significant disagreement exists about approaches to governance and the content of policy. Environmental policy is no exception. Environmental law has always been a fast-moving field. The pace of developments since publication of the 7th edition of the casebook has been stunning, however. The Trump Administration has reversed or has attempted to reverse many Obama Administration policies and practices, most evidently and extensively in connection with climate change. Prominent examples include the President's announced intention to withdraw from the 2015 Paris climate agreement and the Environmental Protection Agency (EPA)'s proposals to repeal and replace the Clean Power Plan for regulating greenhouse gas emissions from electric generating facilities. Congress's use of the rarely invoked Congressional Review Act to repeal several EPA and Interior Department regulations ushered in further change.

The changes that have occurred since the 7th edition touch virtually every chapter of this book. Their fate often remains unclear, as some have only been proposed, and many of those that qualify as final actions have been challenged and are still pending in court. We have prepared this edition to be neutral in its political orientation. Our role is to enhance the capacity of students to think critically about legal and policy issues, to learn about the contents of environmental law, and to develop their own informed views.

This edition of the casebook describes the most significant legal and policy initiatives since the publication of the 7th edition. The basic structure of the book is unchanged, and most of the principal cases that appeared in the 7th edition have been retained. This edition adds important new cases, either as new principal cases or in textual treatment, in which recent upheavals in environmental law have been litigated. It also fully updates the text throughout, including discussion of a rare set of comprehensive statutory amendments (the first major overhaul of a federal environmental statute since 1996) to the Toxic Substances Control Act (TSCA) in Chapter 8.

The most significant changes or additions in the 8th edition include the following:

- Chapter 1 mostly retains its usual structure, but integrates updated materials on the intersection of common law and America's changing energy economy, especially growing reliance on clean energy.
- Chapter 2 contains modest updates throughout, trimming some of the key federalism framework cases but integrating important new developments concerning the reach of federal Commerce Clause power, dormant Commerce Clause jurisprudence, and preemption doctrine. Federalism's role in prompting

climate progress, in shaping skirmishes over deregulatory rollback proposals, and in preserving room for state climate action are also updated and covered here, as well as in Chapter 12.

- Chapter 3 includes coverage of the many judicial decisions in cases alleging violations of core administrative law doctrines because of changes in policy. We have added a new Note on Policy Reversals After Changes in Presidential Administrations. The revised chapter also covers judicial alterations of the scope of the landmark *Chevron* doctrine that governs judicial review of agency statutory interpretations in cases such as *King v. Burwell*. We have added discussion of the Congressional Review Act and its use by Congress to repeal Obama Administration environmental regulations. The chapter also includes analysis of executive orders and other decrees issued by President Trump, including Executive Order 13771, the “2-for-1” order.
- Chapter 5 has undergone perhaps the most extensive revamping of any chapter in the book. We have eliminated *Native Ecosystems Council v. U.S. Forest Service* as a principal case in light of the Forest Service’s disavowal of the concept of management indicator species. We replaced the *Arizona Cattle Growers* case on designation of critical habitat under the Endangered Species Act with the Ninth Circuit’s decision in *Alaska Oil and Gas Ass’n v. Pritzker*, which deals with the impact of climate change on new species listings. The discussion in note materials of listing and critical habitat processes and litigation has been extensively updated and revised. We analyze important new cases, including one that the Supreme Court decided late in 2018 (*Weyerhaeuser v. U.S. Fish and Wildlife Service*). The material on regulatory takings is streamlined and updated.
- Chapter 6 addresses developments concerning the scope of the new source review permit program for new or modified major stationary sources. It also covers administrative efforts to revoke California’s long-standing authority to adopt auto emission standards that are stricter than EPA’s. We have substituted the Supreme Court’s important decision in *Michigan v. EPA*, which deals with the role of cost when EPA exercises its authority to regulate hazardous air pollutants, for the D.C. Circuit decision in *White Stallion Energy* in the same case, which appeared in the 7th edition.
- Chapter 7 updates its coverage of the Obama and Trump administrations’ activities with respect to defining jurisdictional “waters of the United States” under the Clean Water Act. We have revised Problem 7-1 to facilitate robust discussion regardless of how ongoing litigation and regulatory efforts are resolved. We have also removed *E.I. Du Pont de Nemours & Co. v. Train* as a principal case in favor of including *American Farm Bureau v. EPA*, which upheld the Chesapeake Bay TMDL and provides an excellent overview of the TMDL framework and application of the *Chevron* doctrine.
- As mentioned above, Congress adopted a comprehensive overhaul of TSCA in 2016. Chapter 8 analyzes the amended statute and how its administration is likely to differ from the original 1976 version, which most observers agree was badly broken. The chapter includes a new principal case under the Safe Drinking Water Act, *League of United Latin American Citizens v. Wheeler*. The

materials on the Resource Conservation and Recovery Act address EPA's ever-changing definition of solid waste and the litigation that prompted the most recent changes.

- Chapter 9 includes the latest case law defining the parameters of arranger liability under the Comprehensive Environmental Response, Compensation, and Liability Act.
- We have updated Chapter 10's coverage of the dynamic nature of the environmental enforcement process to consider how to enhance the roles that various stakeholders play in improving compliance and facilitating enforcement.
- Chapter 12 includes updated coverage of climate change science. We have also added new diagrams and other graphics to help illustrate the causes and effects of climate change. The recent changes in EPA's regulatory and, more recently, deregulatory strategies have been most dramatic in this area. The expanded Note on Regulation of Greenhouse Gas Emissions under Section 111 of the Clean Air Act covers the fate of EPA's Clean Power Plan and EPA's efforts to replace it with a much more circumscribed program. The section on common law remedies addresses the latest developments in litigation premised on the theory that the federal government's failure to pursue greenhouse gas emissions more vigorously is a violation of its public trust responsibilities. The record on this theory in the courts is mixed at this point. The chapter also covers the Paris Agreement, as well as President Trump's announced intention to withdraw from the Agreement absent unspecified modifications.

In addition to the new material described above, we have made a concerted effort to streamline our coverage throughout the book. We have re-edited some of the principal cases to eliminate extraneous or duplicative material. We have also reduced the amount of note materials so that students can focus on a limited number of important issues that are not answered by but that relate to our coverage of the principal cases. We have retained the problems that appeared in previous editions, which can be used as the primary vehicles for teaching environmental law doctrine or as capstones to assist students in reviewing what has come before. In some instances, we have modified the problems in an effort to make them better teaching tools.

As we have done for several editions, we will continue to maintain a website for the book that alerts readers to developments that occur after the new edition's publication. Readers can access those materials at www.WKLegaledu.com/Glicksman-Environmental8. We will revise the updates at least once each year during the summer, but are likely to do so more frequently, such as when the courts issue decisions in important new cases or Congress enacts new environmental legislation.

As we have also done for several editions, we occasionally rotate responsibilities among co-authors. For the 8th edition, Professor Markell has limited his role to editing chapter 10.

We were assisted during the publication process by Kathy Langone of the Froebe Group and by Patrick Cline, our editor. We extend our heartfelt thanks to both of them. We also benefited from the efforts of our research assistants, including

Claire Eichmann and Kelly Garson. We take sole blame for any errors that remain notwithstanding this assistance.

As always, we encourage professors who adopt the book to contact us with questions, thoughts, suggestions, and criticisms. We appreciate your decision to select our book as a teaching tool, given the array of environmental texts from which to choose. We are committed to making the experience of both teachers and students using the book as valuable, interesting, and perhaps even fun as possible.

Robert L. Glicksman
David L. Markell
William W. Buzbee
Daniel R. Mandelker
Daniel Bodansky
Emily Hammond

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